Reopening the Workplace Virtual Conference: Navigating the New Reality of COVID-19

Employee Rights and Protections

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Presented By

Brian R. Garrison, J.D., is partner at Faegre Drinker. He represents management in collective bargaining, arbitrations, work stoppages, union organizing campaigns, and unfair labor practice and representation proceedings before the National Labor Relations Board (NLRB).

Garrison also provides strategic advice and counseling on the labor law issues that can arise in mergers, acquisitions and reorganizations, and in facility consolidations, relocations and closings involving union and non-union facilities.

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Presented By

Matthew H. Parker, J.D., is partner at Whelan Corrente & Flanders, LLP (Providence, RI). Parker's practice is focused on employment law, business litigation, and labor law. He counsels employers and human resources professionals on how to hire, fire, pay, manage, and negotiate with employees, he drafts employment contracts, employee handbooks, non-compete agreements, and non-disclosure agreements, he conducts workplace investigations and trainings, he represents companies and individuals in federal and state courts, and he is also an experienced practitioner before administrative agencies such as the R.I. Commission for Human Rights, the R.I. Department of Labor, the National Labor Relations Board, and the U.S. Equal Employment Opportunity Commission.

He counsels clients concerning Title VII, the ADEA, the ADA, the FLSA, the FMLA, the NLRA, and state labor and employment laws and regulations. He represents unionized employers in grievance arbitration hearings and in defense of unfair labor practice charges, he contests union representation petitions, and he has successfully handled unemployment and other agency appeals.

Parker has also enforced and challenged various non-compete, non-solicitation, and non-disclosure agreements, and he has prosecuted and defended whistleblower and retaliation cases. Additionally, he has counseled several clients towards favorable settlements in confidential mediations. Parker attended Connecticut College, and Boston College Law School. He is licensed in CT, MA, and RI.

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Agenda

- Sick Leaves / Family Leave
  - FMLA
  - FFCRA
  - ADA
- Reopening – Agency Guidance
- Unemployment Issues
- Frequently Asked Questions
- WARN obligations associated with additional layoffs, furloughs, and facility closures.
- NLRA issues for unionized employers related to bargaining obligations.
- NLRA issues for all employers related to protected concerted activity.
- NLRA issues for non-union employers related to union organizing.

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Sick Leaves / Family Leave

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FMLA

- Employers with 50+ employees within 75 miles
- 12 weeks
- Unpaid*
- Covered purposes (relevant to COVID-19):
  - Care for spouse, son, daughter, or parent with a serious health condition
  - Because of a serious health condition that makes employee incapable of performing essential duties

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FMLA

- "Serious Health Condition"
  - "inpatient care" or "continuing treatment by a health care provider"
- "Inpatient Care"
  - Overnight stay, including any period of incapacity, or any subsequent treatment in connection with inpatient care
- "Continuing Treatment"
  - Incapacity (more than 3 consecutive days) and subsequent treatment
  - Chronic conditions
  - Permanent or long-term conditions
  - Conditions requiring multiple treatments

FFCRA – E-FMLA

- No 50-employee requirement
- Childcare only
- Employee must have worked for you for 30 calendar days
- 12 weeks
- First 2 are unpaid
- Last 10 at 2/3 (up to $200/day)

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FFCRA – Emergency Paid Sick Leave Act

PURPOSE FOR INABILITY TO WORK	RATE OF PAY (UP TO 80 HOURS)
1) EE Subject to Quarantine or Isolation Order	100% up to $511/day
2) EE Advised by Health Care Provider to Self-Quarantine	100% up to $511/day
3) EE Has Symptoms of COVID and is Seeking Diagnosis	100% up to $511/day
4) EE Caring for Individual Covered under #1 or #2	2/3 up to $200/day
5) EE Caring for Son or Daughter b/c Loss of Childcare	***2/3 up to $200/day***
6) "Substantially Similar Condition"	2/3 up to $200/day

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ADA

- Generally:
  - Duty to reasonably accommodate disabled employees so that they can perform the essential functions of their jobs; unless undue hardship.
  - Cannot discriminate based on disability
  - Medical inquiries are illegal without business justification
- ***Exception – If direct threat to employee and others.***

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ADA

- EEOC: Fever, runny nose, cough, cold symptoms are not a “disability”
- EEOC: COVID-19 poses a “direct threat”
- OK to ask employees about their potential exposure and symptoms
- OK to take employees’ temperatures
- Not OK to *require* disclosure of underlying health conditions
- No family leave requirement

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ADA

- EEOC: OK to encourage vaccination (once available), but must allow exceptions to a mandatory vaccination policy where necessary because of disability or religious accommodation
- EEOC: OK to require fitness for duty note upon return to work
  - CDC: But don’t…
- Have a written policy specifying how employees should formally request disability accommodations so that there is no guessing
- Maintain confidentiality of employees’ medical information

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Reopening Agency Guidance & Unemployment Issues

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CDC – Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19), May 2020

- https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html
- Actively encourage sick employees to stay home
- Consider conducting daily in-person or virtual health checks
- Identify where and how workers might be exposed to COVID-19 at work
- Separate sick employees
- Take action if an employee is suspected or confirmed to have COVID-19 infection
- Educate employees about steps they can take to protect themselves at work and at home

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CDC

- Consider commuting changes
- Appoint a COVID czar
- Implement flexible sick leave and supportive policies and practices
- Protect employees at higher risk for severe illness through supportive policies and practices
- Communicate supportive workplace polices clearly, frequently, and via multiple methods
- Assess your essential functions and the reliance that others and the community have on your services or products

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CDC

- Determine how you will operate if absenteeism spikes
- Establish policies and practices for social distancing
- Consider improving the engineering controls using the building ventilation system
- Give employees, customers, and visitors what they need to clean their hands and cover their coughs and sneezes
- Perform routine cleaning
- Perform enhanced cleaning and disinfection after persons suspected/confirmed to have COVID-19 have been in the facility

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CDC

- Limit travel and advise employees if they must travel to take additional precautions and preparations
- Minimize risk to employees when planning meetings and gatherings

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CDC

- Sick employees should not return to work until the ***criteria to discontinue home isolation are met***, in consultation with healthcare providers.
  - Symptom based strategy
    - At least 3 days (72 hours) have passed *since recovery* defined as resolution of fever without the use of fever-reducing medications **and** improvement in respiratory symptoms (e.g., cough, shortness of breath); **and,**
    - At least 10 days have passed *since symptoms first appeared*.
  - Test-based strategy
    - Resolution of fever **without** the use of fever-reducing medications **and**
    - Improvement in respiratory symptoms (e.g., cough, shortness of breath), **and**
    - Negative results of an FDA Emergency Use Authorized COVID-19 molecular assay for detection of SARS-CoV-2 RNA from at least two consecutive respiratory specimens collected ≥24 hours apart (total of two negative specimens).

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OSHA – Guidance on Preparing Workplaces for COVID-19

https://www.osha.gov/Publications/OSHA3990.pdf

- Develop an infectious disease preparedness and response plan
- Basic infection control measures
- Policies and procedures for isolation of sick people
- Workplace flexibilities and protections
- Workplace controls

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CARES Act – Unemployment

- Extra $600/week (until July 31, 2020)
- Extends from 26 weeks to 39 weeks
- Pandemic Unemployment Assistance
  - Independent contractors
  - Voluntary quit – COVID-related
    - Sick
    - Child care
    - Family care
    - Quarantine / Self-isolation order
    - Self-isolation per health care provider
  - Insufficient earning history

– ***Caveat*** – Unavailable if paid leave

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Frequently Asked Questions

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Frequently Asked Questions – 1

Do you have to recall everyone that has been laid off due to COVID-19? Can you recall them in phases?

- *No.*
- *Just confirm that you cannot be accused of recalling employees discriminatorily based upon any protected category (e.g., age, disability, race, etc.) .*
- *Have a business reason justifying the order in which you are recalling people.*

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Frequently Asked Questions – 2

How do we address a scenario where an employee refuses to return to work due to fears of getting infected or infecting family members?

- *Consider it as an ADA request*
- *Require a disability certification from his/her healthcare provider*
- *Weigh alternative accommodations*
- *No obligation to hold job indefinitely*
- *No obligation to accommodate family members*
- *Might be eligible for UI under CARES Act*

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Frequently Asked Questions – 3

What if the employee does not want to return because he is making more on unemployment?

- *Put it in writing to the employee that there is work available for him and that the company will consider his failure to return to work a resignation.*
- *Remind the employee that the company is obligated to respond to the DLT candidly when asked about the circumstances.*
- *Tell the employee that refusal to return may negatively impact his ability to collect UI .*

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Frequently Asked Questions – 4

Do I need to provide hazard pay?

- *No.*
- *You can, but it would come out of your own pocket.*

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Frequently Asked Questions – 5

Will employees lose the $600/week federal pandemic unemployment compensation benefit if they come back part time?

- *Maybe.*
- *If they remain "partially unemployed" and eligible for partial unemployment insurance benefits, they will remain eligible for the $600/week benefit (until it expires at the end of July).*

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Frequently Asked Questions – 6

Do I need to hold an employee's job longer than required under the FFCRA (12 weeks) if he is unable to work due to the need to care for a child who is home because of the pandemic?

- *No.*
- *If he remains unable to work following the expiration of any required leave, he will likely be eligible for pandemic unemployment assistance, but you are not obligated to hold his job.*

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Frequently Asked Questions – 7

I continued paying for an employee's health insurance despite the fact that she was out of work while our office was closed. Can I recoup her share of the premiums from her wages when she returns?

- *Not unilaterally, but yes, if she agrees to it in writing.*

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Frequently Asked Questions – 8

What if an employee refuses to work because he contends that it would be in violation of an executive order?

- *Check with counsel*
- *Explain – in writing – why you are in compliance, and give the employee one last chance to return.*

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Frequently Asked Questions – 9

I received a PPP loan. Will it hurt my chances of getting it forgiven if an employee refuses to return to work?

- *Per SBA guidance, no, if you make the offer in writing and document the refusal.*

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WARN Issues

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WARN Issues – Layoffs and Facility Closures

- WARN Overview:
  - Applies if an employer has over 100 employees
  - Requires 60 days' advance written notice to all employees (or their union representatives, if represented) who experience an "employment loss" as a result of a "plant closing" or "mass layoff."
- Key Terms of Art:
  - Employment Loss
  - Plant Closing
  - Mass Layoff
  - Aggregation Rule

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WARN – DOL's COVID-19 Guidance

- Temporary layoffs/furloughs:
  - Neither trigger notice requirements so long as they last for no more than 6 months
  - If initially expected to last 6 months or less but extended beyond 6 months? May trigger WARN requirements.
  - To avoid liability in this situation:
    - The extension of time beyond 6 months must be due to business circumstances not reasonably foreseeable at the time of the initial layoff.
    - The required notices must be given to the appropriate parties when it becomes reasonably foreseeable that the extension is required.
- "Unforeseeable business circumstances" exception to permanent layoffs resulting from COVID-19

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NLRA Issues

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NLRA Issues – Unionized Workforces

- Bargaining Obligations
  - General duty to notify the union and bargain, if requested, before making changes to union-represented employees' terms and conditions of employment.
    - May apply to various procedures planned to protect employees upon their return to work (*e.g.*, PPE, testing, cleaning, and social distancing measures)
  - CBA may include language by which the union has waived its right to bargain, which gives the employer the right to act unilaterally.
- Duty to Provide Information
  - General duty to provide information, upon request, that is relevant to employees' terms and conditions of employment.
  - Complications arise when requests relate to issues that implicate confidentiality concerns (e.g., specific employees' health issues or matters concerning non-bargaining unit employees)

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NLRA Issues – Union & Non-Union Workforces

- NLRA protects employees who engage in ***protected concerted activity***
- Protected concerted activity may take many forms in connection with reopening the workplace:
  - Discussions at work regarding safety/health concerns
  - Demands for enhanced safety measures
  - Requests for "hazard" pay
  - Discussing workplace issues in the media
  - Airing of grievances on social media
  - Public protests
  - Refusal to work (*e.g.*, Instacart and sanitation workers' strikes).

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NLRA Issues – Non-Union Workforces

- NLRA's purpose is to "promote" collective bargaining and establishes a mechanism for employees to select a bargaining representative.
- COVID-19 pandemic has heightened employees' concerns about safety, job security, compensation, benefits, and treatment by management.
- These issues make workforces ripe for protected activity and union organizing.
- Employers should take steps now in order to be able to respond effectively and legally.

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Frequently Asked Questions (cont.)

1. Our workforce is unionized. What protocol must I follow to bring my employees back to work?
2. Our workforce is unionized, but our contract does not have language that controls recalling employees after a layoff. What do we do?
3. Our workforce is unionized. Do I have to bargain new safety protocols with the union if we don't have contract language requiring it?
4. Our employees have refused to return to work because of safety concerns. What do we do?
5. We've heard rumors that our employees are attempting to form a union. What should we do?

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Thank you. Questions?

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