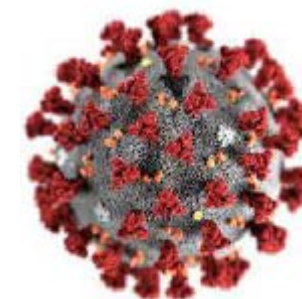




Employment Law During the COVID-19 Pandemic



An Overview for Employers

Presented by Manier & Herod

www.manierherod.com



Disclaimer:

This presentation is for educational purposes and not intended to be legal advice. In any general presentation on legal topics, the audience should seek separate legal advice on their specific cases and facts. In this unique environment dealing with the impacts of a worldwide pandemic, this advice is even more important. The legal analysis of your claim may be dependent on facts, contractual language, laws of your jurisdiction and other issues beyond the scope of this presentation. We hope you find this brief presentation beneficial.



Manier & Herod Employment Law Team

Fred C. Statum, III

fstatum@manierherod.com

Joshua D. Wilson

jwilson@manierherod.com

J. Lawson Hester

lhester@manierherod.com

Tyler Sanders

tsanders@manierherod.com

Jenna M. Macnair

jmacnair@manierherod.com

Caralisa Connell

cconnell@manierherod.com



Employment Law Issues in the COVID-19 Era

- We are living in unprecedented times.
- Issues are evolving rapidly.
- Employers should do their best to implement best practices and take affirmative steps to address these employment issues and to protect its work force.
- Some organizations require employers to provide safe work environments.
- For example, OSHA imposes a legal duty on employers to provide employees with a workplace free from recognized hazards that are causing or likely to cause death or serious physical harm.

Employment Law Issues in the COVID-19 Era

- Many cities and states have now issued mandatory lockdown orders.
- Nashville residents are required to stay inside their home unless they are engaged in “essential activities.”
- This means all non-essential businesses must remain closed.

What are Essential Businesses?

- Federal and state offices and services, including post offices and airports
- Essential Nashville government functions including law enforcement, transportation, and businesses that provide government programs and services
- Banks, savings and loans, insurance companies, accounting businesses, and other business that directly support the insurance and financial services sector
- Legal and judicial services
- Food and beverage: grocery and beverage stores, farmers markets, food banks, catering, convenience stores selling food, agriculture, food processing, feed mills, and other businesses that directly support the food supply
- Sanitation and waste removal businesses and services
- Energy, water, and sewage businesses and services
- Vehicle fuel, support, service stations and businesses
- Laundromats/laundry/cleaning services
- Health care, mental and behavioral health, and biomedical research and businesses that directly support the healthcare industry including health information technology, staffing and supplies
- Pharmacies and medical supply businesses, and other businesses that directly support the drug and medical supply pipeline

What are Essential Businesses?

- Home and business repair, hardware supply
- Warehousing and storage
- Construction and facilities design businesses
- Home and business cleaning and maintenance services
- Product logistics, transport, and distribution businesses
- Parcel transportation and delivery businesses
- Veterinary and pet supply business and services (including agricultural services and the caring and feeding of all livestock and farm animals)
- All businesses which rely upon deliveries may continue, including florists
- Internet and telecommunications systems (including the provision of essential global, national, and local infrastructure for computing services, business infrastructure, communications, and web-based services)
- Certain other business and services the Office of the Mayor determines are essential for the continued safety and security of Davidson County

So What Does this Mean for Employers and Employees?

- Employers are struggling to stay open.
- Many employees are being laid off.
- Other employers are attempting to rapidly switch to a remote work force.
- Employers are faced with how to handle sick leave, paid time off, and disability issues.
- Employers should be enacting specific COVID-19 policies and be ready to implement policies related to COVID-19 issues.

Employment Law Issues that May Arise as a Result of COVID-19

- Workplace Safety
- Privacy
- Employee Benefits
- Immigration
- Wage & Hour
- Anti-Discrimination
- Disability
- Workers Compensation
- Reductions in Force

The WARN Act - Reductions in Force

- The Worker Adjustment and Retraining Notification Act (WARN Act) offers “protection to workers, their families, and communities by requiring employers to provide notice 60 days in advance of covered plant closings and covered mass layoffs.”
- The WARN Act requires that the employer provide 60 days of written notice of the intention to lay off more than 50 employees during any 30-day period of a plant closing.

The WARN Act - Reductions in Force

- Additionally, the WARN Act requires employers to give notice of any mass layoff, that does not result in a plant closing but will result in an employment loss of 500 or more employees during any 30-day period.
- The Act also covers employment losses for 50-499 employees if they make up 33 percent of the employer's active workforce.
- This requirement does not consider the layoff of employees who have worked for the employer less than six of the past twelve months or employees who work, on average, less than 20 hours a week.

Penalties of the WARN Act

- Under the WARN Act provisions, an employer who orders a plant closing or mass layoff without providing this notice is liable to each unnotified employee for back pay and benefits for up to 60 days during which the employer is in violation of the WARN Act.

How to Handle Mass Layoffs - RIF

- Determine whether your company's layoff falls under the WARN Act provisions.
- Select which employees will be laid off and whether it will be a temporary or permanent layoff.
 - The selection process should be consistent and based on the same classifications (i.e., seniority, job classification, performance, etc.) across the board.
- Determine whether the selections impact a protected class:
 - Members of a certain race, color, ethnicity, national origin, religion, gender, genetic information, age (40 or over), those with a disability, or veteran status

How to Handle Mass Layoffs - RIF

- Review Older Workers Benefit Protection Act (OWBPA) Regulations and Compliance.
 - Under the OWBPA, employers must provide employees age 40 and above a consideration period of at least 21 days when one employee over 40 is being laid off and 45 days when two or more employees over 40 are being laid off.
 - Additionally, employees must receive a revocation period of 7 days.
 - Additionally, those employees over 40 must receive a list of the job titles and ages of all individuals selected for the layoffs along with a list of those employees not selected.

How to Handle Mass Layoffs - RIF

- Determine whether to offer Severance Agreements and Pay in exchange for Release of Claims.
- Offering Severance Packages can provide security from potential lawsuits.
- Employers are not obligated to provide Severance Agreements. However, they will contain requirements that the employee release all claims.
- Severance Agreements should be carefully drafted to make sure all potential claims are being released and to ensure the employer is complying with all laws.

How to Handle Mass Layoffs - RIF

- When conducting the layoff, ensure that employees are provided with information regarding COBRA and 401(k) options and the potential for re-hire.
- This should be conducted in one-on-one meetings and by written letter.
- Be sure to work with your benefits companies to handle the benefit requirements.

Anti-Discrimination Laws

- Americans with Disabilities Act (ADA) – Rehabilitation Act
 - Does Coronavirus qualify as a disability or is it perceived as a disability?
 - What issues arise when an employee asks for an accommodation related to the Coronavirus?
- Title VII of the Civil Rights Act
 - Are there issues in the workplace with national origin or race discrimination?
- Pregnancy Discrimination Act
- Age Discrimination in Employment Act (ADEA)

ADA Overview

- The ADA prohibits employee disability-related inquiries or medical examinations unless they are job related and consistent with business necessity.
- An ADA related inquiry is generally considered job related and consistent with business necessity when:
 - An employee's ability to perform essential job functions will be impaired by a medical condition or;
 - An employee will pose a direct threat due to a medical condition.
- The EEOC specifically states that the ADA and Rehabilitation Act continue to apply, but they do not interfere with or prevent employers from following guidelines made by the CDC or state/local public health authorities.

ADA Overview

- If an individual poses a direct threat despite reasonable accommodation, he or she is not protected by the nondiscrimination provisions of the ADA.
- Direct Threat - this is a significant risk of substantial harm to the health and safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.
- Whether pandemic influenza rises to the level of a direct threat depends on the severity of the illness.
 - The 2009 spring/summer H1N1 influenza was held to not pose a direct threat;
 - Based on guidance of the CDC and public health authorities, COVID-19 meets the direct threat standard.

ADA Overview – Reasonable Accommodation

- A “reasonable accommodation” is a change in the work environment that allows an individual with a disability to have an equal opportunity to apply for a job, perform a job’s essential functions, or enjoy equal benefits and privileges of employment.
- Generally, the ADA requires employers to provide reasonable accommodations for known limitations of applicants and employees with disabilities that do not pose an “undue hardship” on employers.
- An accommodation poses an “undue hardship” if it results in significant difficulty or expense for the employer, taking into account the nature and cost of the accommodation, the resources available to the employer, and the operation of the employer’s business.
 - If a particular accommodation would result in an undue hardship, an employer is not required to provide it but still must consider other accommodations that do not provide an undue hardship.

ADA Specific Examples

- Before an influenza pandemic, an employer may not inquire whether an employee has a compromised immune system or chronic health condition because it may disclose the existence of a disability. Before there is a pandemic, there is no evidence that pandemic symptoms will cause a direct threat.
- However, in the event of a pandemic, employers may make inquiries that are not disability related. An inquiry is not disability-related if it designed to identify potential non-medical reasons for absence during a pandemic (i.e., yes-or-no answers related to whether employee could be able to come to work in the event public transportation is shut down or childcare is shut down).

ADA Specific Examples

- May an ADA-covered employer send employees home if they display flu-like symptoms during a pandemic?
 - Answer: Yes
- During a pandemic, employers may ask if employees are experiencing flu-like symptoms, such as fever or chills, and a cough or sore throat. Employers must maintain all information about an employee illness as a confidential medical record in compliance with the ADA.
- During a pandemic, an employer may ask to take an employee's temperature. However, this is only in rare cases, such as COVID-19.

ADA Specific Examples

- During a pandemic, an employer is allowed to ask questions about potential exposure to the virus when an employee returns from travel.
- During a pandemic, an employer may encourage employees to work from home as an infection control strategy.
- During a pandemic, an employer may require its employees to adopt infection control practices, such as regular hand washing.
- During a pandemic, an employer may require employees to wear personal protective equipment.
 - However, if an employee needs an ADA related accommodation, (i.e., non-latex gloves or gowns designed for those in a wheelchair) the employer should provide these absent undue hardship.
- An employer cannot require all employees to take a mandatory vaccination.

Family and Medical Leave Act ("FMLA")

- Employees are eligible to take FMLA leave if they work for a covered employer and:
- have worked for their employer for at least 12 months;
- have at least 1,250 hours of service over the previous 12 months; and
- work at a location where at least 50 employees are employed by the employer within 75 miles.

Family and Medical Leave Act ("FMLA")

- An employee who is sick or whose family members are sick may be entitled to leave under the FMLA under certain circumstances. The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave in a designated 12-month leave year for specified family and medical reasons.
 - This may include the flu where complications arise that create a "serious health condition" as defined by the FMLA. Employees on FMLA leave are entitled to the continuation of group health insurance coverage under the same conditions as would have been provided if the employee had been continuously employed during the leave period.
- Workers who are ill with pandemic influenza or have a family member with influenza are urged to stay home to minimize the spread of the pandemic. Employers are encouraged to support these and other community mitigation strategies and should consider flexible leave policies for their employees.

FMLA and the Families First Coronavirus Response Act

- The Families First Coronavirus Response Act (FFCRA) requires certain employers to provide employees with expanded family and medical leave for specified reasons related to COVID-19.
- These provisions apply through December 31, 2020.
- Generally the FFCRA provides that employees are eligible for:
 - Two weeks (up to 80 hours) of expanded family and medical leave at the employee's regular rate of pay when the employee is unable to work because the employee is quarantined (pursuant to Federal, State, or local government order or advice of a health care provider) and/or experiencing COVID-19 symptoms;
 - Two weeks (up to 80 hours) of expanded family and medical leave at 2/3's the employee's regular rate of pay because the employee is unable to work because of a bona fide need to care for an individual subject to quarantine.
 - Up to an additional 10 weeks of expanded family and medical leave at 2/3's the employee's regular rate of pay when the employee, who has been employed at least 30 calendar days, is unable to work due to a bona fide need for leave to care for a child whose school or child care provide is closed or unavailable for reasons related to COVID-19.

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Fair Labor Standards Act ("FLSA")

- When reviewing whether employers are entitled to pay if they are sent home or operations are closed, employers should be aware of relevant federal, state, and local law; employment contracts; union and/or collective bargaining agreements.
- Generally, under the FLSA, non-exempt employees:
 - are not entitled to pay if they are not performing work
 - are entitled to pay if they are performing work

Fair Labor Standards Act ("FLSA")

- Exempt employees:
 - If they perform work during the workweek, they are entitled to full salary
- However, the employer may deduct from the employee's salary for:
 - 1) an absence of one or more full days due to sickness or disability, if the deduction is made in accordance with a bona fide plan, policy, or practice of providing compensation for salary not due to illness, and
 - 2) unpaid leave taken by the employee under the Family Medical Leave Act (FMLA).
- If the employee does not perform work during the workweek, the employee is not entitled to full salary

Title VII of the Civil Rights Act of 1964

- Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of “race, color, religion, sex and national origin.”
- National origin discrimination involves treating people (applicants or employees) unfavorably because they are from a particular country or part of the world, or because they appear to be of a certain ethnic background.
- With respect to the Coronavirus, the CDC has issued the following instruction: “Do not show prejudice to people of Asian descent, because of fear of this new virus. Do not assume that someone of Asian descent is more likely to have 2019-nCoV.”
- Employers should be sure to monitor that employees are not being treated differently based on their national origin.

Workers Compensation

- Employees may attempt to claim a COVID-19 infection was caused at work and file a workers' compensation claim.
- However, it may be difficult to prove that they contracted the disease at work and their occupation put them at a higher risk than working outside their occupation.