



# QUARANTINE COVID EMPLOYMENT LITIGATION: IDENTIFYING RISKS AND AVOIDING CLAIMS

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# WELCOME

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- Welcome
- COVID-19 Response Team Introduction
- Bodman's COVID-19 Resources Webpage (<http://www.bodmanlaw.com/practices/covid-19-response-team>)
- Bodman is following the fast-moving developments associated with the COVID-19 pandemic and the related governmental action and analyzing the impacts on our clients.

# APPLICABLE EMPLOYMENT LAWS AND EXECUTIVE ORDERS AS OF JUNE 23

- Families First Coronavirus Response Act (“FFCRA”)
  - Paid leave is available under the EPSLA and EFMLA.
  - Small businesses (under 50 employees) may qualify for exemption to providing paid leave due to school closings or the unavailability of child care if the leave payments “jeopardize the viability of the business as a going concern.”
- Executive Order 2020-36
  - Anti-retaliation protections for those suffering COVID-19 symptoms or exposed to COVID-19 via **close contact**.
- Unemployment Compensation Benefits
  - Executive Order 2020-76 expands eligibility for benefits.
  - The CARES Act increases the amount and duration of benefits.
- Family and Medical Leave Act (“FMLA”) and Americans with Disabilities Act (“ADA”)
  - Traditional leave and accommodation rights.



# APPLICABLE EMPLOYMENT LAWS AND EXECUTIVE ORDERS AS OF JUNE 23

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- Executive Order 2020-114 requires employers to take steps to keep workplace safe.
- Executive Order 2020-115 loosened restrictions on Michigan residents.



# APPLICABLE EMPLOYMENT LAWS AND EXECUTIVE ORDERS AS OF JUNE 23

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- Executive Order 2020-114 obligates employers to provide face coverings, affirms the requirement of “COVID-19 preparedness and response plan” based on OSHA guidance addressing:
  - Prevention efforts and workplace controls, including cleanliness and social distancing techniques;
  - Procedures to identify and isolate sick and/or exposed employees, including self-monitoring, daily screenings, and return-to-work processes; and
  - Summary of workplace flexibilities and potential benefits available to affected employees.
  - PPE provided by employers.
- EO 2020-114 requires employers to make the plan “readily available to employees, labor unions, and customers, whether via website, internal network, or by hard copy” by June 1 or within two weeks of resuming in-person activities, whichever is later.
- Risk levels vary by industry and nature of the work. Universities may need complex plans due to having aspects of multiple industries.



# OTHER INCREASED SAFETY REQUIREMENTS

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There are a greater number of requirements on employers permitted to resume operations under EO 114, including:

- Designating a supervisor who will remain onsite during activities and who is familiar with the preparedness and response plan. An on-site employee may perform the supervisory role;
- Providing COVID-19 training to employees;
- Conducting a daily entry self-screening protocol concerning symptoms and suspected or confirmed exposure to people with COVID-19;
  - EEOC guidance, following CDC guidelines, does not allow the antibody test because it is considered to be a medical examination.
  - OSHA's recently released Guidelines advises having employees take their temperatures before reporting to work.
- Keeping everyone at least six feet from one another to the maximum extent possible.
- Providing personal protective equipment (“PPE”) such as gloves, goggles, face shields, and face masks as appropriate for the activity being performed;
- Requiring face coverings when employees cannot consistently maintain six feet of separation from other individuals in the workplace, and consider face shields when three feet of separation is not possible
- Increasing facility cleaning and disinfection to limit exposure



# POTENTIAL COVID-19 CLAIMS

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- Discrimination/Harassment: Age, race, gender, height, weight or sexual orientation discrimination claim regarding employees selected in workforce reductions, including adverse impact; ADA accommodation claims.
- FFCRA: Employee denied leave under FFCRA because unqualified but claims to have had a runny nose, cough or self-reported a COVID-19 “symptom”.
- FFCRA Small Business Exemption: Employee takes emergency sick leave and claims FFCRA applies. Employer asserts it is “exempt” under the Small Business Exemption. The employee is terminated and files a lawsuit claiming unlawful “retaliation” for seeking leave under the FFCRA, whether FFCRA applied or not.
- Employee wrongful termination claims because employee fired due to simple refusal to work due to “fear of unsafe COVID-19 conditions” or “inadequate safety plan.”
- FFCRA/FMLA: Termination of employee after they return to work from qualified FFCRA leave, resulting in retaliation claim based on timing and/or FMLA interference/retaliation claims.



# SCENARIOS TO WATCH OUT FOR

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- Former COVID-19 patient/employee returns to work and is fired – claim under ADA due to alleged disability or being “regarded as” having a disability.
- Employee returns from FFCRA leave but is not returned to former job position.
- Multiple potential scenarios for “whistleblower” claims based on terminations which follow in time an employee “reporting” safety violations and/or other COVID-19 restriction violations, or inadequate or no “safety plan” or training.
- Employee refusing to wear face covering because of disability or because of “civil rights violation.”





# SCENARIOS TO WATCH OUT FOR

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- Employee “forgetting” to keep six feet of separation or wear mask and discrimination in enforcement of social distancing rules.
- Negligent supervision and/or training if employee gets COVID-19 and later complains that he/she contracted at facility [hard to assess] they claim had inadequate supervision or training on safety.
- Terminations for social media activity regarding complaining about management of COVID-19 crisis.
- Responding to social media activity showing employees participating in “higher risk” activities.
- Online, Zoom meeting or group texts with sexual or racial remarks during remote work, personal attempts at “bonding” in work groups and COVID-19 “harassment.”



# **BEST PRACTICES TO AVOID COVID-19 RELATED CLAIMS**

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- Check and update workplace discrimination, harassment and leave policies to include remote workplace and COVID-19.
- Check disability accommodation policy – make sure accommodation policy is sensitive to COVID-19 related disabilities.
- Check FMLA and other leave policies.
- Create, check and/or update safety and response plans.



# **BEST PRACTICES TO AVOID COVID 19 RELATED CLAIMS**

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- Training, training, training (including online; optimal during quarantine).
- Check and update FFCRA leave forms – and obtain required documentation.
- Implement a signed acknowledgment form for employees to agree to abide by and that they understand the safety and response plan and other policies.
- Check social media policies.
- Create central complaint system with management level contact person (but do not interfere with union grievance procedure).



# Q&A

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# CONTACT INFORMATION

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