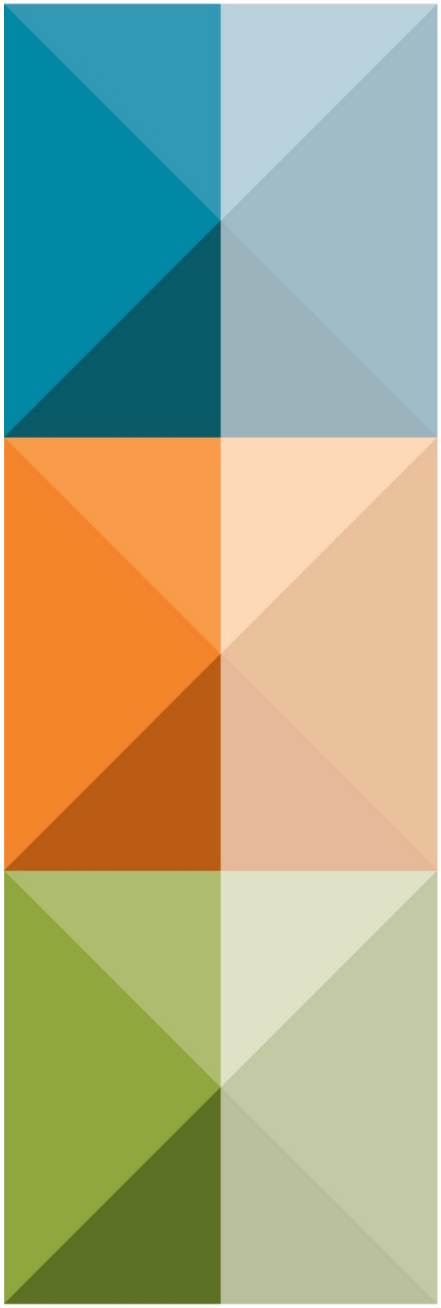

COVID-19 Regulatory Updates & Best Practices

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Disclaimer

This presentation has been prepared by Poms & Associates Insurance Brokers, LLC to provide information on recent developments of interest to our clients. It is not intended to offer legal or regulatory advice for a particular situation. Events are rapidly developing during this national state of emergency, and best practices are constantly changing. We recommend that individuals and entities carefully monitor and follow health directives of the WHO and CDC, along with federal, state and local authorities.

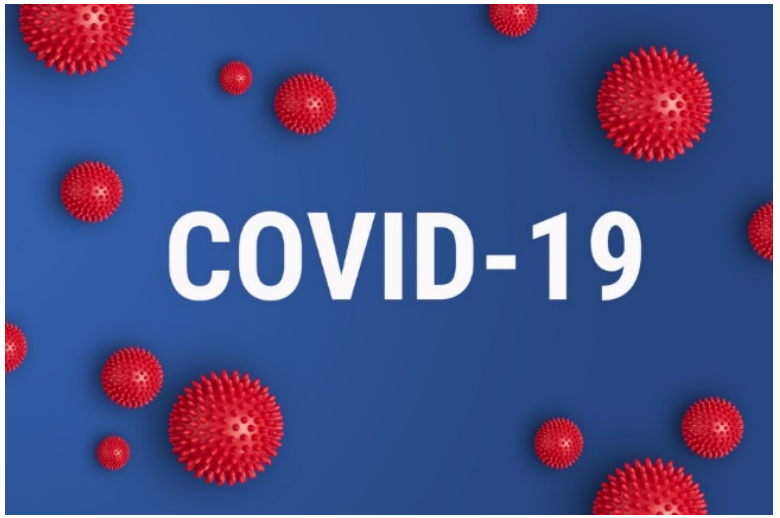
Today's Discussion

1. COVID-19 Standards and Best Practices
2. CDC Guidance on Return to Work and COVID-19
3. Recordkeeping & Reporting
4. Written Programs
   - COVID-19 Return to Work Procedures
   - Injury Illness & Prevention Program (IIPP)
5. New Title IX Regulations
6. Workers' Compensation Presumption
7. Human Resources
   - Families First Coronavirus Response Act (FFCRA) Paid Sick Leave
   - Equal Employment Opportunity Commission (EEOC) Updates

COVID-19 Standards and Best Practices

Federal OSHA

- Federal OSHA is utilizing the General Duty Clause:
  - "Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." **– Section 5(a)(1) of the Occupational Safety and Health Act of 1970**



COVID-19 Standards and Best Practices

Virginia Department of Labor and Industry (DOLI)

- Emergency Temporary Standard (ETS) passed July 15, 2020
  - Effective July 27, 2020
  - Virginia is the first state to adopt a specific standard intended to protect workers from COVID-19 exposure which requires employers to:
    - Conduct an assessment of the workplace and classify job tasks (very high, high, medium, low)
    - Develop Infection Control Plan
    - Implement controls
    - Train
- Expires in six months or upon the expiration of the governor's state of emergency declaration, or the enactment of a permanent standard.

COVID-19 Standards and Best Practices

Oregon OSHA COVID-19 Temporary Standard PROPOSED

- Oregon OSHA is ***proposing*** a temporary rule that would require employers to implement risk-reducing measures, including social distancing, barriers, face coverings, cleanings and information sharing and is accepting public comments on the proposal through Monday, August 31.
- Next step:
  - Draft published for review and comment (3-4 weeks)
  - Expects to publish as final on September 14, 2020

OSHA Resources

- Preparing Workplaces for Influenza Pandemics
- Guidance on Returning to Work
  - Covers multiple scenarios and issues
  - Uses a risk-based classification for workers with information on controls using the Hierarchy of Controls

https://www.osha.gov/Publications/OSHA4045.pdf

Cal/OSHA Updated Guidance on Respirator Shortage

Cal/OSHA

- On August 6, Cal/OSHA released updated guidance for healthcare and other employers covered by the Aerosol Transmissible Diseases (ATD) Standard (title 8 section 5199) facing severe shortages of respirators
- ATD standard applies to hospitals, skilled nursing facilities, correctional facilities, certain labs, clinics, and coroners' offices
- The guidance includes optimization strategies to reduce the use and destruction of respirators during the fit testing process
- It includes engineering controls and work practices to help minimize the need for respiratory protection
- Strategies for extended respirator use and optimizing supplies
- https://www.dir.ca.gov/dosh/coronavirus/Cal-OSHA-Guidance-for-respirator-shortages.pdf

New CDC Return to Work Guidance

COVID-19 Positive

- 10 days - first onset of symptoms
- At least 24 hours have passed since last fever without fever-reducing medications
- Improvement in all other symptoms
- Longer isolation for more severe illness
- Infected with virus but no symptoms:
  - 10 days after date of first positive test for virus

Exposure Only – No Test

- 14 days of self isolation since exposure and no symptoms
- Telework if possible
- Self monitor for symptoms

Recordkeeping

Federal OSHA

Is COVID-19 a Recordable Illness?

- Yes, if:
  - The case is a confirmed case of COVID-19, as defined by the CDC
  - The case is work-related as defined by 29 CFR § 1904.5
  - Case involves one or more of the general recording criteria
- OSHA is exercising enforcement discretion because of the difficulty determining exposure.
- And, if: "Evidence that a COVID-19 illness was work-related should be considered based on the information reasonably available to the employer at the time it made its work-relatedness determination"
- https://www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19

Recordkeeping

Cal/OSHA

Is COVID-19 a Recordable Illness?

- Yes, if:
  - The illness is work-related and results on one of the following:
    - Death
    - Days away from work
    - Restricted work or transfer to another job
    - Medical treatment beyond first aid
    - Loss of consciousness
    - A significant injury or illness diagnosed by a physician
  - Cal/OSHA considers a positive test for COVID-19 determinative of recordability, a positive test result is not necessary to trigger recording requirements.
  - If there is not a known exposure that would trigger the presumption of work-relatedness, the employer must evaluate the employee's work duties and environment to determine the likelihood that the employee was exposed during the course of their employment.
  - https://www.dir.ca.gov/dosh/coronavirus/Reporting-Requirements-COVID-19.html
  - Poms Handout – Cal/OSHA Recordkeeping
    - https://res.cloudinary.com/pomsassoc/image/upload/c_scale,w_640/v1586280698/CalOSHARecordingReq.pdf

Reporting

California - Reporting COVID-19 Cases to Cal/OSHA

- **Do employers have to report COVID-19 Illnesses to Cal/OSHA?**
  - California employers must also report to Cal/OSHA any serious illness, serious injury or death of an employee that occurred at work or in connection with work within eight hours of when they knew or should have known of the illness.
  - This includes a COVID-19 illness if it meets the definition of serious illness.
  - A serious illness includes, among other things, any illness occurring in a place of employment or in connection with any employment that requires inpatient hospitalization for other than medical observation or diagnostic testing.
- **Do I report an illness even if COVID-19 has not yet been diagnosed?**
  - Yes, even if a suspected COVID-19 case has not been diagnosed by a licensed health professional, an employer should still report it to Cal/OSHA if the illness occurred in connection to any employment as described above and if it resulted in death or in-patient hospitalization.

CA COVID-19 Employer Playbook – Updated July 28, 2020

California Department of Public Health https://www.cdph.ca.gov/

- The COVID-19 Employer Playbook was revised on July 28, 2020 to require employers to contact the local health department in any jurisdiction where a *COVID-19 employee resides* when there is an outbreak in a workplace.

- An outbreak is defined as three or more laboratory-confirmed cases of COVID-19 within a two-week period among employees who live in different households.

https://files.covid19.ca.gov/pdf/employer-playbook-for-safe-reopening--en.pdf

Written Programs

All Employers

- Develop written COVID-19 Return to Work Procedures

California

- Injury & Illness Prevention Program (IIPP) Amendment – Guidelines as of May 14, 2020
- Cal-OSHA is requiring employers to add information to their IIPP on protecting workers from COVID-19:
  - Establishing Infection Prevention Measures
  - Providing Employee Training
  - Washing Facilities
  - Personal Protective Equipment (PPE)

https://www.dir.ca.gov/dosh/coronavirus/General-Industry.html.

New Title IX Regulations went into effect August 14, 2020

All Educational Institutions

- U.S. Department of Education new Title IX regulations went into effect on August 14, 2020
- Prohibits discrimination on the basis of sex in education programs or activities receiving federal financial assistance

Workers' Compensation Presumption

Injury presumptions switch the evidentiary burden from the employee to the employer.

- **California**
  - Governor Newsom's presumption created by his May 6th Executive Order expired on July 6th.
  - As a result California currently does not have a COVID-19 injury presumption.
  - Three bills are making their way through the legislature.

Workers' Compensation Presumption

- Pending California COVID-19 Legislation
  - AB 196 - Essential occupations and industries
  - AB 664 - Peace Officers, Firefighters and Healthcare
  - SB 1159 - Specific industries and cluster provision
- **New Mexico**
  - Executive Order 2020-05
    - Directs all Executive Agencies to afford a presumption
    - Award service credit to qualifying State employees and volunteers
- **NCCI - COVID-19 Presumption Tracker**
  - https://www.ncci.com/Articles/Documents/II_Covid-19-Presumptions.pdf

HR: NY Federal Court Ruling on FFCRA Paid Sick Leave

State of New York sued the U.S. DOL to challenge the DOL's interpretation of the FFCRA, because it *"unlawfully narrows workers' eligibility for emergency family leave and paid sick leave guaranteed by the [FFCRA]."*

- NY challenged four aspects of DOL's FFCRA final Rule, and on August 3, 2020, NY prevailed in federal court on all four counts.
- For now, this decision impacts only businesses in the SDNY.
  - The DOL may appeal this decision to the Second Circuit Court of Appeals; or
  - The DOL may revise its rules to be consistent and uniform across the country.

HR: NY Federal Court Ruling on FFCRA Paid Sick Leave

1. **The Work Availability Requirement -** *No paid sick and emergency family leaves to otherwise eligible employees if the employer determines—for any reason—that the employer does not have work for the employee*
   - In its Final Rule, the DOL says that employees cannot get FFCRA paid sick leave benefits if their employers do not have work for them.
   - New York argued that the DOL's position was not consistent with the actual language if the FFCRA. The federal court agreed.
   - ***Practical impact***: An employee can collect FFCRA leave for a qualifying reason while on furlough status.

HR: NY Federal Court Ruling on FFCRA Paid Sick Leave

2. **The Broad Definition of "Health Care Provider"** - *The FFCRA permits an employer to exclude a "health care provider" from getting FFCRA benefits. In its Final Rule, the DOL has broad definition of "health care provider."*
    - Under DOL Rule, the FFCRA would not cover an English professor, librarian, or cafeteria manager employed at a university with a medical school.

- New York argued that the DOL's position was too broad and exceeded its authority under the FFCRA.
- Once again, the federal court agreed with New York.
- ***Practical impact***: More become-FFCRA eligible. This much narrower definition of "health care provider" will control going forward. Think: doctors and health care providers who practice medicine.

HR: NY Federal Court Ruling on FFCRA Paid Sick Leave

3. **Requiring Employer Consent for Paid Sick or Emergency Family Leaves Intermittently** – *FFCRA was silent on this – DOL said:*
    - *The employee would need employer permission to take intermittent leave while teleworking; and*
    - *An employee working onsite may only take intermittent leave (with employer permission) to care for a child whose school or place of care is closed, or childcare provider is unavailable.*

- New York argued that the DOL's position was too broad and exceeded its authority under the FFCRA.
- SDNY agreed with New York, except if IL creates safety concern.
- ***Practical impact***: Employees can take IL for any FFCRA qualifying reason while teleworking. An employee that is working onsite may only take intermittent leave to care for a child whose school or place of care is closed, or childcare provider is unavailable. Either way, the employee doesn't need employer permission.

HR: NY Federal Court Ruling on FFCRA Paid Sick Leave

4. **Documentation Requirements** - *Conditioning an employee's eligibility for paid sick leave or emergency family leave on the employee first providing documentation to the employer.*
   - In its Final Rule, the DOL requires employees to submit specific documentation to their employer to support the need for leave before the leave begins:
     - (1) employee's name; (2) date(s) for which leave is requested; (3) qualifying reason for the leave; and (4) a statement that the employee is unable to work because of the qualifying reason for leave.
   - New York argued that this requirement is inconsistent with the FFCRA. Once again, the court sided with New York.
   - ***Practical impact***: Employees don't need to provide documentation as a precondition to taking FFCRA leave. However, after providing verbal notice, the paperwork can follow.

HR: NY Federal Court Ruling on FFCRA Paid SL – Why do I care?

- **So, what should we do if we're not in SDNY's jurisdiction**?
- The impact of this ruling on employers located outside the New York City area, is unclear at this point,
  - ***Is there a downside to complying with the SDNY ruling?***
- The safest approach would be to apply the FFCRA paid leave provisions in accordance with the SDNY's interpretation.
- Employers, may very well begin to see employees exempted by the regulations applying for paid leave benefits, and should be prepared to respond to such requests.
- Due to the complexity of these issues, it is recommended that employers consult with counsel regarding FFCRA compliance.

HR: Should we have employees sign a waiver re: COVID-19 claims?

- Generally, according to employment defense attorneys, no. They are ineffective and may do more harm than good.
  - Waivers won't bar worker's compensation claims. California have established rebuttable presumptions that certain workers with COVID-19 can pursue claims for workers' compensation
  - Waivers won't avoid gross negligence and intentional tort claims.
  - A Deterrent Effect? Probably not - in most states, an employee cannot preemptively waive work-related claims, so a waiver would be unenforceable.
- The best way to defend a lawsuit is to prevent it, and DOCUMENT what you do.
  - Follow the CDC's Interim Guidance for Businesses – cleaning & disinfection
  - Ensure that employees are provided and properly wearing masks and PPE.
  - Educate your employees and communicate. Check in with sick employees.
- **Have employees sign an acknowledgment** that they will comply with safety policies and measures, and take steps to avoid the transmission of COVID-19.

HR: Do we have to accommodate someone with a disability who claims they can't wear a mask?

- If an employee cannot wear a mask because of a disability (e.g., asthma), the employer should explore reasonable accommodations that enable the person to perform the essential functions of the job.
- What are some of those options?
  - Telework, or work in a location where no one else is present and a mask is unnecessary,
  - an unpaid leave of absence,
  - another face-covering like a face shield or a bandana, or
  - flexible breaks to receive fresh air.
- Ultimately, however, the employer can insist on a face-covering to keep the workplace safe. If an employee not wearing a mask poses a direct threat to the others in the workplace, then there is no duty to accommodate under the ADA.

EEOC UPDATED FAQs – June 11 and 17

- **Antibody Testing**: Based on the CDC's Interim Guidelines, antibody test results "should not be used to make decisions about returning persons to the workplace." That means that, among other things, you cannot require antibody testing before permitting employees to reenter the workplace. Based on CDC guidance, an antibody test does not meet the ADA's definition of "job related and consistent with business necessity" standard for medical examinations. By contrast, viral tests that determine if someone has an active case of COVID-19 are permitted by the ADA.
- **Pregnancy-Based Discrimination**: Similarly, pregnant employees cannot be excluded from the workplace based on their pregnancy. These employees may have a right to request a reasonable accommodation under the ADA, Title VII, and applicable state statutes).
- **ADA Protections for Employee's Family Members**: The ADA only extends workplace protections based on an employee's disability-related needs, not based on the disability of a family member. That means that you are not required under the ADA to provide accommodation to an employee just because their family member is at increased risk from COVID-19. Of course, you are free to offer such accommodations at your discretion.

EEOC UPDATED FAQs – June 11 and 17

- **COVID-19 Screening Accommodations**: You should generally treat requests for an accommodation related to COVID-19 screening (i.e., an alternative method of screening) as you would any other request for a reasonable accommodation by a disabled individual. If the requested accommodation is easy to provide and inexpensive, you can make it available to any employee upon request. Similarly, if a religious accommodation related to COVID-19 screening is requested, you should determine whether it is something you can offer.
- **Age-Based Discrimination**: Though employees age 65 and older are at increased risk from COVID-19, you cannot exclude these employees from the workplace based on their age. Employees over the age of 65 are not automatically eligible for an accommodation based on their age, but you are free to offer them work accommodations.
- **Accommodations for Caregivers of School-Age Children**: You are free to provide workplace accommodations or flexibility to employees who are caregivers of school-age children, but you must offer those accommodations equally to all employees regardless of sex and all other EEO-protected characteristics.

EEOC UPDATED FAQs – June 11 and 17

- **Pandemic-Related Harassment**: Be on the alert for any workplace harassment surrounding COVID-19, especially against employees who are (or are perceived to be) Chinese or of Asian national origin. These incidents have increased sharply since the outbreak of COVID-19. Make sure managers are trained in advance to recognize, investigate, and address this type of harassment, whether it comes from employees, customers, vendors, or anyone else with access to the workplace. This includes harassing behavior against on-site employees and those teleworking due to the pandemic. You may wish to send out a reminder to all employees of your organization's anti-harassment and anti-discrimination policies and the consequences of violating them.
- **Inviting Employees to Request a Work Accommodation**: As a best practice, you should provide information to all employees about how to request a work accommodation under the ADA or another EEO law. Send this notice in advance of having all employees return to the workplace to give them an opportunity to ask questions. If there is a different point of contact for different types of accommodation requests, make that clear to all employees.

Thank you! Any Questions?

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A representative of Poms & Associates Insurance Brokers, LLC can provide you with a personalized assessment concerning COVID-19 Regulatory Updates & Best Practices.

Please visit our website at www.pomsassoc.com or call us at 818-449-9300.