NAVIGATING VARIOUS LAWS IMPACTING EMPLOYERS IN THE COVID-19 WORLD

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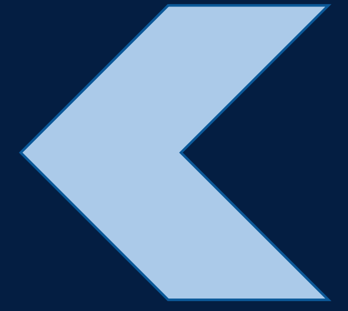
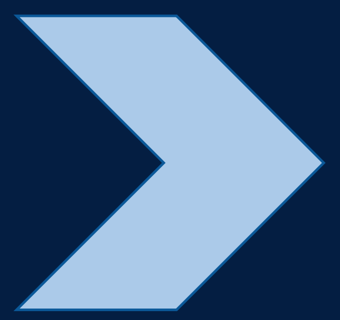
THIS WEBINAR IS INTENDED TO GIVE A BASIC OVERVIEW REGARDING THE STATUTES DISCUSSED AND HOW COURTS MIGHT TREAT CIRCUMSTANCES CAUSED BY THE CURRENT COVID-19 CRISIS WITH RESPECT TO THESE STATUTES.

IN THIS ONE HOUR WEBINAR, HOWEVER, WE OBVIOUSLY CANNOT POSSIBLY PROVIDE A COMPREHENSIVE OVERVIEW OF ALL THE REQUIREMENTS SET FORTH IN THESE STATUTES OR PROVIDE A COMPLETE AND COMPREHENSIVE OVERVIEW OF HOW COURTS MIGHT HYPOTHETICALLY APPLY THESE STATUTES WITH RESPECT TO CIRCUMSTANCES CAUSED BY THE CURRENT COVID-19 CRISIS.



COVID-19 RELATED HEALTHCARE ISSUES

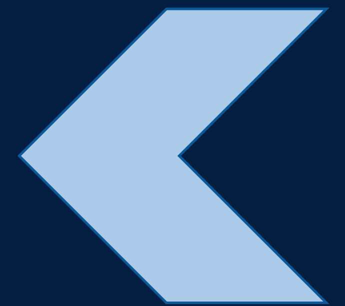


HEALTHCARE ISSUES

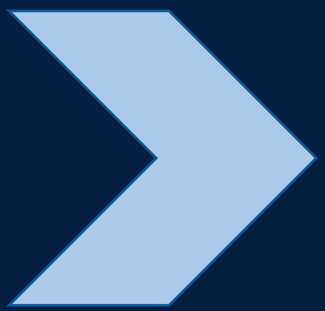
- Health Insurance Portability and Accountability Act ("HIPAA")
  - HIPAA rules still apply in COVID-19 world
  - If contacted by officials seeking emergency personal health information about an employee, non-medical providers and non-sponsored group health plan employers may provide information in employment records because not subject to HIPAA restrictions
    - Caution: Verify agency requesting

HEALTHCARE ISSUES

- How to treat medical information
    - Treat as confidential and same protections as required by HIPAA



HIPAA



HIPAA PRIVACY RULE

General Rule: Medical providers and other “Covered Entities” cannot release a patient’s information without consent

- Covered entity: A health plan, health care clearinghouse, or health care provider. HIPAA's Privacy Rule generally prohibits covered entities from disclosing individually identifiable health information, with of course certain exceptions, such as treatment, billing, etc.

HIPAA PRIVACY RULE

- A “Business Associate” is also covered by the general rule:
  - A “Business Associate” is a person or entity who, on behalf of a covered entity, performs an activity using individually identifiable health information. This includes functions such as data analysis, claims processing, or legal service or accounting services. These entities are also bound by HIPAA's Privacy Rule.

HIPAA PRIVACY RULE

- Some well-known exceptions:
  - When necessary for treatment of patient
  - In response to request by public health authority such as CDC
  - To prevent a serious and imminent threat to health and safety of person or public

HIPAA PRIVACY RULE

- Violation of the rule carries penalties, including heavy fines and potentially criminal prosecution for a knowing violation
- Department of Health and Human Services (“HHS”) has authority to promulgate rules concerning penalties

HIPAA PRIVACY RULE

In response to the coronavirus pandemic, HHS suspended penalties for some activities that otherwise may violate privacy rule

- HHS has acted with respect to two areas:
  - Hospitals that have implemented an emergency protocol
  - Use of telecommunications for purposes of diagnosis and treatment

HIPAA PRIVACY RULE – HOSPITALS

- For hospitals, HHS will refrain from imposing penalties for failing to meet 5 particular requirements when such failure occurs within 72 hours after a hospital invokes disaster protocol
- 1. REQUIREMENT TO OBTAIN PATIENT'S CONSENT TO SPEAK WITH FAMILY MEMBERS OR FRIENDS INVOLVED IN PATIENT'S CARE
- 2. REQUIREMENT TO HONOR REQUEST TO OPT OUT OF FACILITY DIRECTORY

HIPAA PRIVACY RULE – HOSPITALS

- 3. REQUIREMENT TO DISTRIBUTE NOTICE OF PRIVACY PRACTICES
- 4. PATIENT'S RIGHT TO REQUEST PRIVACY RESTRICTIONS
- 5. PATIENT'S RIGHT TO REQUEST CONFIDENTIAL COMMUNICATIONS

HIPAA PRIVACY RULE – HOSPITALS

- Important caveats:
  - Applies only in areas covered by public health emergency
  - Applies only to hospitals that have implemented a disaster protocol
  - Applies only for 72 hours after disaster protocol is implemented

HIPAA PRIVACY RULE - TELECOMMUNICATIONS

No penalties for telecommunications used in providing health care where such methods ordinarily may not be fully HIPAA compliant if implemented in good faith

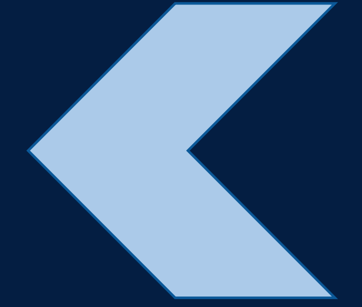
- Health care provider can use any non-public audio or video communication technology
- For instance, can use non-public video application on patient’s personal computer or phone to assess patients
  - SKYPE
  - ZOOM

HEALTHCARE ISSUES

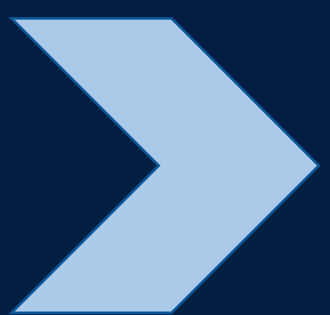
- Are employees eligible for healthcare insurance if not working?
  - Maybe. Check group health plan documents or certificate of coverage to determine how long employees not actively working are covered
  - You may seek to amend your plan
  - If self funded, you may waive requirements, but need to check stop-loss coverage

HEALTHCARE ISSUES

- What happens to healthcare premiums if the employee is not working?
  - They are still applicable
  - Options for payment can include:
    - Seeking a waiver of payment from insurance company
    - Payment by employer
    - Payment by employee
  - COBRA rules still apply



COVID-19 RELATED WAGE AND HOUR ISSUES



WAGE AND HOUR ISSUES

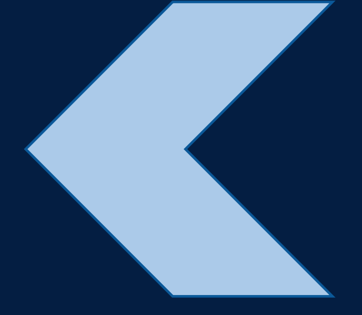
- Does an employer have to keep paying employees not working?
  - No, if hourly, but… see below
  - Maybe if exempt, but… see below
    - If an exempt employee performs at least some work in the employee’s designated seven-day workweek, the rules require that they be paid the entire salary for that particular workweek. There can be exceptions.
    - Yes, if covered by the Families First Act

WAGE AND HOUR ISSUES

- Does an employer have to keep paying employees not working?
  - Consider legal obligations to keep paying employees because of an employment contract, a collective bargaining agreement, or some policy or practice that is enforceable as a contract or under a state wage law.
  - Also, consider public relations aspects

WAGE AND HOUR ISSUES

- Other considerations
  - Consult state law on deadline for wage payments after layoff
  - Consult state law on whether “bonuses/commissions” constitute wages which must be paid
  - Consult state law on whether paid sick leave constitutes wages which must be paid
  - Consult state law on whether paid vacation leave constitutes wages which must be paid
  - Consult state law on whether any other paid leave constitutes wages which must be paid



"WARN" ACT NOTICE REQUIREMENTS FOR WORKFORCE REDUCTIONS CAUSED BY COVID-19

WORKFORCE REDUCTION ISSUES RAISED BY COVID-19

- Due to the COVID-19 crisis, many retailers, small businesses, and large companies have little or limited revenue coming in and are forced to address “stay-at-home” employees who are without the ability to conduct “work-from-home” business.
- Whether government mandated or not, restrictions on business caused by COVID-19 leave these companies with few workforce options other than workforce reductions and/or temporary, indefinite, or permanent business closures.
- In the event of a COVID-19-related workforce reduction or business closure, these companies should consider whether they have notice obligations under the federal WARN Act and/or its state-law equivalents.

THE FEDERAL WARN ACT - 29 U.S.C. §§ 2101, *ET SEQ.*

The federal Worker Adjustment and Retraining Notification Act (the “federal WARN Act”) requires a “covered employer” to provide a 60-day written notice to “affected employees” if the employer initiates either of 2 types of workforce reduction triggering events: a “plant closing” or “mass layoff.”

THE FEDERAL WARN ACT – "COVERED EMPLOYER" DEFINED

Applies to:

- 100 or more employees, excluding part-time employees; or
- 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime).
    - "Part-time employee" means an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required.

THE FEDERAL WARN ACT – “AFFECTED EMPLOYEE” DEFINED

- An employee is an “affected employee” entitled to 60-day notice under the Act if the employee may reasonably be expected to experience an “employment loss” as a consequence of a proposed “plant closing” or “mass layoff” by their employer.
  - An “employment loss” means (1) an employment termination, other than a discharge for cause, voluntary departure, or retirement; (2) a layoff exceeding 6 months; or (3) a reduction in hours of work of more than 50 percent during each month of any 6-month period.

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THE FEDERAL WARN ACT – "PLANT CLOSING" DEFINED

- A "plant closing" is a permanent or temporary shutdown of a "single site of employment" that affects at least 50 full-time employees.
- Notably, a shutdown that halts production or work may be considered a covered "plant closing" under the Act even if a few employees remain.

THE FEDERAL WARN ACT – "MASS LAYOFF" DEFINED

- A "mass layoff" is (1) termination of more than 500 full-time employees at a single site of employment within a 30-day period, or (2) termination of at least 50 full-time employees at a "single site of employment," but only if the number of terminated employees within that 30-day period is also at least 33 percent of the full-time employees at that same "single site"
- In either "mass layoff" scenario, a covered employer must provide the required 60-day written notice only if the employer expects the "mass layoff" to exceed 6 months. However, extensions of shorter "mass layoff" periods also obligate a covered employer to provide the required 60-day written notice.
  - With respect to workforce reductions caused by COVID-19, this latter "extension" provision may provide covered employees some leeway with respect to the 60-day notice requirement because it is not necessarily foreseeable that COVID-19 business disruptions will exceed 6 months.

THE FEDERAL WARN ACT – "SINGLE SITE" DEFINED

- A triggering event has not occurred unless a "plant closing" or "mass layoff" occurs at a "single site of employment."
- The term "single site of employment" may refer to either (1) single location or (2) a group of contiguous locations.
- Whether separate locations are considered "a group of contiguous locations" is a fact-specific inquiry regarding, *inter alia:*
  - The geographic proximity of the separate locations,
  - The nature of the operations conducted at the separate locations, and
  - Whether management and/or staff at the separate locations overlap.
- There is no bright-line rule.

THE FEDERAL WARN ACT – "SINGLE SITE" EXAMPLES

Although no factual inquiry is identical and a detailed individual analysis of an employer's circumstances is imperative, ***generally***:

- Groups of structures which form a campus or industrial park, or separate facilities across the street from one another. **YES.**
- Multiple of warehouses in the same area regularly shift or rotate the same employees from one building to another. **YES.**
- Assembly plants located on opposite sides of a town are managed by same people, but they employ different workers. **NO.**
- Contiguous buildings have separate management, produce different products, and have separate workforces. **NO.**
- **NOTE:** Workers who primarily travel, work from home, or regularly work outside primary work site are considered to be assigned to the single site of employment to which they report

THE FEDERAL WARN ACT – PENALTIES

- Back pay and benefits for each day of violation to each aggrieved employee up to 60 days, and $500 in civil penalties for each day an employer fails to provide notice to a unit of local government.
- An employer may avoid the $500 civil penalty if it provides back pay to each aggrieved employee within three weeks of separation.

THE FEDERAL WARN ACT – EXCEPTIONS

- A covered employer is not obligated to provide the required 60-day written notice under three circumstances.
  - **Faltering Company Exception**
  - **Natural Disaster**
  - **Unforeseeable Business Circumstances**
- Whether any of these exceptions may be applied to COVID-19 related workforce reductions or business closures will likely be resolved by the courts across the country.

THE FEDERAL WARN ACT – FALTERING COMPANY EXCEPTION

- If, as of the time that notice would have been required, (1) a covered employer failed to obtain capital or business which it was actively seeking and which would have enabled the covered employer to avoid or postpone the plant closing or mass layoff, and (2) the covered employer in good faith believed that giving the required notice would have precluded it from obtaining the needed capital or business.
- While some pundits believe COVID-19-related layoffs may fall within this exception, it does not seem likely given the latter requirement.
- Least likely application to COVID-19-related workforce reductions or business closures.

THE FEDERAL WARN ACT – NATURAL DISASTER EXCEPTION

- No notice required if "the plant closing or mass layoff is due to any form of natural disaster, such as a flood, earthquake, or the drought currently ravaging the farmlands of the United States."
- The Code of Federal Regulations further provides that such disasters that include floods, earthquakes, droughts, storms, tidal waves, tsunamis and "similar effects of nature."
- Some pundits believe COVID-19-related layoffs may fall within this "similar effects of nature" exception.
- Future litigation will likely test this theory, but its application to COVID-19-related workforce reductions or business closures seems less likely than application of the unforeseeable business circumstances exception.

THE FEDERAL WARN ACT – UNFORESEEABLE BUSINESS CIRCUMSTANCES EXCEPTION

- No notice required triggering event is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required.
- The Code of Federal Regulations further provides that unforeseen business circumstances include a "sudden, dramatic, and unexpected action or condition outside of the employer's control" such as a "dramatic major economic downturn" or "[a] government ordered closing of an employment site that occurs without prior notice."
- Future litigation will likely test this theory, but it seems like the most likely exception courts may apply for COVID-19-related workforce reductions or business closures.
- Regardless of future litigation, notice should still be provided as soon as possible, and late notice should include a statement that the shortened notice was unavoidable due to specific sudden, dramatic, and unexpected business circumstances caused by COVID-19.

WORKFORCE REDUCTION CAUSED BY COVID-19 - CAUTIOUS RELIANCE ON EXCEPTIONS ENCOURAGE

- Exceptions do not excuse any lack of notice, just notice that is less than 60 days.
- Exceptions are affirmative defenses that must be proven.
- Whether any of the exceptions applies to a workforce reduction caused by COVID-19 is a fact-specific inquiry, and covered employers certainly will have differing factual circumstances regarding their knowledge and ability to give the required 60-day notice.
- Case law makes clear that reasonable business judgment, not hindsight, dictates the scope of unforeseeable business circumstances
- Common sense dictates that given the option of (1) satisfying obligations under the federal WARN Act (and in certain cases, under a state-law mini-WARN Act as well), or (2) rolling the dice during years of litigation on an unproven legal theory, it behooves covered employers to satisfy their WARN Act obligations if possible. If not, they should at least give as much notice to affected employees as they can).

STATE-LAW “MINI-WARN” ACTS

- Some states also have state-law “mini-WARN” or other state-law notification requirements that must be considered in addition to federal WARN Act considerations.
- An employer is not exempt from fulfilling the obligations of a state-law mini-WARN act simply because it has complied with the federal WARN Act.
- Although these state-law mini-WARN acts usually mirror many aspects of the federal WARN Act, key aspects such as triggering thresholds and notice requirements may vary.
- The following states presently have mini-WARN Acts or other state-law notification requirements: California, Connecticut, Delaware, Georgia, Hawaii, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, North Dakota, Ohio, Tennessee, Vermont, Wisconsin, and Illinois.

POSSIBLE STATE LAW DIFFERENCES – "COVERED EMPLOYEE" DEFINED ILLINOIS MINI-WARN ACT EXAMPLE

- State-law mini-WARN Acts might apply to differently defined covered employers.
- For example, the Illinois mini-WARN Act applies to employers with:
  - More than 75 (rather than 100) employees working in Illinois, excluding part-time employees; or
  - More than 75 (rather than 100) employees working in Illinois who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime).

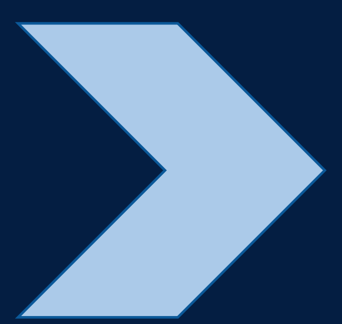
POSSIBLE STATE LAW DIFFERENCES – "MASS LAYOFF" DEFINED ILLINOIS MINI-WARN ACT EXAMPLE

- Similar to the federal WARN Act, the Illinois WARN Act requires a covered employer to provide a 60-day written notice to affected employees in advance of a "plant closing" that affects at least 50 full-time employees at a single site of employment.
- However, a "mass layoff" under the Illinois WARN Act includes (1) more than 250 (rather than 500) full-time employees at a "single site of employment" or (2) at least at least 25 (rather than 50) full-time employees at a "single site of employment" if the "mass layoff" also includes at least 33 percent of the full-time employees at the same site.

SOME STATES HAVE ALREADY RELAXED NOTICE REQUIREMENTS UNDER THEIR STATE-LAW MINI-WARN ACTS DUE TO COVID-19

- On March 17, 2020, California's governor issued Executive Order N-31-20, which suspends normal notice requirements under California's mini-WARN Act. Prior to this Order, California's mini-WARN Act only excepted workforce reductions caused by a "physical calamity" or "act of war."
- New York's Labor Department published a statement on its website to clarify that an exception to its notice law is likely to apply under the circumstances caused by COVID-19.
- There may be others …

COVID-19 RELATED WORKERS' COMPENSATION CLAIMS



COVID-19 RELATED WORKERS' COMPENSATION CLAIMS – HEALTHCARE WORKERS AND FIRST RESPONDERS

- Subject to variations in state law, a health care worker or first responder who has contracted COVID-19 likely has a compensable claim if he/she has been regularly working.
- These employees will likely enjoy a presumption that any communicable disease was contracted as the result of their employment.
  - States are beginning to take specific action on this issue. For example, Washington State's Governor recently directed his state's Department of Labor, *inter alia*, to "ensure" workers' compensation protections for these workers and to "provide benefits to these workers during the time they are quarantined after being exposed to COVID-19 on the job."

COVID-19 RELATED WORKERS' COMPENSATION CLAIMS – OTHER TYPES OF EMPLOYMENT

- Other types of employees also have a compensable claim, but a fact-specific inquiry must be made on a case-by-case basis.
- To be compensable under state-law workers' compensation statutes, a claimant must establish that his/her case of COVID-19 is and "occupational disease."
- Subject to state law variations, this means that the employee's case of COVID-19 must have been:
  - Contracted in the course of employment; and
  - Caused by "conditions peculiar to the work."

COVID-19 RELATED WORKERS' COMPENSATION CLAIMS – OTHER TYPES OF EMPLOYMENT (CONT.)

BUSINESS TRIPS

- For purposes of the fact-specific inquiry, claims that an employee contracted COVID-19 on a business trip require additional considerations with respect to whether employee "contracted COVID-19 in the course of employment."
  - States often differentiate between exposures that occur while "working" during a business trip versus exposures that occur during "down time."
  - Some states create almost strict liability for any injury that occurs on a business trip, whether the employee is working or not.

COVID-19 RELATED WORKERS' COMPENSATION CLAIMS – OTHER TYPES OF EMPLOYMENT (CONT.)

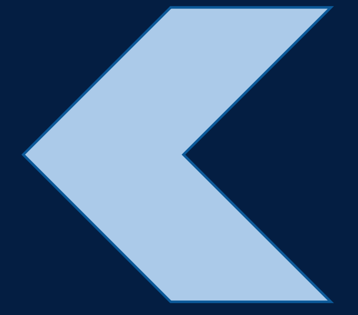
- "Conditions peculiar to work" means that the particular type of work at issue must have created a risk of contracting COVID-19 in a greater degree and in a different manner than in the public generally.
- Some states create almost strict liability for any injury that occurs on a business trip, whether the employee is working or not.
- Even if an employer takes all reasonable precautions to protect an employee from exposure, a compensable claim may be determined where the employee can show:
  - That they contracted the virus after an exposure,
  - The exposure was peculiar to the work, and
  - There are no alternative means of exposure demonstrated.

COVID-19 RELATED WORKERS' COMPENSATION CLAIMS – ELIGIBLE BENEFITS FOR COVID-19 RELATED COMPENSABLE CLAIMS

- The chances that an employee diagnosed with COVID-19 will have significant long-term health care problems are low.
  - Medical costs associated with the claim are likely to be limited to visits to the family physician and anti-viral medications.
  - More significant cases may involve hospital stays of two to three weeks.
  - In rare situations, severe complications result in more significant costs are obviously more likely to be incurred. These extreme cases are usually limited to older patients or those who suffer from immune deficiencies. However, extreme cases in younger, apparently healthy individuals have also occurred.
- Compensation costs should be limited to:
  - Lost time associated with any recovery from the illness; and
  - Lost time due to quarantine as required by the employer or local, state, or federal government agencies are also likely to be eligible benefits.

COVID-19 RELATED WORKERS' COMPENSATION CLAIMS – EMPLOYER CHALLENGES TO COVID-19 RELATED CLAIMS

- Absent state legislation, an employee seeking workers' compensation benefits for COVID-19 related claims will still have to provide medical evidence to support the claim.
- Employers who seek to contest such a claim may be able to challenge the allowance they can establish another alternative exposure or if the employee's medical evidence is merely speculative.



OSHA GUIDANCE RELATED TO COVID-19

OSHA GUIDANCE ON PREPARING WORKPLACES FOR COVID-19

- The Occupational Safety and Health Administration ("OSHA") recently published "Guidance on Preparing Workplaces for COVID-19," which outlines steps employers can take to help protect employees.
- It divides workplaces and work operations into four risk zones which can be useful in determining appropriate work practices and precautions.

COVID-19 MUST BE RECORDED IN OSHA 300 LOGS

- OSHA recordkeeping requirements mandate covered employers record certain work-related injuries and illnesses on their OSHA 300 log.
- Recent OSHA guidance requires employers to record instances of workers contracting COVID-19 only if the worker contracts it while on the job (as opposed to off the clock). Employers must record cases of COVID-19 if:
  - The case is a confirmed case of COVID-19;
  - The case is "work-related," as defined by 29 CFR 1904.5; and
  - The case involves one or more of the general recording criteria set forth in 29 CFR 1904.7, which include, *inter alia*: (1) medical treatment beyond first-aid and (2) absence from work.

OSHA 300 LOG RECORDING – OSHA'S RECENTLY PUBLISHED COVID-19 EXCEPTION

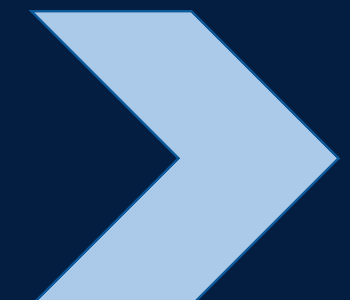
- Recognizing the difficulty in determining whether COVID-19 was contracted while on the job, OSHA recently provided guidance which waives enforcement of its COVID-19 recordkeeping requirements in area where ongoing community transmission will frustrate work-relatedness determinations.
  - However, employers must still record a COVID-19 case in its OSHA 300 log if:
    - Objective evidence establishes that the COVID-19 case may be work-related; and
    - The evidence was reasonably available to the employers.
- **NOTE:** This waiver does not apply to (1) correctional institutions or (2) employers of health workers or emergency responders even in areas where in area where ongoing community transmission will frustrate work-relatedness determinations. These employers must continue to make work-relatedness determinations when one of their employees contract COVID-19.

EMPLOYEE REQUESTS TO WEAR A MASK IN THE WORKPLACE

- OSHA's respiratory protection standard (which covers the use of most safety masks in the workplace), employers are must provide a respirator to employees only "when such equipment is necessary to protect the health of such employees."
- Since there is no currently recognized health or safety hazard with respect to COVID-19, OSHA's respiratory protection standard does not prohibit an employer from refusing an employee's request to wear a respirator or mask.
  - While the CDC's April 3, 2020 guidance recommends wearing cloth face coverings in public settings, it based this recommendation on the belief that this practice will slow the spread of the virus because a significant portion of individuals with COVID-19 lack symptoms, not on protection of the health of the wearer.
  - The CDC made clear that the cloth face coverings being recommended are not surgical masks or N-95 respirators, and they are therefore not subject to OSHA's respiratory protection standard.

ERISA, SEVERANCE, AND IMMIGRATION

COVID-19 CONSIDERATIONS TO KEEP IN MIND



ERISA — SOME CONSIDERATIONS TO KEEP IN MIND

- When operations permanently cease at single location, assess whether more than 15.0% of total number of company-wide employees who are participants under an ERISA-governed pension plan were laid off
    - Statute says 15% threshold, reg says 20% is penalty
- Three-year lookback period for all laid-off employees if no relocation or (in certain cases) if no asset disposition
- May not apply if "fewer than 100" participant employees or if 90%+ ratio of FMV plan assets to funding target
- Additional contributions to plan may not qualify as "payroll costs" under CARES Act

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SEVERANCE — SOME CONSIDERATIONS TO KEEP IN MIND

- Older Workers Benefits Protection Act
  - If Company offers a severance agreement to obtain employees' waiver of discrimination claims, employees 40+ years of age have 45 days to review (and 7 days to revoke signature)
- Employee Retirement Income Security Act
  - ERISA governs severance plans too
  - Hopefully your company has a formal, clear, and consistently enforced plan in place and is not providing *de facto* severance
  - Depending on state, may have duty to volunteer information about adoption of a severance pay plan or early retirement incentive plan before the plan is adopted

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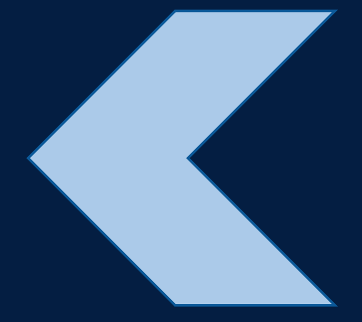
IMMIGRATION — SOME CONSIDERATIONS TO KEEP IN MIND

- Limited types of visas possibly affected (non-exclusive list)
  - H-1B (four-year workers with college degree)
  - J-1 (research scholars, professors, cultural exchange visitors, especially in healthcare or business)
  - O-1 ("extraordinary ability" in arts/sciences/education/etc.)
  - L-1 (noncitizen branch manager in foreign office)
- Varying times to refile with new employer if laid off
- USCIS indicated flexibility with certain deadlines and reuse of old biometrics for limited types of work authorization requests, but very slow to respond overall



YOU HAVE POWER OVER YOUR MIND — NOT OUTSIDE EVENTS. REALIZE THIS, AND YOU WILL FIND STRENGTH.

— *Marcus Aurelius*