NORTH RISK PARTNERS™

Returning to Work During COVID-19: What You Need to Consider

September 2020

Presented by:

Mike Bourgon
Employment & Labor Law Attorney
Synergy Human Resources

SYNERGY HUMAN RESOURCES

NORTH RISK PARTNERS™

Topics Include:

- How you can prepare now to best protect your business from the coming onslaught of lawsuits
- Pros and cons of continuing to work from home and what you need to do if you continue
- Reluctant employees and high-risk employees
- Updated OSHA and EEOC recall requirements
- Preparing to fully return
- A return to work plan
- Having a strategy to move forward and deal with the uncertainty of the coronavirus pandemic
- Slide of resources
  - Families First Coronavirus Response Act Q&A
  - COVID-19 and the Fair Labor Standards Act Q&A
  - COVID-19 and the Family and Medical Leave Act Q&A
  - Returning to Work During the COVID-19 Pandemic: Are You Ready?

NORTH RISK PARTNERS™

NORTH RISK PARTNERS™

The Coming Wave of Coronavirus Lawsuits: How to Stay Out of Court

Agenda

- Wage and hour risks
- Failing to accommodate high-risk employees
- Disability, age, and race discrimination
- Paid sick leave and paid FMLA:
  The Families First Coronavirus Response Act
- Layoffs, furloughs, the WARN Act
- Working parents and caregiver discrimination
- OSHA, the NLRA, and whistleblowers

NORTH RISK PARTNERS™

Wage and Hour Risks

- Payment for remote work
  - No issue for exempt employees; huge risk for non-exempt employees
  - Employees must be paid for all work of which an employer knows or should know
  - Reporting and tracking time

Wage and Hour Risks

- Payment for pre-work health screenings
  - No issue for exempt employees; huge risk for non-exempt employees
  - “Necessary and indispensable” test
  - *Integrity Staffing Solutions v. Busk* case
- Payment issues related to furloughs and reduced work schedules
  - Minimal issue for non-exempt employees
  - Potential pitfalls for exempt employees because of strict salary docking rules

NORTH RISK PARTNERS™

Failing to Accommodate High Risk Employees

- ADA's interactive process
- Consideration of exceptions to COVID-19 rules for employees with medical issues
  - Telework / work from home
  - Unpaid leave of absence
  - Exception to policy
  - Separate working area
- No such requirement for older workers (but beware potential discrimination
- Communication is KEY

NORTH RISK PARTNERS™

Disability, Age, and Race Discrimination

- ADA: All bets are off
  - EEOC classifies COVID-19 as a “direct threat”
  - Medical exams and questions are okay
  - Confidentiality rules still apply
- Age Discrimination
  - Beware paternalism
  - It’s an employee’s choice whether to work or not, not an employers
  - Policies that seek to protect older workers are a no-no

Disability, Age, and Race Discrimination

- Race
  - Over-representation of African Americans in COVID-19 hospitalizations
  - Beware disparate impact claims
- Layoffs will be scrutinized

Paid Sick Leave and Paid FMLA: The Families First Coronavirus Response Act

FFCRA Leave (if < 500 employees)

- The employee is under a government quarantine or self-isolation order (PSL only @ 100%)
- The employee is quarantined or self-isolating because of coronavirus concerns (PSL only @ 100%)
- The employee is experiencing symptoms of coronavirus and seeking a medical diagnosis (PSL only @ 100%)
- The employee is caring for an individual who is quarantined or self-isolating because of coronavirus concerns (PSL only @ 2/3)
- The employee is caring for a child who's school or place of care has been closed or is unavailable due to coronavirus precautions (PSL *and* FMLA @ 2/3rds)

NORTH RISK PARTNERS™

Paid Sick Leave and Paid FMLA: The Families First Coronavirus Response Act

DOL Settlements

- City of North Branch, MN: $1,696 to employee denied paid sick leave after healthcare provider recommended a 14-day quarantine
- Indiana truck driver: $3,017 to employee denied emergency paid sick leave while experiencing coronavirus symptoms and seeking a medical diagnosis
- Discount Tire: $2,606 to employee advised to self-quarantine while awaiting a family member's test for coronavirus
- USPS: $3,680 to employee denied paid sick leave for time spent home caring for child due to school closure
- New Mexico Human Services Dept: $1,411 to employee who sought leave to care for 3 young children with school closed.

NORTH RISK PARTNERS™

Paid Sick Leave and Paid FMLA: The Families First Coronavirus Response Act

Filed Lawsuits

- *Jones v. Eastern Airlines*
  - Jones is the Director of Revenue Management for Eastern Airlines
  - March 24, 2020: Requested FFCRA leave to care for 11-year-old son
  - Told by HR, “The new laws are there as a safety net for employees, not as a hammer to force management into making decisions which may not be in the best interest of the company or yourself
  - Fired 3 days later

Paid Sick Leave and Paid FMLA: The Families First Coronavirus Response Act

Filed Lawsuits

- *Robtoy v. The Kroger Co.*
  - Ariel Robtoy developed various signs of a COVID-10 infection
  - Provided a doctor's note explaining that while she most likely had an upper respiratory infection, she should self-isolate for 14 days to prevent potential spread of COVID-19
  - Fired for missing work

The WARN Act

- Covers employers with 100 or more employees
- Applies to plant closures (a shutdown of a facility or operating unit within a single site of employment with a layoff or 50 or more employees), and mass layoffs (500 or more employees or 50-499 if one-third of the workforce
- Requires 60 days advance written notice, or 60 days pay in lieu of notice
- KEY EXCEPTION: Unforeseeable business circumstances before a shutdown
- KEY EXCEPTION: Layoffs of an expected duration of less than 6 months
- Some states and municipalities have their own specialized WARN requirements
- *Hooters* class action lawsuit

NORTH RISK PARTNERS™

Working Parents and Caregiver Discrimination

- Federal law does not expressly include “family responsibility” as a protected class
- Family responsibility discrimination remains unlawful under Title VII
- The EEOC has long held that Title VII’s prohibits discrimination against parents as parents if you are treating some more favorably than others (e.g. dads better than moms, or men better then moms)
- There are also a few states that expressly prohibit parental discrimination
- Avoid decisions or policies that treat working parents differently or impact them worse than non-parents

OSHA, the NRLA, and Whistleblowers

- OSHA section 11(c) – An employer cannot discriminate or retaliate against an employee who:
  - Files an OSHA complaint
  - Starts an OSHA proceeding
  - Testifies or will testify in an OSHA proceeding
  - Exercises any rights under OSHA
- National Labor Relations Act section 7
  - Employees have the right to engage in protected concerted activity
  - PCA = talking between and among themselves about wages, hours, and other terms and conditions of employment
  - Safety issues included
- State-law whistleblower protections

NORTH RISK PARTNERS™

Preventative Measures

- Review / update
  - Employee handbook
  - Safety policies
  - COVID-10 policies (FFCRA, reopening, telework)
- Train employees on COVID-19 issues
  - FFCRA
  - Discrimination
  - Reasonable accommodation

NORTH RISK PARTNERS™

Preventative Measures

- Review employee FLSA statuses
- Document, document, document
- Encourage the open door
- Double-check insurance coverages (EPLI)
- **NEVER** retaliate

NORTH RISK PARTNERS™

New CDC Testing

- Since the COVID-19 Pandemic first began to affect the United States, testing supplies were in high demand and short supply. This shortage has caused bottlenecks at labs and delays in test results. Accordingly, the Centers for Disease Control (CDC) has made changes to its guidance on testing, along with other recommendations as to when infected people can rejoin the community.

What you should know:

- Testing is no longer generally recommended to clear a person who once tested positive for COVID-19.
- Instead, the CDC now presents a symptoms-based approach.
- If ten days have passed since diagnosis, along with 24 hours since the last fever without fever-reducing medications (acetaminophen or ibuprofen); and there is improvement in symptoms, then the person is cleared from isolation and free to return to their “new normal routine.”

NORTH RISK PARTNERS™

Discontinuation of Isolation for Persons with COVID-19 Not in Healthcare Settings

- https://www.cdc.gov/coronavirus/2019-ncov/hcp/disposition-in-home-patients.html

OSHA Updates

- The Occupational Safety and Health Administration (OSHA) recently issued new guidance on employers' obligation to document COVID-19 cases in the workplace for OSHA recordkeeping purposes. Specifically, employers who are required to keep OSHA 300 logs are now required to record cases of COVID-19 (which OSHA considers a respiratory illness) on such logs if the employer determines that the employee's COVID-19 illness is work-related.
- The new guidance went into effect on May 26, 2020 and is an abrupt departure from OSHA's previous guidance.

NORTH RISK PARTNERS™

OSHA Updates

When to Record

- Under the new guidance, a case of COVID-19 must be recorded by the employer if:
- An employee has a confirmed case of COVID-19, as defined by the Centers for Disease Control and Prevention (CDC);
- The case is work-related (i.e., an event or exposure in the work environment caused or contributed to the illness); and
- The case meets one or more of the recording criteria set forth under general OSHA standards (i.e., the case results in death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, loss of consciousness or significant injury or illness diagnosed by a physician or other licensed healthcare professional).

OSHA Updates

"Work-Related" Cases

- The guidance acknowledges that it may be difficult for employers to determine whether a COVID-19 illness is work-related and states that OSHA will "exercise enforcement discretion" in evaluating whether an employer has made a reasonable determination of work-relatedness, taking into account the following factors:
- The reasonableness of the employer's investigation into work-relatedness The guidance clarifies that employers should not undertake extensive medical inquiries. It is sufficient in most cases for the employer, when it learns of an employee's COVID-19 illness:

1 To ask the employee how he or she believes the illness was contracted;

2 Discuss with the employee his or her work or non-work activities that may have led to such illness; and

3 Review the employee's work environment for potential COVID-19 exposure (including any other instances of workers in that environment contracting COVID-19);

NORTH RISK PARTNERS™

OSHA Updates

- The evidence available to the employer OSHA will look at the information that was reasonably available to the employer at the time of the work-relatedness determination and any additional information it learned of later on.
- The evidence that a COVID-19 illness was contracted at work There are several factors that point to a finding of work-relatedness (*e.g.*, when coworkers who work closely together develop COVID-19 or the employee falls ill after lengthy, close exposure to a customer/coworker who has a confirmed case of COVID-19, and there is no alternative explanation). There are also several factors that weigh against work-relatedness (*e.g.*, the employee is the only worker in her vicinity to contract COVID-19 and his or her job duties do not involve frequent contact with the general public, or the employee frequently associates with someone outside of the workplace who has COVID-19, is not a coworker and is in contact with the employee during the period when the individual is likely infectious).

OSHA Updates

Reasonable and Good Faith Inquiries

- OSHA will also consider any other evidence of causation provided by medical providers, public health authorities or the employee. Notably, the guidance states that if after a "reasonable and good faith inquiry" an employer cannot conclude that exposure in the workplace caused a particular COVID-19 case, the employer does not need to record that case on the OSHA 300 log.
- To show that they engaged in a "reasonable and good faith inquiry," employers should maintain records reflecting their analysis and the information relied upon in making their determination of work-relatedness.

Privacy Concerns

- The guidance further notes that if a COVID-19 case is recorded on the OSHA 300 log, the affected employee has the right to request that his or her name not be entered on the log for privacy reasons. Under such circumstances, the employer must comply with the employee's request and enter the phrase "privacy case" instead. The employer must also maintain a separate, confidential list of privacy concern cases with case numbers and employee names to be provided to the government if requested.

OSHA Updates

Partially Exempt Employers

- Under existing OSHA regulations, employers with ten or fewer employees and certain employers in low-hazard industries — including advertising and financial services — are not required to maintain OSHA 300 logs. These "partially exempt" employers are still required to report to OSHA any workplace incident that results in death or in-patient hospitalization within a certain time frame. Unfortunately, employers may see a surge in in-patient hospitalizations as more states and cities reopen and employees return to the office.
- Regardless of whether a COVID-19 case is determined to be work-related or not, employers are advised to closely examine and track any COVID-19 cases occurring among their employees in order to reduce the spread of the virus and to respond appropriately to protect workers. OSHA recently released its updated interim enforcement response plan, which states that OSHA will be resuming its usual investigation procedures — which include unannounced on-site inspections — in areas where community spread of COVID-19 has decreased, and that it will continue to prioritize COVID-19 cases. Employers should ensure that they have COVID-19 protocols in place that are up-to-date and consistent with the latest OSHA, CDC and state and local guidance.

EEOC

On June 11, 2020, the Equal Employment Opportunity Commission (EEOC) issued updates to its technical assistance guidance, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," to address employers' questions as they plan for the safety of employees returning to the workplace.

No Accommodation for COVID-19-Related Associational Disability:

- Employers are not required to provide an accommodation to an employee to avoid exposing a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition.
- An employer is not required to provide telework as an accommodation to an employee without a disability in order to protect the employee's family member with a disability from potential COVID-19 exposure.

Return to Work Screening:

- If an employee requests an alternative method of return to workplace screening due to a medical condition, employers may choose to make the requested change available to all employees without going through an interactive process.
- Alternatively, employers may proceed as they would for any other request for an accommodation under the Americans with Disabilities Act (ADA). If the employee requests the alternative method as a religious accommodation, employers should determine if accommodation is available under Title VII.

EEOC

Notice in Advance of Return to Work:

- Employers may provide advance notice to all employees advising them of who to contact to request an accommodation they may need for a disability upon a return to work even if a return date has not been set. The notice may identify the medical conditions listed by the U.S. Centers for Disease Control and Prevention (CDC) that may place people at higher risk of serious illness if they contract COVID-19.
- The notice should explain that the employer is willing to consider, on a case-by-case basis, any reasonable request from employees who have the CDC-listed or other medical conditions. Should an employee request an accommodation in advance of returning to work, employers may engage in the interactive process before the return to work date and proceed as they would for any other request for an accommodation under the ADA.

Pandemic-Related Harassment:

- Employers should remind all employees that harassment by any means, including emails, calls, video or chat communications, based on national origin, race or other protected characteristics is illegal. Employers also should remind supervisors and managers of their role to look out for, stop and report workplace harassment.

EEOC

Age Discrimination:

- Employers may provide flexibility (*e.g.*, telework, modified schedules) to employees age 65 and older even if it results in employees age 40-64 being treated less favorably based on age in comparison.
- Employees age 65 and older also may have medical conditions that bring them under the protection of the ADA, entitling them to request a reasonable accommodation for their disability.

Caregiver/Family Responsibilities Discrimination:

- Employers may provide flexibility to employees with school-age children due to COVID-19-related school closures or distance learning, so long as employers do not treat employees differently based on sex or other protected characteristics.
- Employers should not provide flexibility to female employees but not male employees because of a gender-based assumption about who may have caretaking responsibilities for children.

EEOC

Pregnancy Discrimination:

- Employers may not exclude an employee from the workplace due to pregnancy even if motivated by a genuine concern for the pregnant employee's health and safety due to the pandemic.
- Pregnant employees may be entitled to an accommodation under the ADA for pregnancy-related medical conditions. Pregnant employees also may be entitled to job modifications and leave under Title VII to the extent such modifications and leave are provided to other employees who are similar in the ability or inability to work.

There may be state and local legislative developments that could impact the guidance provided by the EEOC. Employers should consult legal counsel for individualized legal advice regarding specific circumstances on COVID-19-related return to work issues.

DOL Releases Additional COVID-19 Guidance Related to FFCRA, FMLA and FLSA

NORTH RISK PARTNERS™

COVID-19 Guidance Related to FLSA

FLSA Guidance

The latest FLSA guidance addresses compensable time and exempt status issues as they relate to telework, as well as hazard pay (or the lack thereof under federal law).

- The guidance explains that telework is treated the same as work performed at the employer's primary worksite for purposes of determining compensability of time for non-exempt employees. This means that employers must compensate non-exempt employees for all hours of telework actually performed, including overtime work, if the employer knows or has reason to believe the work was performed.
- This includes time spent teleworking that the employer did not authorize, as well as working time that is not reported by an employee, so long as the employer "has reason to believe" the work occurred. As such, employers should ensure that their procedures include non-exempt employee-submission of weekly time records (including the employee's certification of accuracy), and ensure non-exempt employees are informed of proper time reporting procedures, advised that "working off the clock" is a violation of the employer's policies, and reviewing those policies to ensure that include warnings that failure to comply may result in discipline up to and including discharge.

COVID-19 Guidance Related to FLSA

FLSA Guidance

- The guidance also addresses the subject of the “continuous workday rule,” which is a principle under the FLSA whereby all time between the first and last principal activity of the day is generally considered compensable work time for non-exempt employees (with the exception of meal or rest breaks of 30 minutes or more).

- In recognition of the challenges faced by many employees in juggling work and family needs during the pandemic, some employers have allowed teleworking employees to stop work for periods throughout the day to care for personal and family obligations. The guidance makes clear that employers who provide this flexibility do not need to count all the time between an employee’s first and last principal activities in a workday as hours, but rather only must compensate employees for all hours actually worked in a given day.

COVID-19 Guidance Related to FLSA

FLSA Guidance

- With respect to exempt employees, taking paid sick leave or expanded FMLA leave under the FFCRA will not affect an employee's exempt status.
- During a declared public health emergency, employees who are otherwise exempt may temporarily perform non-exempt duties that are required by the emergency and still maintain their exempt status, provided such employees continue to be paid on a salary basis of at least $684 per week.
- An employer may prospectively reduce exempt employees' salaries for economic reasons related to COVID-19 or a related economic slowdown so long as those reductions are pre-determined and bona fide.
- Employers cannot implement after-the-fact deductions from an employee's salary based on the employer's fluctuating employment needs or do so in an attempt to evade salary requirements or as a result of the quality of the work performed.
- Regarding hazard pay, the FLSA does not require hazard pay for employees working during the pandemic. However, state and local laws, as well as private agreements between employers and employees, may impose other increased pay obligations as a result of the pandemic.

COVID-19 Guidance Related to FMLA

FMLA Guidance

- The newest COVID-19 guidance states that until December 31, 2020, telemedicine visits will be considered to be in-person visits for purposes of establishing a serious health condition under the FMLA, provided the visit

  (1) includes an examination, evaluation, or treatment by a health care provider;

  (2) is performed by video conference; and

  (3) is permitted and accepted by state licensing authorities.

- Electronic signatures are deemed to be signatures for the same purpose of establishing a serious health condition under the FMLA.

NORTH RISK PARTNERS™

COVID-19 Guidance Related to FMLA

FMLA Guidance

- FMLA does not prohibit an employer from requiring an employee to get a COVID-19 test prior to returning to the office after FMLA leave, pursuant to a policy requiring all employees obtain such a test, even if the policy was implemented while the employee was out on FMLA leave.
- Other laws may restrict employers from requiring certain testing – namely, the Americans with Disabilities Act (ADA) requires that any mandatory medical test (including a COVID-19 test) be "job related and consistent with business necessity."
- As set forth in the EEOC's guidance, employers may take steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others.
- In light of CDC's Interim Guidelines that antibody test results "should not be used to make decisions about returning persons to the workplace," an antibody test at this time does not meet the ADA's "job related and consistent with business necessity" standard for medical examinations or inquiries for current employees.

COVID-19 Guidance Related to FFCRA

- Employers may require employees returning from FFCRA leave to telework, be assigned to a different position, or take additional leave until they have tested negative for COVID-19 – provided such measures are applied uniformly and not just because the employee took FFCRA leave.
- Employees returning from leave taken under the FFCRA must be reinstated to the same or an equivalent position, subject to limited exceptions. However, given the public health emergency, where an employee has had potential exposure to an individual with COVID-19, employers can temporarily reinstate returning employees to equivalent positions which require less interaction with co-workers, or require they telework – provided they take similar measures for similarly affected employees who did not take FFCRA leave.
- Employers may also require any employee that knows they've interacted with someone diagnosed with COVID-19 to telework or take leave until they test negative for COVID-19, regardless of whether that employee has taken any kind of leave. Employers may not, however, require employees to telework or be tested for COVID-19 simply because they took leave under the FFCRA.

COVID-19 Guidance Related to FFCRA

- If employee exhausts their paid sick leave under the FFCRA prior to being furloughed, they are not entitled to any additional leave if they ultimately return to work. Employees who use fewer than 80 hours of paid sick leave prior to being furloughed may use any remaining hours after returning to work.
- The same is true for expanded FMLA leave under the FFCRA: employees may take a portion of their expanded family and medical leave prior to being furloughed and use any remaining leave after returning to work, as the weeks that the employee was furloughed do not count as time on FFCRA leave.
- Since the reason an employee needs leave may have changed during furlough, the guidance suggests treating a post-furlough request for expanded family and medical leave as a new leave request, and obtain documentation related to the current reason for leave.
- Employers may not discriminate against employees or prospective employees for exercising their rights to leave under the FFCRA (including, for example, extending an employee's furlough in anticipation of a request to take FFCRA leave after calling the employee back to work).

FFCRA and School Re-Opening

What do school reopening plans mean for employee requests for leave to care for a child under the Families First Coronavirus Response Act ("FFCRA")?

- Under the FFCRA regulations and previous guidance issued by the Department of Labor ("DOL"), if a child's school is physically open and the child is permitted by the school to attend in person, then any personal choice by the child's parents to instead have the child participate in remote schooling will not provide a qualifying reason for FFCRA leave.
- The FFCRA entitles eligible employees of covered employers to take up to two weeks of Paid Sick Leave, and up to ten additional weeks of Expanded FMLA leave, when the employee is unable to work (including telework) due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

NORTH RISK PARTNERS™

FFCRA and School Re-Opening

Early on during the pandemic, the DOL made clear that Child Care Leave is available when instruction has moved entirely online, due to the physical location of a school being closed:

My child's school or place of care has moved to online instruction or to another model in which children are expected or required to complete assignments at home. Is it "closed"?

- Yes. If the physical location where your child received instruction or care is now closed, the school or place of care is "closed" for purposes of paid sick leave and expanded family and medical leave. This is true even if some or all instruction is being provided online or whether, through another format such as "distance learning," your child is still expected or required to complete assignments.
- However, the focus on "physical location" suggests that, if a school building is physically open this fall, and students are invited by the school district to return to school in person, then a choice by the parent/employee to instead select a remote learning option (if offered) will not result in the employee having a qualifying reason for Child Care Leave under the FFCRA. This is because in-person learning is available; i.e., the school building itself is not closed or unavailable. This would be true even if the employee's choice is based on a COVID-19 concern.

FFCRA and School Re-Opening

Recommendations:

- When an employee requests FFCRA leave relating to the need to care for a child, be sure to understand the underlying reason for the request.
- If the employee is requesting Child Care Leave (i.e., leave due to the child's school being closed or unavailable for reasons relating to COVID-19), ask follow-up questions as necessary, e.g.: Is the child's school actually closed? Does the employee have a choice to send the child to school in person, but instead is exercising a choice to have the child engage in remote learning?
- Require the employee to support the need for Child Care Leave under the FFCRA with appropriate information and documentation, i.e.:
  - A statement that the employee is unable to work (including, if applicable, telework) because the employee is caring for the employee's son or daughter because his/her school is closed or unavailable due to COVID-19, and no other person will be providing care for the child during the period for which the employee is requesting leave;
  - The name(s) and age(s) of the child(ren) to be cared for;
  - The name(s) of the school(s) that are closed or unavailable;
  - If the child is older than 14 and care will be provided during daylight hours, a description of the special circumstances that require the employee to provide care to the child; and
  - A copy of the applicable notice(s) of closure or unavailability from the school, such as a notice published on the school website or emailed to the employee from an official of the school.

NORTH RISK PARTNERS™

FFCRA and School Re-Opening

- Track use of FFCRA leave carefully, so that you are aware of whether and when an employee has exhausted his or her FFCRA leave entitlement.
- Remember that, as of now, the right to FFCRA leave expires at the end of 2020.
- Be prepared to discuss any other leave options an employee may have, if leave under the FFCRA is not applicable or available.
- If the child's health care provider advises the child to self-quarantine, and if the parent is needed to care for the child during that quarantine, the parent may be entitled to up to two weeks of Paid Sick Leave under the FFCRA for that separate qualifying reason.

Liability Waivers for COVID-19

- A trend is developing that demands that employees sign waivers of liability, in favor of their employers, in the event they contract COVID-19 upon their return to work as the restrictions are lifted. They are spreading like a virus across the country. In a handful of states, laws have been enacted or gubernatorial executive edicts issued immunizing employers from liability claims by coronavirus-infected workers, including Alabama, North Carolina, Oklahoma and Utah.
- Legislation is pending in Congress, promoted by Republicans in the Senate, to require immunity for large sectors of the workplace, in exchange for joining Democratic-sponsored legislation in the House of Representatives, extending additional stimuli payments.
- Waiver supporters insist that such immunization is necessary in order to reinvigorate the economy, while opponents caution against them for fear that they will expose employees to illnesses for which they cannot receive compensation.
- Other observers point out that the insistence on those waivers may give out the wrong signal, particularly to customers and vendors, that measures are not being taken to safeguard the places they patronize.

Liability Waivers for COVID-19

- COVID-19 has changed how industries across the United States and the world are conducting business. It has cast uncertainty and apprehension into even the most routine commercial interactions.
- Many industries continue to provide their customers with essential services necessary for continued economic stability and public safety.
- Continuing operations means businesses are supplying integral services and helping prop up the American economy during a time of economic downturn. On the other hand, these businesses are operating in unchartered territory, which carries costs and risks of its own.
- In the ever-changing landscape of this pandemic, businesses continuing operations should be proactive in trying to limit these risks. They should monitor and comply with government rules and guidelines.
- These businesses—particularly those in the services industries whose very nature requires physical interaction with their customers—should also consider taking steps to protect against possible future liability for coronavirus exposure claims (i.e., claims that a customer contracted coronavirus while on their premises or while an employee performed services at a customer's home or business and—inadvertently—exposed customers).
- Sound legal principles can provide guidance to businesses and industries committed to continuing essential operations.

NORTH RISK PARTNERS™

Liability Waivers for COVID-19

What is a Liability Waiver?

- A liability waiver is a simple, familiar, and cost-effective first step that businesses can take to protect against potential liability for exposure claims.
- Most individuals are familiar with liability waivers, and you probably signed one prior to opening a gym membership or going skiing, sending your kids on a school field-trip.
- A waiver is simply a voluntary relinquishment or abandonment of a legal right.
- A liability waiver—sometimes also called an exculpatory agreement—is a written contract between two or more parties in which one party (generally the customer) acknowledges the risks of participating in an activity or of accepting the services of another party (generally the provider).
- The customer agrees to prospectively waive the right to sue the provider for injuries or damages arising out of the activity or services. The waiver may be as simple as a clause in a services contract or a separate form of its own, and the parties will typically execute it prior to or immediately following performance of the subject services.

NORTH RISK PARTNERS™

Liability Waivers for COVID-19

- Even though liability waivers are routine and well-known, it is unclear whether a COVID-19 waiver relieving a service provider of liability for exposure claims would be enforceable. This is due, in part, to the practical reality that no court in the country has yet analyzed such waiver in this context.
- Basic legal principles should guide any such analysis, and those seeking to execute liability waivers should consider the following general principles.
- Courts will enforce liability waivers that insulate a party from liability arising out of that party's negligent conduct. For example, courts have enforced waivers for negligence claims arising out of horseback riding and skiing accidents, slip and falls, and even accidental data breaches.

Liability Waivers for COVID-19

- Waivers seem legally suspect because they are presented as unilateral take-it-or-leave-it arrangements that employees may view as coercive and are signed under duress.
- The courts generally uphold these kinds of devices, as long as employees have a choice, which they do, to either accept an employer's imposed terms or not work.
- How courts interpret and apply waivers of liability varies by state. Some states favor enforceability of waivers on the basis of freedom of contract, while others will more strictly scrutinize such waivers.
- A majority of states will enforce valid waivers, and only three states—Connecticut, Montana, and Virginia—have categorically refused to enforce liability waivers.

Liability Waivers for COVID-19

- The Minnesota courts have long upheld prospective disclaimers of liability for incidents of negligence, but not gross impropriety or intentional wrongdoing by the propagator of the instrument and not for what are deemed "essential services," which generally do not extend to employment relationships.

- The state Legislature stepped into the fray in 2013, enacting a law that imposes limitations on disclaimers for consumers. The measure basically leaves the existing judicially crafted law intact, permitting disclaimers as long as they do not grant immunity to employers for actions beyond mere negligence or ordinary carelessness.

- The statute, however, only applies to consumers and not to others who may have engaged in relationships, such as employees, subcontractors, vendors, and the like.

Liability Waivers for COVID-19

- Even if facially valid, the compelled waivers may not be legally enforceable. The rarely invoked legal doctrine of "public policy" could void them. Under that tenet, an arrangement, even if mutually agreed upon between parties, may be invalid if it is contrary to what is known as "well established public policy."
- In the case of back-to-work waivers, it could be argued, and possibly determined, that the devices are inimical to the public interest and, therefore, not enforceable.
- The arrangements may run afoul of the Minnesota workers' compensation laws. Similar to most states, the Minnesota measure provides that employers are liable, without regard to fault, for any injuries or afflictions incurred at work. The amounts, however, are quite meager. Although Minnesota at one time was one of the most hospitable states for workers' compensation benefits, for the last two decades, statutes have converted it to one of stingiest.

Liability Waivers for COVID-19

What About Other States in the Upper Midwest?

- With the notable exception of Minnesota and North Dakota, Iowa, Nebraska, Wisconsin and South Dakota have no significant current prohibition or cautions against the use of liability waivers. However, this landscape could change quickly.
- North Dakota does not have an absolute prohibition, but its courts are very wary of enforcing waivers, especially those that purport to prospectively waive liability arising from intentional reckless or grossly negligent conduct.
- Courts define gross negligence as an extreme deviation from the ordinary standard of care or a conscious disregard for the rights and safety of others, a service provider that visited a customer's home while exhibiting coronavirus symptoms or being aware of a positive diagnosis would not be contractually immune from liability to an exposure claim. This is because exposing a customer to a known risk of contracting coronavirus may be considered reckless or grossly negligent conduct.

NORTH RISK PARTNERS™

Liability Waivers for COVID-19

Conclusion – A Roadmap for Employers

- Liability is not automatic; proving that a virus was contracted at a workplace may be difficult. While the workers' compensation law surmounts that problem by imposing liability on an employer regardless of fault, there must be sufficient proof that the workplace was the cause of the affliction.
- In exchange for the indulgence in imposing liability without regard to fault, the workers' compensation law deprives employees, in most instances, of their ability to sue employers for damages unless they can show that the employer acted in a way that constitutes "gross negligence," meaning beyond the ordinary type of carelessness, or intentional misconduct.

NORTH RISK PARTNERS™

Liability Waivers for COVID-19

- The workplace waivers also may be ineffectual for other reasons. Employees who contract the virus at work and can prove the relationship to the workplace may be barred from suing, or relegated to workers' compensation benefits.
- However, their family members or others who pick up the disease from them would not be subject to the waiver, and therefore could sue, subject to significant evidentiary problems proving the link to the workplace through the workers there.
- The workplace immunity also would not limit possible claims by others who contract the disease, such as subcontractors, customers, vendors or others who are on the work premises but not employed there.
- Work waivers are of dubious enforceability and effectiveness. Far from these legal infirmities, they provide a signal to the community, particularly prospective customers, that the workplace is not safe.
- Given these problems, both legal and pragmatic, employers may choose to refrain from requiring employees to waive their rights as a condition to return to work. They may figure, on balance, that the problems associated with the waiver trump the advantages of using them.

Resources:

- Families First Coronavirus Response Act Q&A: https://www.dol.gov/agencies/whd/pandemic/ffcra-questions
- COVID-19 and the Fair Labor Standards Act Q&A: https://www.dol.gov/agencies/whd/flsa/pandemic
- COVID-19 and the Family and Medical Leave Act Q&A: https://www.dol.gov/agencies/whd/fmla/pandemic#q12
- Returning to Work During the COVID-19 Pandemic: Are You Ready?: https://www.sgrlaw.com/client-alerts/returning-to-work-during-the-covid-19-pandemic-are-you-ready/

NORTH RISK PARTNERS™

Questions?

Mike Bourgon
Employment & Labor Law Attorney
Synergy Human Resources

NORTH RISK PARTNERS™

NEW!

North Risk Partners
Value-Added Services Hotline

(888) 667-4135

Call the hotline to get personalized advice from HR and safety professionals on a variety of topics, including state and federal compliance, employer best practices, workplace programs and more.

*You may also reach Synergy Human Resources by emailing hr@northriskpartners.com

NORTH RISK PARTNERS™