

May 13, 2020

Dear Member of Congress:

As the United States returns to the workplace in the coming weeks and months, employers and their employees will be on the front lines of getting the country and our economy back to an interim semblance of normalcy. For employers, the health and safety of their employees will come first. The logistical hurdles alone will be daunting, but on top of this will be an array of federal, state, and local employment laws that raise the prospect of enormous liability, potentially adding substantial costs to companies at a time when they are struggling to compete, if not survive. The irony is that, absent reasonable and flexible interpretation and enforcement of these laws, employers could be penalized for taking the very actions that are in the best financial and health interests of their employees.

The HR Policy Association's Future Workplace Policy Council staff has prepared the enclosed memorandum based on our discussions with member companies. The document synthesizes the various laws with which employers must comply during the return effort and raises key compliance and interpretive questions for our members. As you may know, the HR Policy Association represents the Chief Human Resource Officers of over 390 of the largest companies doing business in the United States. The Future Workplace Policy Council is composed of the officials in those companies that are responsible for compliance with the various employment and privacy laws, and they guide the Association in its advocacy efforts in those policy areas.

I am sharing this with you for two reasons. First, since Congress itself is required to comply with most of these laws, we hope it will be useful to you in ensuring your own compliance during this critical period. Second, we believe it is important that you be aware of the plethora of legal hurdles employers are facing and encourage you to consider ways to ensure a flexible governmental approach to compliance, including, where justified, safe harbors and shields against liability. Conversely, we believe that enacting legislation that adds to these regulatory hurdles would be disastrous for employers and employees alike.

Thank you for your consideration and, if you have any questions, please do not hesitate to contact us.

Best regards,

Tim



Timothy J. Bartl  
President and CEO  
HR Policy Association

## **Executive Summary**

HR Policy Association represents the Chief Human Resource Officers of over 390 of the largest companies doing business in the United States. The attached memorandum from the Association's Future Workplace Policy Council summarizes for our member companies the federal, state, and local labor and employment laws and regulations in play as they work to return their workers to the workplace in the midst of the continuing COVID-19 pandemic. Below are the key laws covered in the memorandum and the relevant issues each presents in the current environment.

### **Occupational Safety and Health Act**

- Extent of employer liability/responsibilities under the general duty clause, which requires employers to provide a safe workplace for employees free from hazards such as COVID-19
- The extent to which face coverings and other protective equipment must be provided to employees, and how such equipment will be financed
- The extent to which pre-entry to the workplace screening and testing will be required, how the equipment for such will be acquired, and how it will be financed

### **National Labor Relations Act**

- Protection accorded concerted action/strike activity related to workplace safety issues
- Feasibility of holding safe and equitable representation elections

### **Fair Labor Standards Act & State Compensation Laws**

- Whether time spent undergoing pre or post-workplace entry COVID-19 screening is compensable under the FLSA and associated state laws
- Whether waiting time while sanitation procedures occur in the workplace, and other infection control protocols are completed, is compensable for non-exempt employees under the FLSA and associated state laws
- Whether employee self-conducted, at-home COVID-19 screening will trigger the "continuous workday" rule under the FLSA, requiring employers to compensate employees for their time beginning with the at-home screenings through the end of their workdays
- Whether bonus payments and related pay incentives (e.g. hazard pay) is to be included in non-exempt employees' regular rate of pay for overtime pay purposes

### **Workers' Compensation**

- Increasing action on the state level through which employees who contract COVID-19 will be presumed to have medical and disability paid under workers' compensation, without possibility or practicality of federal intervention

### **Age Discrimination in Employment Act**

- Increased liability for employers who seek to prevent older employees from re-entering the workplace out of concerns for their own safety and the safety of other employees

**Americans with Disabilities Act**

- Potential liability in conducting COVID-19 screenings
- Cost and feasibility of increased reasonable accommodations related to infection control protocols
- Liability for excluding employees from the workplace whose disabilities put them at a higher risk for severe illness from COVID-19
- Keeping identity of an infected employee confidential while ensuring the safety of the workplace and other employees
- Extent of an employer's duty to engage in interactive discussion with employees who develop a disability as a result of COVID-19 infection or who otherwise are currently disabled, and may be particularly vulnerable to COVID-19, and also provide reasonable accommodations for their continuation to work or their return to work

**Title VII**

- Increased protection against harassment of people of Asian descent due to the COVID-19 pandemic
- Religious accommodations for employees related to personal protective equipment such as facial coverings and gloves

**Federal Family and Medical Leave Act**

- Reluctance of or difficulty for employees to return to the workplace, especially due to childcare and elder care responsibilities related to COVID-19 issues
- Uncertainty over whether COVID-19 entitles an employee to FMLA leave
- Potential for liability under anti-discrimination and anti-retaliation provisions of the Act

**Privacy Laws (such as the Health Insurance Portability and Accountability Act, Genetic Information Nondiscrimination Act, and Illinois Biometric Privacy Act)**

- Keeping employees' and employees' family and relatives' health information confidential while also maintaining workplace safety
- Whether employers must gain consent from their employees to conduct COVID-19 screenings that otherwise might be required or recommended by the CDC or OSHA
- Protecting against elevated cyber threats such as social engineering in light of increased remote and flexible working

**Employee Retirement Income Security Act**

- Expansion of COBRA health plan continuation coverage and associated notice requirements due to increased job loss and hours reduction associated with the COVID-19 pandemic
- Exposure to class action lawsuits due to improper wording of COBRA notices

**State and Local Scheduling Laws**

- Increasing employee absences, hours reductions, and workforce restructuring making it difficult to provide predictable schedules for employees required by several laws

May 13, 2020

TO: HR Policy Association Member Companies

FROM: Future Workplace Policy Council Staff

SUBJECT: **Federal Employment Law Compliance in Returning to Work**

As the United States prepares to reopen its economy in the wake of the COVID-19 pandemic, employers, their employees, and federal, state, and local regulators face the monumental task of reopening America for business while maintaining pandemic mitigation efforts. Our sincere hope is that regulatory guidance from the government remains flexible and practical, empowering employers to reopen their facilities for business and ensure the safety of their workplaces, without having to grapple with a complex array of legal challenges. Employers beginning plans to return to work already face a legally complex balance between prioritizing workplace safety and compliance with a plethora of federal, state, and local labor and employment laws. Uncertainty and expansive interpretations of often ambiguous laws would only exacerbate the difficulties of this endeavor. This memorandum provides a survey of such laws as they relate to workplace safety, privacy, and discrimination, and the challenges facing employers in limiting liability while preparing to return to the workplace.

## **I. Workplace Safety**

The foremost priority for employers when the nation returns to work in the wake of the COVID-19 pandemic will be ensuring the safety of their employees. While the exact timeline of when the majority of the country will be able to return to work remains unknown, any return scenario will undoubtedly occur while many of the risks of COVID-19 remain present. Thus, ensuring workplaces are sufficiently safe for employees' return is critical. This is a colossal task for employers, particularly where measures taken to ensure employee safety and mitigate the effects of the current pandemic will necessarily implicate a considerable number of federal and state laws designed to protect employees' rights in organization, safety, privacy, and discrimination-free environments. It is essential to strike the right balance between proper enforcement of employees' rights and permitting employers to provide the safest environment possible for their employees.

Consider the context of the current COVID-19 pandemic. Safety concerns could include, among others, the possible presence of infected employees in the workplace, an insufficient supply of necessary safety equipment such as masks and gloves, and employment-required travel to a geographic area with a high rate of infection (such as New York City). These safety concerns unique to the pandemic are in addition to the workplace safety concerns under "normal" circumstances.

The burden on employers to provide safe workplaces – already significant – will become even more challenging and complex as employees return to work during a global health crisis. Even if the shortages of needed safety equipment are addressed, the burden on employers to conduct adequate testing and provide adequate personal protective equipment, alone, will be massive. And even where employers go above and beyond in ensuring the safety of their workplaces, their employees may nonetheless be afraid to return to the workplace.

A review of the requirements for employers under each of the laws implicating health and safety follows.

#### A. *Occupational Safety and Health Act*

The Occupational Safety and Health Act (“OSH Act”) is the primary labor law concerned with workplace safety and imposes a variety of standards on employers to that effect. Under the general duty clause of the OSH Act, an employer is required to furnish to each worker “employment and a place of employment, which are free from recognized hazards that are causing or likely to cause death or serious physical harm.”<sup>1</sup> Further, employees have certain rights under the OSH Act to refuse to work under hazardous conditions, and employers are prohibited from retaliating against employees who raise safety concerns under the OSH Act’s whistleblower protections.<sup>2</sup>

Within these general OSH Act requirements and prohibitions, the COVID-19 pandemic raises unprecedented questions for employers to grapple with, including:

- What types of face coverings or masks will employers be required to provide to their employees, and when and where will such masks be mandatory?
- To what extent can employers refuse to furnish medical masks/respirators to their employees?
- Are employers solely responsible for bearing the costs of furnishing, cleaning, and replacing face coverings or masks to employees?
- Will there be a standardized approach to face coverings and similar infection control protocols across different industries and jurisdictions?
- To what extent will employers be required to test employees for COVID-19 upon entry to the workplace? Will such requirements be standard across different industries and jurisdictions?
- Who will bear the cost burden of testing materials and procedures?
- With multiple types of both testing materials and testing procedures available, how can employers ensure they are employing the best testing practices available?

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<sup>1</sup> 29 U.S.C. § 654(a).

<sup>2</sup> *Your Rights as a Whistleblower*, Occupational Safety and Health Administration, [https://www.osha.gov/OshDoc/data\\_General\\_Facts/whistleblower\\_rights.pdf](https://www.osha.gov/OshDoc/data_General_Facts/whistleblower_rights.pdf) (last visited May 7, 2020).

- How frequently will such testing need to be conducted for each employee?
- How expansive will the “general duty” clause be as applied to the COVID-19 pandemic? Will such an application be standard across different industries and jurisdictions?
- Will traditional employee gathering areas – break rooms, cafeterias, locker rooms – need to be eliminated or substantially changed? To what extent will employers be required to continue providing these types of shared spaces?
- How will employers be required to mitigate exposure risks for third parties coming into the workplace, such as independent contractors and vendors, as well as the risks these parties pose to employees?
- Will there be a safe harbor for employers who can demonstrate best efforts to comply with OSHA infection control standards?

Appropriate guidance from OSHA and other agencies within the Department of Labor answering these questions will be essential for employers to confidently reopen their doors for business as shelter-in-place and stay-at-home orders begin to be rescinded around the country. The need for a standardized approach to workplace safety protocols related to COVID-19 is similarly essential; a patchwork of localized workplace safety regulations will only serve to interfere with employers’ efforts to reopen, slowing the nation’s return to work and the economy’s recovery. We are hopeful that OSHA will consider a flexible safe harbor for employers, under which employers can limit their liability if they can demonstrate best efforts to comply with an OSHA-promulgated standard of safety protocols, such as maintenance of appropriate social distance, the wearing of masks, gloves, and other protective equipment, as necessary, for employees, and sanitization practices such as regular surface cleaning and hand washing. This sort of safe harbor will safeguard employees and the workplace while enabling employers to reopen their facilities without the specter of considerable liability exposure.

A recent decision in *Rural Community Workers Alliance v. Smithfield, Inc.* provides helpful precedent in this area. In this district court case in Missouri, a federal judge dismissed a lawsuit brought by meat packing plant workers against their employer alleging that Smithfield, Inc. was failing to abide by OSHA workplace safety guidance related to COVID-19.<sup>3</sup> The workers asserted state law claims of public nuisance and failure to provide a safe workplace.<sup>4</sup> The federal judge dismissed both claims and held that OSHA was better positioned to determine whether Smithfield was adequately complying with its guidance, and that “maintaining a uniform source for guidance and enforcement is critical” during the COVID-19 pandemic.<sup>5</sup> Hopefully, other courts will take a similar approach. At best, Congress will consider codifying the decision.

#### B. *The National Labor Relations Act*

The National Labor Relations Act (“NLRA”), enforced by the National Labor Relations Board (“NLRB” or “Board”), is the cornerstone of American labor law and guarantees the right of private sector employees to organize and engage in collective bargaining.

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<sup>3</sup> *Rural Community Workers Alliance v. Smithfield, Inc.*, 2020 WL 1969164 (W.D. Mo. May 5, 2020).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

## 1. Right to Engage in Concerted Activity

Under the Board's interpretation of the NLRA, a key element of the right to organize are broad rights to refuse to work in an unsafe environment if employees are engaged in what the NLRB deems "protected concerted activity."<sup>6</sup> Employees can individually, or as a group, raise workplace safety issues and are generally protected by the Act if they have an objective basis to support safety-related concerns affecting more than one employee.<sup>7</sup> This right applies even in the absence of any intent to form a union.<sup>8</sup> An employer retaliating against one or more employees exercising this right could be acting in violation of the NLRA.

The safety concerns expressed above that are unique to COVID-19 provide a recipe for a seemingly infinite number of unfair labor practice charges and widespread strike activity, potentially crippling American businesses and the economy before it has a chance to truly reopen. Standards unique to the current pandemic that ensure employers can maintain the safety of their workplaces while remaining in compliance with the NLRA are therefore necessary.

One potential advantage of the NLRA is that it is enforced exclusively by the NLRB, subject to review by the federal courts. The NLRB General Counsel exercises broad, unreviewable discretion in bring alleged violations before the Board. With the many uncertainties regarding the workplace safety and health aspects of COVID-19, we hope the General Counsel will exercise restraint in issuing unfair labor practice complaints in this area with a view toward encouraging conscientious employers and their employees to work together to address these unique situations.

## 2. Representation Elections

Representation elections represent another significant workplace safety concern for both employers and employees alike under the NLRA. The importance of facilitating employee choice of representation through NLRB-held elections is an important statutory responsibility of the Board under the NLRA. Significantly, union representation status established through an election continues, in most instances, as long as that workplace exists. This could be decades after a Board-held election has been held, potentially impacting the terms and conditions of a worker's employment for years to come. The choice of union representation is therefore a critical exercise of an employee's rights under the NLRA, requiring the consideration of a wide variety of perspectives and adequate discussion among employees, potential union representatives, and employer representatives. The election process also requires that the Board provide parties an "appropriate" hearing before the scheduling of such an election, involving the rights of both parties to present witnesses, the right of parties to submit evidence, and the right of parties for cross examination and document review.<sup>9</sup> The logistics of representation election proceedings can be complex even in "normal" times.

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<sup>6</sup> Atlantic Steel, 245 NLRB 814, 816 (1979).

<sup>7</sup> Note that this right only applies to "collective" concerns. Thus, if an employee is only acting to protect her/himself, it does not apply.

<sup>8</sup> NLRB v. Washington Aluminum Co., 370 U.S. 9, 14 (1962).

<sup>9</sup> 29 U.S.C. § 159 (c)(B).

During a public health crisis on the scale of the COVID-19 pandemic, such proceedings become nearly impossible to conduct, from a practical standpoint, while adequately ensuring the safety of all parties involved. As recently as late April 2020, nearly 95 percent of the American population was under some form of local, state, or federal mandate to stay at home or shelter-in-place.<sup>10</sup> Logistical and practical issues make it difficult to gather people for an election with such social distancing measures in place. Asking employers and employees to hold representation elections, therefore, is similarly problematic and raises a multitude of safety issues, nearly all of which will be incumbent upon the employer to resolve themselves. Representation elections thus could place another enormous workplace safety burden on employers.

Virtual hearings, mail ballot elections, and electronic elections have been suggested as possible alternatives to the traditional Board-held manual, onsite representation election process. In practice, however, these measures hold the potential to create far more problems than they solve. As discussed above, the hearing process under the NLRA, which would be necessary before an electronic or mail ballot election could be held, involves many logistical steps to ensure the rights of both parties in presenting and cross-examining witnesses as well as submitting and reviewing evidence. Attempting to meet these demands virtually will be incredibly difficult in practice, for employers, their employees, and petitioning unions. Witness questioning alone – assuming witnesses are even available – presents potentially insurmountable practical issues, including cross-examination and document review. The potential for hearing objections and overturned elections as a result is considerable.

Employers should approach any proposal to conduct a mail ballot with considerable caution and may decide to oppose the NLRB's use of such a procedure in their situation. As an initial matter, countless employees are subject to either quarantine or shelter-in-place mandates at locations other than their normal residence, and thus may not even receive a mail ballot, while others may be suffering from COVID-19 symptoms, making thoughtful voting even by mail ballot very difficult.

Within the representation election context specifically, “longstanding Board policy is that representation elections should, as a general rule, be conducted manually.”<sup>11</sup> This is largely because mail ballot elections “are more vulnerable to the destruction of laboratory conditions” required for representation proceedings<sup>12</sup> Many of the key safeguards involved with manual, on-site elections can be absent from mail ballot proceedings, including: (1) communicating to the voters the importance of the choice they are about to make; (2) secrecy of the ballot; (3) integrity of the voting process; (4) an absence of coercion on the voter; (5) maximum participation by the electorate; and (6) full opportunity for the voter to hear all points of view.<sup>13</sup> Finally, voter participation has historically

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<sup>10</sup> Sarah Mervosh et al., *See Which Residents and Cities Have Told Residents to Stay at Home*, N.Y. Times (April 7, 2020), [nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html](https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html).

<sup>11</sup> San Diego Gas & Electric, 325 NLRB 1143, 1144 (1998).

<sup>12</sup> Thompson Roofing, 291 NLRB No. 108 (1988).

<sup>13</sup> San Diego Gas, *supra* note 9, at 1150 (Members Hurtgen and Brame, dissenting).

been significantly lower in mail ballot elections than those conducted manually on-site.<sup>14</sup> Thus, mail balloting is clearly not a preferable alternative to manual elections.

## II. Compensation

Returning to the workplace may require comprehensive COVID-19 screening protocols for employees upon entry. These may take the form of simple Q&As and self-checks, or may be more invasive and time-consuming measures such as temperature checks, and testing for COVID-19. Employees will also likely be required to wear protective equipment ranging from facial coverings and gloves to more sophisticated PPE such as respirators and full-body protective suits, depending on the industry. Finally, employers will be required to spend a significant amount of time during each workday sanitizing the workplace and ensuring its safety for its employees – employees similarly will be required to engage in constant workplace sanitization procedures such as hand washing. All of these potentially time-consuming processes present a variety of compensable time issues under both state and federal law.

Under the Fair Labor Standards Act (“FLSA”), as amended by the Portal-to-Portal Act, employers are generally not required to pay their employees for time spent commuting to and from work, and for activities before and after the start of the “principal activity or activities” which such employee is employed to perform.<sup>15</sup> Under the “continuous workday rule,” compensable time comprises the period between the commencement and completion on the same workday of an employee’s principal activity or activities, whether or not the employee engages in work throughout all of that period.<sup>16</sup> The Supreme Court has interpreted these compensable time provisions of the FLSA so as to exclude, in most cases, time spent donning and doffing personal protective equipment as compensable.<sup>17</sup> Additionally, the Supreme Court has ruled that security screenings before or after work are similarly generally not compensable under the FLSA.<sup>18</sup>

Finally, under the FLSA’s *de minimis* rule, infrequent and insignificant periods of time beyond scheduled working hours, which cannot as a practical matter be precisely recorded for payroll purposes, may be disregarded.<sup>19</sup> However, this rule only applies where uncertain and indefinite periods of time are involved, a few seconds or minutes in duration, and where the failure to count such time is justified by industrial realities.<sup>20</sup> An employer may not arbitrarily fail to count any part, however small, of working time that can be practically ascertained. It is unclear at this point if an employer requires their employees to regularly complete a medical screen and take their temperature before coming to work if that would be covered by the *de minimis* rule or if it would be compensable time.

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<sup>14</sup> *Kwik Care v. NLRB*, 82 F.3d 1122, 1126 (D.C. Cir. 1996)(“postal elections generally inspire lower participation than on-site elections”); *see also* *Shepard Convention Servs. V. NLRB*, 85 F.3d 671 (1996)(overturning Board-held mail ballot election due to low voter turnout).

<sup>15</sup> 29 U.S.C. § 254 (a).

<sup>16</sup> 29 C.F.R. § 790.6(b) (2013).

<sup>17</sup> *Sandifer v. U.S. Steel Corp.*, 571 U.S. 2020.

<sup>18</sup> *Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27 (2014).

<sup>19</sup> *Recording Hours Worked*, DEPARTMENT OF LABOR, <https://webapps.dol.gov/elaws/whd/flsa/hoursworked/screence29.asp> (last visited April 30, 2020).

<sup>20</sup> *Id.*

A growing number of state laws also differ significantly from the FLSA and the Supreme Court's interpretations of compensable time. In California, for example, the state's supreme court has held that security screenings are compensable time, and established a new set of factors to consider when determining what time is compensable, potentially significantly expanding its definition.<sup>21</sup> California has also eliminated the *de minimis* rule for wage and hour claims brought pursuant to California state law.<sup>22</sup> Courts have also held security screenings to be compensable time under Nevada and Arizona law.<sup>23</sup>

Given the current lack of guidance on medical screening from the Wage and Hour Division of the Department of Labor, employers may not be able to assume that COVID-19 screening (whether done onsite or in an employee's home) and the donning and doffing of COVID-19-related personal protective equipment are not considered compensable time under the FLSA. Even if they can, employers will still have to grapple with compensable time issues related to these activities on the state level. Temperature checks alone can be potentially time-consuming procedures, causing "traffic jams" of employees attempting to enter the workplace – COVID-19 testing and other infection control protocols will likely prove even more onerous. The costs of compensating employees for this time could be substantial for large employers, and even untenable for smaller businesses, particularly if employers are also expected to pay the costs of these screenings and infection control protocols.

We are hoping that the Wage and Hour Division of the Department of Labor will promulgate guidance establishing that, depending on the specific circumstances, COVID-19 screening and infection control protocols are largely excepted from compensable time under the FLSA, wherever possible. Enforcement to the contrary will discourage employers from implementing medical screens during the pandemic. For these same reasons, it would be highly preferable for a uniform federal approach to the issue of compensable time and COVID-19 screening, superseding the patchwork of state and local regulations in this area.

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<sup>21</sup> *Frlekin v. Apple, Inc.*, 8 Cal. 5<sup>th</sup> 1038 (Cal. 2020);

<sup>22</sup> *Troester v. Starbucks Corp.* 5 Cal. 5<sup>th</sup> 829 (Cal. 2018).

<sup>23</sup> *Busk v. Integrity Staffing Sols., Inc.*, 905 F.3d 387 (2020).

### III. Workers' Compensation

A growing number of states are issuing directives to make contracting COVID-19 compensable under workers' compensation. Generally, the burden has been on injured employees to establish that the injury they sustained occurred in the workplace. However, recent actions by certain states flip this burden of proof, and create a new presumption where employees who contract the virus would be presumed to have medical and disability paid under workers' compensation, unless the employer can prove they contracted it elsewhere. While this flipped presumption is generally reserved for health care workers and first responders who contract the virus, other states are expanding their list of "covered" employees. States which have recently taken action on this issue include New York, California, Florida, Kentucky, Illinois, and Minnesota.

Creating these presumptions in workers' compensation claims could result in considerable liability exposure for employers of all sizes. The plaintiffs' bar will become a frenzy of workers' compensation claims that employers will be almost powerless to stop – in practice, rebutting a presumption that the employee contracted COVID-19 in the workplace will be almost impossible. In many instances, employers will likely be hesitant to reopen for business given the drastically increased liability risk they face. Given the unprecedented levels on which COVID-19 has spread amongst populations both within the United States and globally, it is unreasonable to expect employers to eliminate the threat of contraction at the workplace at a one hundred percent level. A proliferation of these presumptions in workers' compensation claims on the state level is essentially tasking employers with this impossible expectation, and will result in endless litigation and an unsustainable drain on employers' financial resources. Like OSHA, a more reasonable approach would involve creating a safe harbor under which employers who demonstrate best efforts to adhere to accepted infection control protocols should be able to limit their workers' compensation liability in situations where employees contract the virus in the workplace.

### IV. Discrimination

Returning to the workplace during the COVID-19 pandemic will also implicate a variety of federal anti-discrimination laws. Employers will face challenges in remaining in compliance with these laws as they try to keep more vulnerable sections of their employee populations safe from COVID-19 related risks and make accommodations for others as required under the law. Below is an examination of the various federal anti-discrimination laws and the issues they present for employers as they reopen for business.

#### A. *The Age Discrimination in Employment Act*

The Age Discrimination in Employment Act ("ADEA") makes it unlawful for an employer to discriminate against individuals with respect to their terms, conditions, or privileges of employment on the basis of their age.<sup>24</sup> The Centers for Disease Control and Prevention ("CDC"), among many other public health organizations across the world, have established that

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<sup>24</sup> 29 U.S.C. § 623 (a).

older adults are at a significantly higher risk for severe illness due to COVID-19.<sup>25</sup> Nevertheless, the Equal Employment Opportunity Commission (“EEOC”) has warned employers that they are prohibited from excluding from the workplace older employees on the basis of such higher risk of severe illness from contracting COVID-19.<sup>26</sup> The long-standing law in this area was settled by the U.S. Supreme Court in *Int’l Union v. Johnson Controls*, 499 U.S. 187 (1991). That case held that an employer cannot discriminate against a group of employees or prospective employees in a protected class in the interest of the employees’ own health. In that case, an employer implemented a policy that excluded women who were pregnant or capable of bearing children from workplaces involving lead exposure.<sup>27</sup> The Supreme Court ruled that this policy explicitly and impermissibly discriminated against women on the basis of their sex, and was not neutral because it only addressed female employees.<sup>28</sup>

The convergence of these three factors – the ADEA’s ban on age discrimination, the higher risk of severe illness due to COVID-19 among the older population, and the EEOC’s guidance to employers on this issue – present employers with a unique dilemma: how to ensure the safety of their workplaces, particularly when it comes to their older employees, without running afoul of federal anti-discrimination law. The problem is particularly prevalent in situations where remote or teleworking is impossible, as the choice then necessarily implicates an employee’s continued employment, and not just whether they can be forced to work from home. Having to walk this tightrope between ensuring workplace safety and compliance with federal labor law is problematic and costly for employers of all sizes due to protracted litigation expenses. Employers will do all they can to comply with these requirements but the need for commonsense solutions to these issues is of vital importance. Medical policy advisors, such as the CDC, should continually reassess employee vulnerability issues, including the age of individuals, to determine whether employers should take preventative measures.

#### B. *Americans with Disabilities Act*

The Americans with Disabilities Act (“ADA”) also presents a compliance challenge for employers during the COVID-19 pandemic. At its most basic level, the ADA prohibits an employer from discriminating against a job applicant or employee on the basis of a disability or a perceived disability.<sup>29</sup> The law also requires the employer to provide reasonable accommodations to a disabled employee, unless such an accommodation would result in an undue hardship on the employer.<sup>30</sup> The employer is further obligated to continuously engage with the disabled employee to find the best means of accommodating the disability.<sup>31</sup>

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<sup>25</sup> *COVID-19 Guidance for Older Adults*, CDC, <https://www.cdc.gov/aging/covid19-guidance.html> (last updated April 10, 2020).

<sup>26</sup> *Transcript of March, 27, 2020 Outreach Webinar*, EEOC (Mar. 27, 2020), <https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar>

<sup>27</sup> *Int’l Union v. Johnson Controls*, 499 U.S. 187, 192.

<sup>28</sup> *Id.*

<sup>29</sup> 42 U.S.C. §12112.

<sup>30</sup> 42 U.S.C. § 12112(a).

<sup>31</sup> *Id.*

The ADA prohibits discrimination against “a qualified individual with a disability.”<sup>32</sup> An individual is “qualified” under the ADA if she or he can “perform the essential functions of the employment position” that the individual holds or is seeking, with or without reasonable accommodation.<sup>33</sup> A “disability” is defined under the ADA as a “physical or mental impairment that substantially limits one or major life activities” of an individual, a “record of such an impairment,” or “being regarded as having such an impairment.”<sup>34</sup> The last of these three definitions is particularly important – an individual will be considered “disabled” under the ADA if he or she can establish that they have been subjected to a discriminatory action because of an actual or “perceived” physical or mental impairment, whether or not the impairment otherwise actually meets the definition of “disabled” under the ADA.<sup>35</sup> All of these definitions are required to be met under the statute to be construed in favor of broad coverage.<sup>36</sup> The ADA prohibits discrimination against individuals who either have a disability or are perceived by the employer as having a disability, provided they can otherwise perform the essential job functions of the employment position.

The ADA also prohibits an employer from making disability-related inquiries and requiring medical examinations of employees except under limited circumstances.<sup>37</sup> Specifically, the ADA prohibits employee disability-related inquiries or medical examinations unless they are job related and consistent with business necessity. Generally, a disability-related inquiry or medical examination of an employee is job-related and consistent with business necessity when an employer has a reasonable belief, based on objective evidence, that (1) an employee’s ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition.<sup>38</sup> An employee poses a “direct threat” where they pose a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated by reasonable accommodation.<sup>39</sup> Such employees are not protected by the ADA.

The EEOC has issued temporary guidance, allowing employers to, among other actions, take employees’ temperatures, conduct inquiries into whether employees have come into contact with anyone who has been diagnosed with COVID-19, conduct pre-workplace entry COVID-19 testing, and require employees to stay home if they have COVID-19 symptoms.<sup>40</sup> This sort of common sense enforcement guidance is critical during the current pandemic, and empowers employers to take appropriate actions to ensure the safety of their workplaces while remaining in compliance with the ADA. Employers will nevertheless still need to take extra care that their efforts to keep their employees safe remains in compliance with the ADA’s limitations on medical examinations and disability-related inquiries.

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<sup>32</sup> *Id.*

<sup>33</sup> 42 U.S.C. §12111(8).

<sup>34</sup> 42 U.S.C. § 12102 (1).

<sup>35</sup> 42 U.S.C. § 12102 (3).

<sup>36</sup> 42 U.S.C. § 12102 (4)(A).

<sup>37</sup> 42 U.S.C. § 12112(d).

<sup>38</sup> 42 U.S.C. § 12112(d).

<sup>39</sup> *Id.*

<sup>40</sup> *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Mar. 21, 2020), [https://www.eeoc.gov/facts/pandemic\\_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html)

To date, the EEOC has noted that it is “unclear at this time” whether COVID-19 is or could be a disability under the ADA.<sup>41</sup> Lack of clarity in this area and others still present employers with a host of issues in trying to comply with the ADA during the current COVID-19 pandemic. Providing reasonable accommodations in accordance with ADA statutory obligations will become significantly more difficult during the current pandemic and under any return to work scenario. Employers may have to require masks, hand washing, social distancing and other infection control protocols in their workplaces. These necessities can pose difficulties for those with disabilities, and it is likely that certain employees with disabilities under the ADA will require reasonable accommodations in these areas, such as modified face masks and non-latex gloves. Some employees may have preexisting disabilities that put them at higher risk from COVID-19, requiring reasonable accommodation. Where remote work or teleworking is available, employers may have to provide this arrangement as a reasonable accommodation.

The burden on employers becomes far more complex in situations where a job may only be performed at the workplace. The EEOC has maintained that “even with the constraints imposed by a pandemic,”<sup>42</sup> employers are still responsible for providing reasonable accommodation to those employees whose preexisting disability puts them at a greater risk from COVID-19, so as to enable them to continue coming into the workplace. The EEOC has recommended “low cost solutions” and changes to the work environment such as “plexiglass, tables, or other barriers to ensure minimum distances between customers and coworkers wherever feasible.”<sup>43</sup> Assuming such measures are both fiscally and logistically feasible for employers to implement, such a situation obviously creates potential safety and liability issues for the employer. If employees who become seriously ill as a result of COVID-19 and/or its symptoms are determined to be disabled under the ADA,<sup>44</sup> employers will need to provide reasonable accommodations for these infected employees as well.

Particularly for cases where employees cannot work from home, we hope the EEOC will continue to issue guidance for employers outlining sensible and feasible steps they should take to ensure such employees are reasonably accommodated. Such guidance should be flexible and practical, taking into consideration the heightened difficulties in providing such accommodations during the pandemic, and the increase in such accommodations associated with COVID-19. Employers are also hopeful that the EEOC will continue its reasonable enforcement of the ADA’s limitations on medical examinations and disability-related inquiries for the duration of the pandemic, as such examinations and inquiries are essential for employers in ensuring the safety of their workplaces and containing the spread of COVID-19.

### C. Title VII

Title VII prohibits an employer from discriminating on the basis of race, color, religion, sex, or national origin.<sup>45</sup> Title VII further compels an employer to maintain a workplace free from harassment based on the above characteristics. During the current COVID-19 pandemic, the EEOC

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<sup>41</sup> *Id.*

<sup>42</sup> *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and other EEO Laws*, EEOC (April 23, 2020), [https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm).

<sup>43</sup> *Id.*

<sup>44</sup> It should be noted that depending on an employer’s actions, COVID-19 could be a “perceived-as” disability under the ADA regardless of whether the EEOC determines COVID-19 to be a per se disability or not.

<sup>45</sup> 42 U.S.C. § 2000e – 2.

has noted reports of mistreatment and harassment of people of Asian descent – such actions “can result in unlawful discrimination on the basis of race.”<sup>46</sup> Employers are tasked with ensuring that such mistreatment and harassment is absent from their workplace, which would clearly be a goal anyway for any responsible employer, whether required by law or not. Further, the EEOC is closely tracking workplace discrimination charges related to COVID-19.<sup>47</sup> The current health crisis, and the stressful reactions it may induce increases the likelihood for more emotionally charged workplaces and thus more instances of harassment. Employers should take measures to ensure that their work environments are both safe for employees and free from harassment. The expected prevalence of masks, gloves and other personal protective equipment in the workplace also raises other Title VII issues for employers, who may need to provide religious accommodations under Title VII such as modified equipment for employees due to their religious attire.

#### D. *Federal Family and Medical Leave Act*

Under the Federal Family and Medical Leave Act (“FMLA”), employers are prohibited from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise leave rights.<sup>48</sup> Employers are similarly prohibited from discriminating or retaliating against persons, whether or not they are employees, for opposing any unlawful practice under FMLA.<sup>49</sup>

Employees have broad leave rights to care for themselves and family members if affected by a “serious health condition.”<sup>50</sup> While the Wage and Hour Division of the Department of Labor has established that employees cannot take leave under FMLA to avoid contracting the virus, to date no guidance has been issued on whether COVID-19 automatically qualifies as a “serious health condition” that entitles an individual to FMLA leave.<sup>51</sup> Instead, the Wage and Hour Division has advised that depending on symptoms and complications related to COVID-19, contraction of the virus may entitle an employee to FMLA leave.<sup>52</sup> This uncertainty can put employers in the difficult situation of having to make these determinations of whether leave taken during the pandemic is for FMLA-qualifying “serious health conditions.” Such decisions will have significant implications for an employer’s liability under FMLA’s anti-discrimination and anti-retaliation provisions.

While many employers have been necessarily flexible when it comes to employee leave during the COVID-19 pandemic, such flexibility will become less practical as businesses prepare to return to the workplace in the coming weeks and months. Employees may be reluctant to reenter the workplace and may choose to remain on FMLA leave or begin taking FMLA leave. Short-staffed employers will be put in a legally complex position where any action taken with respect to such employees could expose them to liability under FMLA.

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<sup>46</sup> *Message from EEOC Chair Jane Dhillon on National Origin and Race Discrimination During the COVID-19 Outbreak*, EEOC (last visited April 27, 2020), [https://www.eeoc.gov/eeoc/newsroom/wysk/national\\_origin\\_race\\_discrimination\\_covid-19.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/national_origin_race_discrimination_covid-19.cfm).

<sup>47</sup> Erin Mulvaney, *Workers’ Coronavirus-Related Bias Claims Now Tracked by EEOC*, BLOOMBERG (April 6, 2020), <https://news.bloomberglaw.com/daily-labor-report/workers-coronavirus-related-bias-claims-now-tracked-by-eeoc>.

<sup>48</sup> 29 U.S.C. § 2615.

<sup>49</sup> *Id.*

<sup>50</sup> *COVID-19 and the Family and Medical Leave Act Questions and Answers*, Wage and Hour Division, Department of Labor, <https://www.dol.gov/agencies/whd/fmla/pandemic> (last visited May 1, 2020).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

## V. Privacy

As noted in other sections of this memorandum, employment law considerations often require that employers take measures to protect the operational safety and health of employees. To help prevent the spread of COVID-19 to and in the workplace, it stands to reason that during this major public health emergency some of the measures that employers will need to implement will involve the handling of additional volumes of health and other personal information about employees. For example, employers may need to collect information through temperature screenings and questionnaires for COVID-19 purposes to help protect other employees in the workplace and for public health. And given the scale of the challenge of securing workplaces in the current crisis, employers may need to leverage digital technologies such as contact tracing and proximity sensor applications that may generate additional information, some of which may be linked to identifiable individuals.<sup>53</sup>

Employers will thus need to carefully consider state and federal employment law requirements alongside laws relating to personal information collection and processing for COVID-19 employment-related purposes. Key regulators' pronouncements make this clear while also emphasizing employers' ongoing obligations to protect privacy and confidentiality. For example, the EEOC has explicitly stated that employers may disclose to public health authorities such as the CDC the names of employees it learns have COVID-19.<sup>54</sup> The CDC recommends that employers inform fellow employees of their possible exposure to COVID-19 in the event of an employee's contraction of the virus, while simultaneously warning employers to maintain confidentiality as required by the ADA, including by withholding the affected employee's identity.<sup>55</sup>

Such recent examples of regulatory guidance amplify and reinforce the existing multiple federal and state requirements to safeguard personal information with which employers must comply. Anti-discrimination and privacy laws such as the federal ADA, GINA, HIPAA, and the FTC Act (as well as a number of analogous and additional state laws such as "little FTC Acts,"<sup>56</sup>

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<sup>53</sup> While public health emergency exceptions exist to the major anti-discrimination and privacy laws, the prospect of relatively new digital technologies being used to assist in securing workplaces has newly prompted public discussion of the implications for employees and employers. See, for example, D. R. Stoller & P. Smith, *Contact Tracing Poses 'Pandora's Box' for Reopening Businesses*, BLOOMBERG LAW (May 1, 2020), [https://news.bloomberglaw.com/tech-and-telecom-law/contact-tracing-poses-pandoras-box-for-reopening-businesses?utm\\_source=twitter&utm\\_medium=lawdesk&utm\\_campaign=00000171-clcc-dcef-a9f3-cdecbbf30001&campaign=56334AF4-8BAB-11EA-85D3-541050017A06](https://news.bloomberglaw.com/tech-and-telecom-law/contact-tracing-poses-pandoras-box-for-reopening-businesses?utm_source=twitter&utm_medium=lawdesk&utm_campaign=00000171-clcc-dcef-a9f3-cdecbbf30001&campaign=56334AF4-8BAB-11EA-85D3-541050017A06). It seems reasonable to anticipate that ethical and legal questions about the extent to which information about individuals' COVID-19 status and risk can be used in the workplace context will remain with us for the foreseeable future.

<sup>54</sup> *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and other EEO Laws*, EEOC (guidance updated as of April 23, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last visited May 8, 2020).

<sup>55</sup> *Interim Guidance for Businesses and Employers to Plan and Respond to COVID-19*, CDC (March 21, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html> (last visited May 9, 2020).

<sup>56</sup> Across the United States, consumer protection laws that prohibit unfair and deceptive acts or practices (so-called "UDAP" laws) are regularly used by state attorneys general to enforce perceived privacy violations with monetary penalties available in the range of several thousand dollars per violation per individual affected. For an explanation of the legal underpinnings for the use of these laws to be used in this manner see J. Sovern, *Protecting Privacy with Deceptive Trade Practices Legislation* (Jan. 2009), available at

the California Consumer Privacy Act,<sup>57</sup> and the Illinois Biometric Information Privacy Act<sup>58</sup>) impose numerous obligations on employers in this respect, and also create the potential for significant legal liability for their violation. Such compliance obligations continue during the current pandemic and thus employers need to be mindful that they are implementing appropriate information protection procedures at the same time as they take steps to collect, access, and use information in the fight against COVID-19. Below is a brief overview of key such obligations:

*Americans with Disabilities Act* (“ADA”). The ADA requires employers to keep confidential medical information about employees obtained through medical examinations or inquires, even if that information is unrelated to an ADA-covered disability.<sup>59</sup> Such information must be collected and maintained on separate forms and in separate medical files, apart from regular personnel files.<sup>60</sup> Information that an employee has symptoms of, or a diagnosis of, COVID-19, is medical information required by the ADA to be kept confidential with exception allowed for disclosure of such information to public health authorities.<sup>61</sup>

*Health Insurance Portability and Accountability Act* (“HIPAA”). While employers are generally not directly subject to HIPAA, if COVID-19-related data is received from HIPAA-covered providers or health plans—which many HR Policy members sponsor on behalf of their employees—it should be obtained and handled in accordance with HIPAA's requirements. These include, but are not limited to, data security safeguards, record retention requirements, notice requirements, data minimization standards, and limitations on the disclosure of covered data. Note that HIPAA does allow certain disclosures by covered entities to employers for purposes of workplace medical surveillance (such as employee medical screening), and disclosure of test results by health providers or other covered entities for on-site workplace safety purposes may fit within this exception.<sup>62</sup>

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<https://poseidon01.ssrn.com/delivery.php?ID=312025116122112123102124014079125120117035019009034090074027123081067083117097069101096034023121015125114116022096078074075091059082053065068065077002002125087088071086042026119006066004002110020089025007025093080099117071119107006065015096096103006&EXT=pdf>

<sup>57</sup> Under the California Consumer Privacy Act (“CCPA”), covered entities, including employers, that collect a California resident’s personal information must inform the individual at or before the point of collection of the categories of personal information collected and the purposes for which the personal information is used. CCPA also provides a private right of action for consumers, including employees, whose personal information is compromised due to a covered entity’s failure to establish and maintain reasonable security measures. Enforcement of the CCPA begins July 1, 2020, with the California Attorney General to date declining to postpone enforcement of the law until the pandemic passes.

<sup>58</sup> A cottage industry of plaintiffs’ lawyers has emerged to pursue actions against companies for violations of BIPA, which to date is the only state biometric privacy law that provides for such actions. BIPA provides for penalties of \$1,000 to \$5,000 per violation per consumer and allows private rights of action. 740 ILL. COMP. STAT. 14 § 20 (2008).

<sup>59</sup> 42 U.S.C. § 12112 (d)(3)(B) and § 12112(d)(4)(C) as well as EEOC, *supra* n. 56.

<sup>60</sup> *Id.*

<sup>61</sup> EEOC, *supra* n. 56.

<sup>62</sup> Disclosures for Public Health Reporting, <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/disclosures-public-health-activities/index.html> (last visited May 8, 2020)

*Genetic Information Nondiscrimination Act* (“GINA”). GINA prohibits employment discrimination on the basis of genetic information.<sup>63</sup> Generally, it is illegal under GINA for an employer to require applicants or employees to answer questions about their family medical history, which could include contraction of, or exposure to, COVID-19. There are limited exceptions, however. For example, if an employer provides health care benefits or a wellness program, they may ask employees about the health conditions of their family members, including COVID-19, provided they obtain prior, voluntary, written authorization. Biometric screening for COVID-19, such as via infrared testing, may constitute genetic testing or monitoring requiring an employee’s prior permission under GINA.

In the context of the current public health emergency, employers should take steps to ensure that the basis on which information that reasonably may be characterized as genetic information under GINA is properly documented and that appropriate compliance steps are put in place (e.g., restrictions on use of genetic information beyond the purpose for which such information was collected would be expected).

*Fair Information Practice Principles* (“FIPPs”). In conducting return-to-work activities employers should also take into account compliance with FIPPs, a set of principles that reflect the requirements of federal and state consumer protection laws that prohibit unfair and deceptive acts and practices (also known as UDAP laws).<sup>64</sup> For the past 20 years UDAP laws have been used by consumer protection agencies such as the U.S. Federal Trade Commission acting under its Section 5 authority to enforce against breaches of privacy-related statements and practices. Notably, the FTC has not traditionally brought many privacy enforcement actions under Section 5 related to employee personal information, but this federal agency’s official position is that employees are also consumers under its consumer protection mandate.<sup>65</sup> It is therefore prudent to expect state consumer protection agencies to take the same view with respect to their authority.

Acting consistently with the FIPPs will help employers mitigate privacy and compliance risk overall. In the context of fighting COVID-19, for example, employers should conduct their activities transparently and collect only the personal information they need for screening or other legitimate purposes such as to maintain social distancing in the workplace. Employers should also limit access to employee personal information to those with a need to know, not retain the information longer than needed for legitimate business purposes, only share it with service providers and governmental authorities as reasonably necessary or with appropriate disclosures, and store it securely. Employers should offer choices to employees where appropriate, although in some instances given the imperative to protect all employees providing such individual choices may not be feasible.

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<sup>63</sup> EEOC GINA Fact Sheet, <https://www.eeoc.gov/laws/guidance/fact-sheet-genetic-information-nondiscrimination-act> (last visited May 8, 2020).

<sup>64</sup> *Supra* n. 58.

<sup>65</sup> See, for example, the FTC’s definition of “consumer” to include employees and prospective employees in the Consent Order filed *In the Matter of CVS/Caremark Corp.*, <https://www.ftc.gov/sites/default/files/documents/cases/2009/02/090218cv3agree.pdf> (last visited May 8, 2020).

In sum, a large number of federal and state laws impose privacy-related obligations on employers. And while similar principles inform these existing laws, each law has its unique requirements, and thus even before the global COVID-19 emergency considerable attention was required on the part of multi-state employers to maintain compliance with all such applicable laws.

The current COVID-19 emergency has only intensified the privacy compliance challenge for employers. The speed with which new health and safety protocols must be implemented calls for equally rapid development and implementation of compliant and protective information handling procedures, particularly for employee health information. With many employees, including potentially employees who have access to employee personal information, still working remotely, regulators will also expect that employers will take steps to confirm that appropriate IT security controls are in place and that remote working security reminders and education have been provided.<sup>66</sup>

Employers will also need to be mindful of the inherent tension between, on the one hand, regulatory frameworks primarily focused on workplace health and safety (such as the OSH Act) and frameworks focused on anti-discrimination and data privacy. Particularly in light of the speed with which the current health emergency has emerged, employers are likely to encounter scenarios where there will be uncertainty (and, worse yet, potentially different expectations across states) regarding how to achieve both compliance with safety mandates and compliance with employee information privacy requirements.

EEOC guidance on this topic, while helpful, has been insufficient to provide complete clarity. Per EEOC guidance issued in late March 2020, an employer should “make every effort to limit the number of people” who are informed of the identity of the employee with COVID-19 or COVID-19 symptoms.<sup>67</sup> Further, the EEOC instructed that attempts to undertake contact tracing within the workplace as a result of learning about an infected employee must be done without disclosing the identity of the employee, potentially creating confusing situations for other employees who may be told that they must quarantine without knowing exactly why.<sup>68</sup> In situations where an employee has COVID-19 or COVID-19 symptoms and is required to telework or take sick leave, employers are also prohibited, per EEOC guidance, from notifying other employees the reason why the affected employee is absent from the workplace.<sup>69</sup> While this may be the appropriate action to take from a public health and confidentiality perspective, it is reasonable to anticipate some resulting confusion and speculation within the workplace that incomplete information may pose workplace safety risks if other employees are left without sufficient information about interactions that may have introduced risk to them. We are hopeful that key employment and public health agencies such as the EEOC, CDC, and OSHA will work together to provide coordinated enforcement guidance that provides additional clarity and

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<sup>66</sup> Key government agencies have warned about the increased threat posed by attackers taking advantage of the COVID-19 crisis, including by targeting teleworkers. See, for example, Federal Trade Commission, *Online Security Tips for Working at Home* (Mar. 18, 2020), available at <https://www.consumer.ftc.gov/blog/2020/03/online-security-tips-working-home> (last visited May 9, 2020); and U.S. Dep’t of Homeland Security, *Alert (AA20-099A) Covid-19 Exploited by Malicious Cyber Actors* (Apr. 8, 2020), available at <https://www.us-cert.gov/ncas/alerts/aa20-099a> (last visited May 9, 2020).

<sup>67</sup> *Transcript*, supra note 28.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

certainty for employers so they can be as effective as possible in playing their key role in securing, and returning to productivity the nation's workplaces while continuing to protect employee privacy.

## VI. Other Federal and State Labor Laws

Certain other federal and state labor and employment laws, while not directly implicating privacy, discrimination, or workplace safety issues, nonetheless similarly present employers with compliance issues exacerbated by the COVID-19 pandemic. A brief overview of these laws and the challenges facing employers is provided below.

### A. *Employee Retirement Income Security Act*

The Employee Retirement Income Security Act ("ERISA") and the Consolidated Omnibus Budget Reconciliation Act ("COBRA") require group health plans to offer continuation coverage to covered employees, former employees, spouses, former spouses, and dependent children when group health coverage would otherwise be lost due to: (1) a covered employee's death; (2) a covered employee's job loss or reduction in hours for reasons other than gross misconduct; (3) a covered employee's becoming entitled to Medicare; (4) a covered employee's divorce or legal separation; and (5) a child's loss of dependent status under the plan.<sup>70</sup> Employers must provide covered employees and their families with specific notices explaining how their COBRA continuation coverage is offered, and such notices must contain certain elements pursuant to COBRA requirements.<sup>71</sup> A failure to properly provide such notices may result in significant liability for employers, who may be subject to lawsuits for notices that lack required information or are simply not written in an easily understandable manner.<sup>72</sup>

The COVID-19 pandemic has drastically increased job loss and hours reduction, triggering COBRA continuation coverage and the associated notice requirements at a higher rate than usual. Employers have increased liability exposure under COBRA for the duration of the pandemic and will need to reexamine their COBRA coverage under their group health plans, as well as their COBRA notice policies in order to minimize such exposure. In April 2020, the Department of Labor updated its model notices that employers can use to satisfy the requirement to provide the general notice and election notice under COBRA.<sup>73</sup> We hope the Department of Labor and the Employee Benefits Security Administration will continue to assist employers in efforts to comply with the COBRA notice requirements under COBRA and ERISA.

### B. *State Scheduling Laws*

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<sup>70</sup> *An Employer's Guide to Group Health Continuation Coverage under COBRA*, EMPLOYEE BENEFITS SECURITY ADMINISTRATION (Sept. 2018), <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/an-employers-guide-to-group-health-continuation-coverage-under-cobra.pdf>.

<sup>71</sup> *Id.*

<sup>72</sup> Lydia Wheeler, *Attorneys Brace for More Lawsuits Over Health Insurance Notices*, BLOOMBERG LAW (May 4, 2020), <https://news.bloomberglaw.com/health-law-and-business/attorneys-brace-for-more-lawsuits-over-health-insurance-notices>.

<sup>73</sup> *FAQs About Model Notices*, DEPARTMENT OF LABOR (May 1, 2020), <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/cobra-model-notices.pdf>.

A growing number of states and local jurisdictions have implemented, or are planning to implement, predictive scheduling laws and ordinances that require employers to provide employees with more predictable work schedules and advance notice of such schedules. Such laws often also prohibit employers from scheduling employees to close a location and open it the next morning. To date, California, Illinois, New York, Oregon, Pennsylvania, and Washington have scheduling laws on a statewide or local basis.<sup>74</sup>

The COVID-19 pandemic has made providing employees with advance notice of schedules, and creating predictable schedules in general, far more difficult, and will continue to do so as employers return employees to the workplace. Widespread employee absences due to quarantine, childcare obligations, teleworking preferences, and a fear of coming back to the workplace, among other reasons, will necessitate abrupt schedule changes to cover such absences. Employers may have difficulty complying with these various scheduling laws in order to keep their operations running. While certain scheduling laws have exceptions for natural disasters such as pandemics, employers may still have potential liability under these laws, and must demonstrate a good faith effort to remain in constant communication with their employees with regard to work schedules. States and localities with predictive scheduling laws should consider implementing certain exceptions to these laws for the duration of the COVID-19 pandemic.

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<sup>74</sup> *Predictive Scheduling Laws*, HR DIVE (Dec. 2, 2019), <https://www.hrdiver.com/news/a-running-list-of-states-and-localities-with-predictive-scheduling-mandates/540835/>.

## VII. Conclusion

It is clear that the return to work will pose significant legal challenges for employers, even under the situation as we now know it. As events unfold in this unprecedented environment, additional challenges will surface that even the best lawyers could not anticipate. Even in the absence of liability, legal costs for employers will be substantial among those who rely heavily on outside counsel for assistance. It remains to be seen whether governments at all levels will make this situation more manageable through reasonable interpretations and, even better, safe harbors and liability shields, or whether it will exacerbate the situation by imposing new requirements and adopting inflexible enforcement postures. HR Policy Association will continue to press for the former approach as its members navigate one of the most challenging periods in the history of the American workplace.

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