

# **The Great Unknowns:** **Anticipating the 2020 Fall/Winter Labor & Employment Challenges**

Suzanne Decker, Kirsten Eriksson,  
Veronica Jackson, Paolo Pasicolan  
Miles & Stockbridge  
September 16, 2020





MILES &  
STOCKBRIDGE

# Health & Safety in the Workplace

## Worker Health & Safety

- CDC guidance is not mandatory
- OSHA, the agency tasked with worker safety has been silent
- Unions heavily lobbying
- Left up to state action: emergency rules, executive orders

# Virginia's Emergency Temporary Standard (7/15/20)

- Exposure Assessment
- Return to Work
- Sanitation and Disinfecting
- Non-Discrimination

## Other States??

- Mandatory masks at work
- Best practices/recommendations for employers

## Health & Safety in the Workplace

- Inquiries to employee about own health? About health of family?
- Returning to work following a COVID-19 exposure:
  - Employee should remain out 14 days following exposure
  - If employee resides with COVID-positive individual, it's ongoing
  - Is a negative test sufficient?

## Health & Safety in the Workplace

- Returning to work following a positive COVID-19 test
  - Employee should remain out 10 days after symptoms resolve and no fever for 24 hours
  - Is a negative test sufficient?
- What can you tell co-workers?
- When does the business need to shut down?
- How long is the shutdown?



MILES &  
STOCKBRIDGE

# Remote Work Safety Concerns

## Managing Remote Work

Telework Policy should cover much of these issues.

- Pay for expenses
- Set expectations around remote work but manage performance, not schedule

Employers may reduce pay to match reduced hours

- Notice of pay change under state law
- Watch FLSA exempt status

Employers must pay for time “suffered or permitted to work”

- Employers should require timekeeping and reporting of time
- All time reported should be paid

## Managing Remote Work

- FFCRA regulations clarified non-application of “continuous workday” rule
  - Employers allowed to break up time – e.g., allow employee to work 7-12 then 3-6
- Safety Concerns
  - Does workers’ compensation apply?
- ADA and reasonable accommodations
- Cybersecurity

## Travel Bans & Vacation Plans

- No/rare business travel in age of COVID-19.
- Consider this: How will you respond when an employee requests PTO to travel to a COVID-19 hot spot, like Florida or Georgia?
  - Remote or in-person work obligations?
  - Questions to ask employee before approving PTO.
  - Will FFCRA apply to post-travel quarantine obligations?
  - Travel Ban? Mandatory quarantine post-trip?
  - Risks associated with denying leave.

## Travel Bans & Vacation Plans

- What happens when an employee shows you pictures of their co-worker going to a 200+ person wedding with no visible social distancing?
  - Proactive policies regarding COVID-19 screening
  - Safety concerns
  - PTO

# Off-Duty Conduct: Twitter Fingers, Caught on Camera, and Other Viral Mishaps

- Anti-Harassment and Anti-Discrimination Policy
  - Investigate complaints.
  - Act when necessary.
  - No retaliation.
  - No confidentiality.
- Public relations concerns



# Managing Time Off, Scheduling and Accommodation Requests

## Hot Off the Presses!

On August 3, a federal judge in NY vacated several key provisions of the FFCRA, including:

- Employer consent to intermittent leave
- Definition of “health care worker”
- Work-availability requirement
- Documentation

In Response, the DOL issued new regulations, effective TODAY!

## FFCRA Regulations – Take Two (ish)!

DOL “doubled down” on some regulations:

- Maintains requirement that there must be work available for employee in order to take leave – employees on furlough not eligible
- Maintains requirement that intermittent leave is only available with employer consent

## FFCRA Regulations – Take Two!

DOL modified some regulations:

- Revised definition of “health care provider” – those who provide patient care or are “integrated into and necessary to” to patient care
  - Covered – doctors, nurses, lab techs, patient transportation, CNAs
  - Not covered – IT, HR, food services, billing, maintenance
- Documentation must be provided as soon as practicable – in many cases, that will be at the time leave is requested

## Leave May Be Covered for:

- Employee health
- Employee caring for child, parent, spouse or other individual with health issue
- Employee caring for child whose school or place of care is closed

## Leave Is Generally NOT Covered for:

- Employee age
- Employee has a family member at high risk
- Employee is afraid of coming to office, transportation, etc.
- “Recommendations” but not “Orders” – compare MD vs. DC provisions re self-quarantine after travel

## Employee Health

- ADA – reasonable accommodation for disability (physical or mental impairment that substantially limits one or more major life activities)
- FMLA – employee cannot work due to a serious health condition
- EPSL – employee is unable to work or telework because of order to self-quarantine from doctor or public health official, experiencing symptoms of COVID-19 and seeking medical care
- State Paid Sick Leave or FMLA laws

## Employee Caring for Someone Else

- FMLA – child, spouse or parent with serious health condition; employee is required to care for the individual
- EPSL – caring for an individual (not just child, spouse or parent) advised to self-quarantine or subject to government isolation order
- State Paid Sick Leave or FMLA laws

## Employee Caring for Child When School/Place of Care Is Closed

- EPSL/EFMLA – care for child whose school or place of care is closed, or child care provider is unavailable due to COVID-19
  - Child under 18 (but need to justify need to care for children over 14 during the day)
  - Schools operating remotely are considered “closed”
  - Schools on a hybrid model are “closed” for students on days where student is remote, but are “open” on days of in-person instruction
  - If school OFFERS in-person schooling, parent decision to keep student home DISQUALIFIES parent from EPSL/EFMLA – BUT, possibly qualifies for “regular” FMLA
  - Co-parent or co-guardian not available to provide care
- School Activities Leave
- State Paid Sick and Safe Leave



# Top 10 COVID-Driven Changes in Employee Benefits

## Employee Benefits

### 1. Coronavirus-Related Distributions

- for those diagnosed with or financially affected by COVID-19
- up to \$100,000 during 2020
- taxable over 3 yrs.; repayable
- no 20% withholding or 10% penalty
- plan amendment required by 2022\*

## Employee Benefits

### 2. Delay Plan Loan Repayments

- for loans due 3/27/2020 to 12/31/2020
- delay for up to 1 yr., usually till 1/1/2021
- reamortized schedule (with interest)
- extend term by 1 yr.
- plan amendment required by 2022\*

## Employee Benefits

### 3. Increase Limit on Plan Loans

- \$50,000 → \$100,000 or 50% → 100%
- for loans on 3/27/2020 to 9/22/2020
- plan amendment required by 2022\*

## Employee Benefits

### 4. Continued Health Coverage

- for furloughed employees
- notify your insurer; amendment may be required
- do **not** favor highly paid

## Employee Benefits

### 5. Subsidized Health Premiums

- for furloughed employees
- increased employer subsidy or prepayment
- do **not** favor highly paid

## Employee Benefits

### 6. FSA Changes

- permit midyear election changes
- carryover limit: \$500 → \$550
- extended grace period
- plan amendment by 12/31/2021

## Employee Benefits

### 7. Waive 2020 RMD

- applies to RMDs for 2020 (even if due 2021), and for 2019 not made in 2019
- plan amendment by 2022;  
IRS sample amendment available

## Employee Benefits

### 8. Reduce Retirement Costs

- no amendment needed to reduce discretionary employer contributions
- temporary relief from prohibition on midyear reduction or suspension of safe harbor contributions
- delay required DB contributions due in 2020 to 1/1/2021 (with interest)

## Employee Benefits

### 9. Leave-Sharing Programs

- Simple: donated PTO taxable to donor EE; no additional income to recipient EE
- Special: no income to donor EE; donated PTO is taxable to recipient EE
- Special conditions apply; consult counsel

## Employee Benefits

### 10. Tax-free Student Loan Relief

- Certain educational expenses are tax-free up to \$5,250
- For 2020 only, student loan repayments can be paid or reimbursed tax-free

## Employee Benefits

### Honorable Mention

- Cancellation of deferrals under a NQDC plan
- Retirement plan distributions for birth or adoption expenses up to \$5,000
- Employer-sponsored disaster relief payments
- Leave donation to a charity
- Temporary relief from physical presence required for spousal waivers



MILES &  
STOCKBRIDGE

# Vaccine Considerations

## There Is a Vaccine, Hallelujah . . . Now What?

- Employer has obligation to keep workplace free from serious hazards
- No law permits employers to absolutely require a vaccine
- Would be a medical inquiry (ADA) to find out if employee has had the vaccination.

## EEOC Guidance – Pandemic FAQ

*May an employer covered by the ADA and Title VII of the Civil Rights Act of 1964 compel all of its employees to take the influenza vaccine regardless of their medical conditions or their religious beliefs during a pandemic?*

*No. An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him from taking the influenza vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense). Similarly, under Title VII of the Civil Rights Act of 1964, once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents him from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII ("more than de minimis cost" to the operation of the employer's business, which is a lower standard than under the ADA). (36)*

*Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it. \*As of the date this document is being issued, there is no vaccine available for COVID-19.*

## Bona Fide Medical Concern – ADA

- Is the employee a qualified individual with a disability?
- Does disability prevent safe vaccination?
- Interactive process and review of alternatives
  - Mask? Continued remote work?

## Bona Fide Religious Objection – Title VII

- Sincerely held religious belief
- Some faiths have absolute objections
- Many arguments come from socio-political objections
  - Current anti-abortion groups concerned about cell lines used to develop the vaccine
- Interactive process

## Considerations for a Vaccine Program

1. Who will cover the cost?
2. Employees can opt out if they have medical or religious objections to vaccination.
3. In the event of a medical or religious objection, an interactive dialog should be established.
4. Human resources professionals should be responsible for this process, versus line managers who lack training.
5. Job descriptions should be updated to provide for essential functions, which may include travel, customer-facing positions, close interaction with other employees, or other factors that might compel mandatory vaccination.
6. Employers should pay particular attention to recordkeeping given the ADA mandate that medical records be kept separate from general personnel files and the importance of data integrity and limited internal access to medical information.
7. Vaccine is not a fail-safe for an employer's general obligation to provide a safe working environment.

## Questions?



Suzanne W. Decker  
sdecker@milesstockbridge.com  
410 385-3417



Kirsten M. Eriksson  
keriksson@milesstockbridge.com  
410 385-3583



Veronica Jackson  
vjackson@milesstockbridge.com  
410 385-3499



Paolo Pasicolan  
ppasicolan@milesstockbridge.com  
410 385-3713

## Firm Overview

Miles & Stockbridge is a leading law firm with offices in the mid-Atlantic region, including offices in Baltimore and Washington, D.C. Its lawyers help global, national, local and emerging business clients preserve and create value by helping them solve their most challenging problems.

Miles & Stockbridge P.C.

[www.mslaw.com](http://www.mslaw.com)

Twitter: @mstockbridgelaw

---

*The opinions expressed and any legal positions asserted in this presentation are those of the author and do not necessarily reflect the opinions or positions of Miles & Stockbridge P.C. or its other lawyers. No part of this presentation may be reproduced or transmitted in any way without the written permission of the author. Images are subject to copyright. All rights reserved.*