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# Returning to Work Strategies: Employment & OSHA Law Implications of COVID-19

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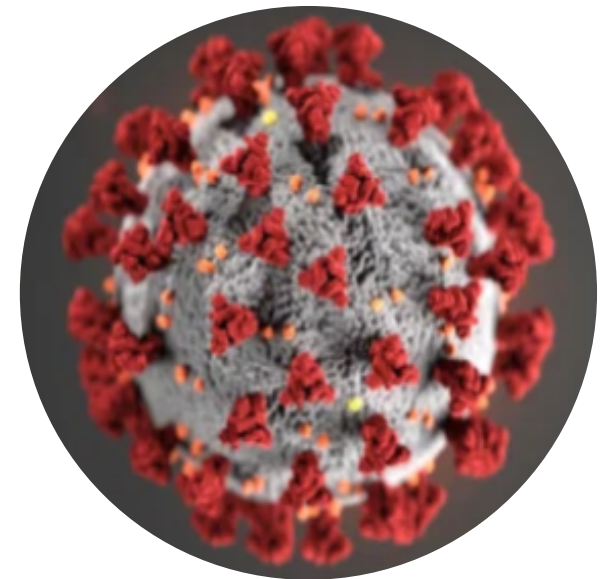
July 29, 2020

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**Kara Maciel and Eric Conn, Co-Founders at Conn Maciel Carey**  
**Beth Caseman, General Counsel at Whitman Walker Health**

# Agenda

- ✓ Flexible Work Arrangements & Telework Policies
- ✓ Initial Employment Issues upon Reopening
- ✓ New Federal Laws Impacting Employees
- ✓ OSHA Guidance on Infection Control in Workplaces
- ✓ Exposure Control and Response Plans
- ✓ Respirators, Masks and Face Coverings
- ✓ Recording & Reporting COVID-19 Cases
- ✓ Liability Resulting from COVID-19 Tort Claims in the Workplace





# Flexible Work Arrangements and Telework Policies

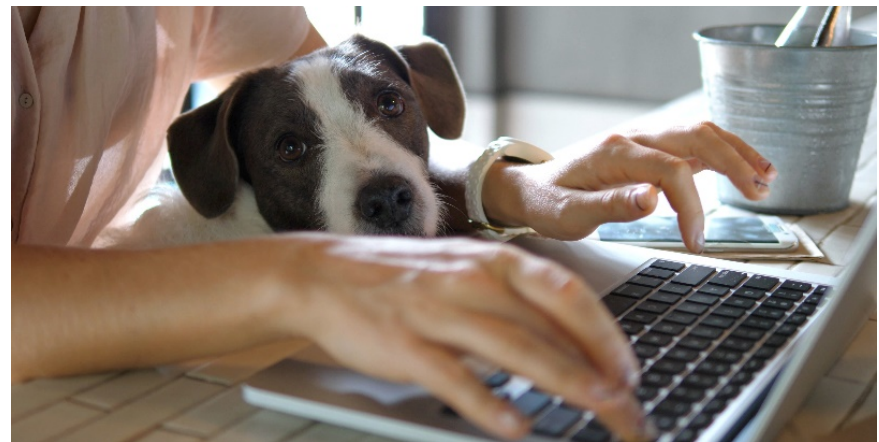
# Flexible Work Arrangements

- Employers need to keep up w/ local social distancing mandates
- If returning employees to work, businesses may opt to change their physical worksite to avoid overcrowding
  - Ex: altering office layouts or adding barriers in stores
- Businesses may allow employees to stagger shifts or experiment w/ different workweeks
  - Ex: allowing some employees to work 4-day weeks or work at different start times (also consider child-care needs)



# Telework Considerations

- To the greatest extent possible, give employees a choice to continue teleworking
  - Mitigate risk by having fewer employees in the workplace
  - Opportunity to test out new health screening measures, safety precautions, and social distancing strategies
  - Shows employees you are doing everything you possibly can to maintain a safe work environment



# Telework Policies

- In drafting written telework policies, employers must establish clear expectations and responsibilities for all employees:
  - which positions are eligible for telework;
  - # of days, expected work hours, and duration of the telework arrangement
  - how employees should request to telework;
  - protocols for when employees may return to work following an illness;
  - expectations and responsibilities while teleworking;
  - how non-exempt employees will report hours worked and continue to abide by the employer's overtime policy (to the extent non-exempt employees are able and permitted to telework); and
  - workspace expectations – including reporting any workers compensation injuries incurred during business hours



# Initial Employment Issues Upon Reopening

# Preparing to Reopen

- Employers should consider the following when rehiring and/or recalling staff:
  - Number of employees to recall (some or all?)
  - Does each employee need to be in the same position and/or w/ the same pay?
  - What if you recall someone and they don't want to come back due to safety concerns?
    - Do they get unemployment?
  - Are positions with the same job titles officially “the same”?
  - Do you need to provide “New Hire” forms?



## Potential Bias in Rehiring/Recalling

- Employers need to balance fairness and health issues
- Be aware of unintentional discrimination
  - Ex: allowing only younger workers to return right away could lead to an age discrimination claim
  - Transparency and having rational bias for any rehiring decisions is key to guarding against bias claims
  - All decisions must be based on legitimate and non-discriminatory reasons

# Potential ADA Lawsuits

- Workers w/ conditions that make them susceptible to COVID-19 may be reluctant to return to work
  - If they are denied “reasonable accommodation” under the ADA, that may be reason to sue
  - Ex: a worker with an underlying condition may ask that she be allowed to continue to work remotely even when the majority of the workforce comes back full time





# New Federal Laws Impacting Employees

# Emergency Paid Sick and Family Leave Under the FFCRA

- Employers must familiarize themselves with the FFCRA
  - This will continue to be a tricky issue throughout the year, as the law expires on December 31, 2020
- Includes new paid sick and family leave provisions
- Act provides paid leave benefits to employees of employers with fewer than 500 employees
  - Employers w/ 50 or fewer employees (and healthcare providers) exempt from paid family leave in certain circumstances



# Paid Sick Leave Benefits

## Permitted to use paid sick leave if:

- Subject to quarantine or isolation order related to COVID-19
- Advised to self-quarantine due to concerns of COVID-19
- Obtaining diagnosis or caring for symptoms of COVID-19
- Caring for or assisting family member meeting the aforementioned criteria
- Caring for child whose school/daycare closed due to COVID-19
- Experiencing any other substantially similar condition as defined by other agencies

Full-time employees entitled to 2 weeks (80 hours)

Part-time employees entitled to avg. number of hours worked over 2-week period

Pay rate is dependent on the reason for the leave

Law explicitly does NOT preempt existing state/local paid sick leave requirements

# Paid Family Leave Benefits

Provides 12 weeks of paid FMLA leave – first 10 days may be unpaid, though employees must be permitted to use other paid leave during that time if they choose

Employees are eligible if they worked for employer for at least 30 calendar days

After the first 10 days, must compensate employees at a rate of at least 2/3 regular rate

Permitted to use paid family leave to care for child whose school/daycare closed due to COVID-19

# Potential FFCRA Liabilities

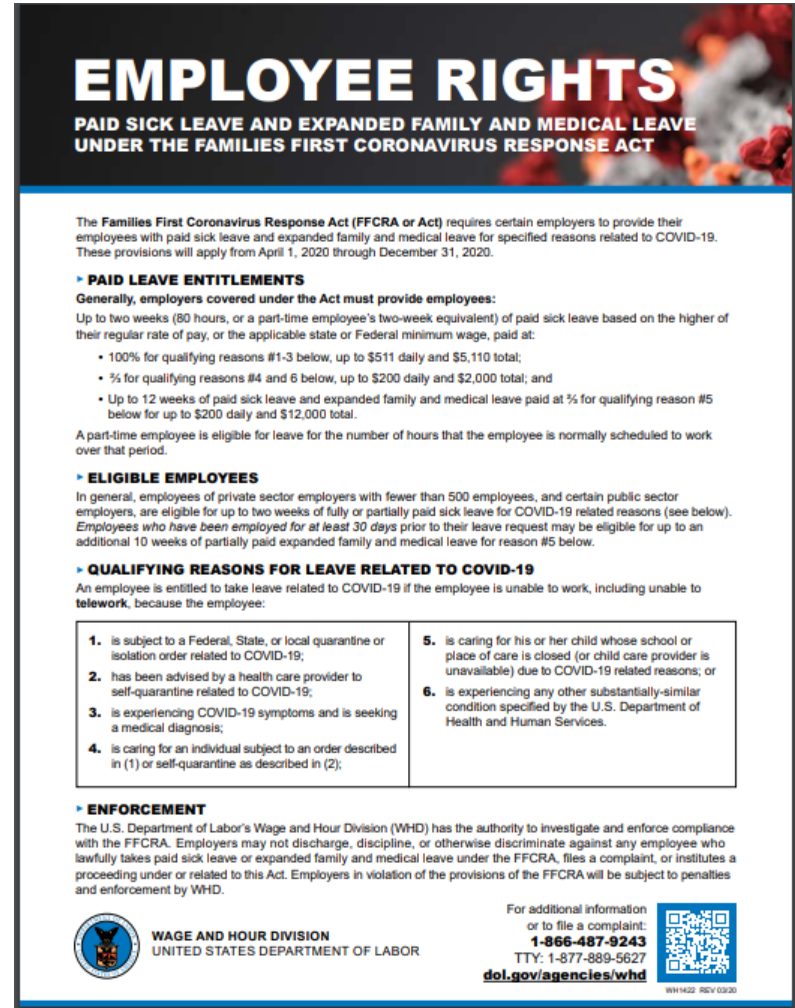
- Employers face exposure if they deny time off to eligible workers, miscalculate their pay, or retaliate against those who request leave
- Such lawsuits have already been filed in federal court
  - Eastern Airlines employee (a single mother) alleged she was fired for asking for leave (2 hours a day of flex time) due to her child's school being closed

***"Defendant Eastern Airlines unlawfully retaliated and otherwise discriminated against plaintiff because of conduct protected by the FFCRA," the complaint said. "Defendant Eastern Airlines' conduct was not in good faith and defendant Eastern Airlines did not have reasonable grounds for believing it did not violate the FFCRA."***

- Employers who actively engage w/ employees are less likely to be sued

# Employee Notice & Employer Tax Credits

- Employers must post/email employee rights notice to all employees, which is available for download on DOL's website
- Covered employers qualify for a dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA



**EMPLOYEE RIGHTS**  
PAID SICK LEAVE AND EXPANDED FAMILY AND MEDICAL LEAVE  
UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The Families First Coronavirus Response Act (FFCRA or Act) requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply from April 1, 2020 through December 31, 2020.

► **PAID LEAVE ENTITLEMENTS**  
Generally, employers covered under the Act must provide employees:

Up to two weeks (80 hours, or a part-time employee's two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at:

- 100% for qualifying reasons #1-3 below, up to \$511 daily and \$5,110 total;
- ⅔ for qualifying reasons #4 and 6 below, up to \$200 daily and \$2,000 total; and
- Up to 12 weeks of paid sick leave and expanded family and medical leave paid at ⅓ for qualifying reason #5 below for up to \$200 daily and \$12,000 total.

A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

► **ELIGIBLE EMPLOYEES**  
In general, employees of private sector employers with fewer than 500 employees, and certain public sector employers, are eligible for up to two weeks of fully or partially paid sick leave for COVID-19 related reasons (see below). Employees who have been employed for at least 30 days prior to their leave request may be eligible for up to an additional 10 weeks of partially paid expanded family and medical leave for reason #5 below.

► **QUALIFYING REASONS FOR LEAVE RELATED TO COVID-19**  
An employee is entitled to take leave related to COVID-19 if the employee is unable to work, including unable to telework, because the employee:

1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;	5. is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or
2. has been advised by a health care provider to self-quarantine related to COVID-19;	6. is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services.
3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;	
4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);	

► **ENFORCEMENT**  
The U.S. Department of Labor's Wage and Hour Division (WHD) has the authority to investigate and enforce compliance with the FFCRA. Employers may not discharge, discipline, or otherwise discriminate against any employee who lawfully takes paid sick leave or expanded family and medical leave under the FFCRA, files a complaint, or institutes a proceeding under or related to this Act. Employers in violation of the provisions of the FFCRA will be subject to penalties and enforcement by WHD.

For additional information or to file a complaint:  
**1-866-487-9243**  
TTY: 1-877-889-5627  
[dol.gov/agencies/whd](https://www.dol.gov/agencies/whd)

WAGE AND HOUR DIVISION  
UNITED STATES DEPARTMENT OF LABOR

WH1422 REV 03/20



# OSHA Guidance on Infection Control in Workplaces

# General Duty Clause

- OSHA lists the General Duty Clause as a relevant standard that may apply to preventing occupational exposure to COVID-19
- Sec. 5(a)(1) of the OSH Act (the General Duty Clause):

“Each employer shall furnish each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”
- 4 elements necessary to prove a violation:
  1. Hazard exists in the workplace;
  2. Employer or its industry “recognizes” the hazard;
  3. Hazard is like to cause death or serious injury; and
  4. Feasible means exist to eliminate/reduce the hazard

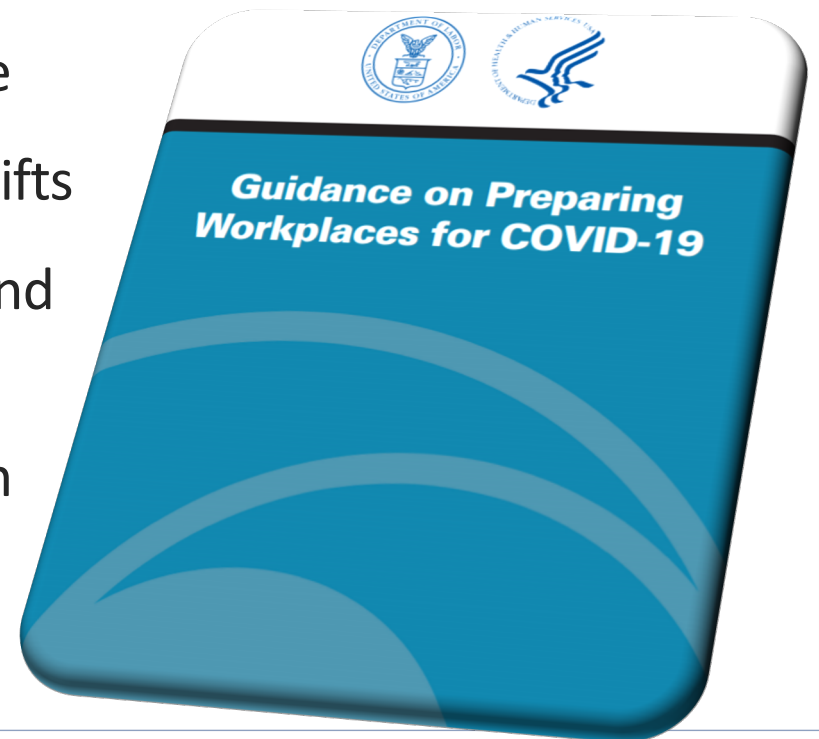
# State OSH Plans Adopting Emergency Temporary COVID-19 Regulations

- July 15 - VOSH adopted the nation's 1<sup>st</sup> workplace COVID-19 infection prevention regulation (emergency temporary standard effective the week of July 27)
- Generally, the ETS requires Virginia employers to:
  - Assess (and categorize) potential exposures to COVID-19 in their workplaces; and
  - Develop and implement infection control plans that include:
    - policies to remove known/suspected COVID-19 employees from the workplace
    - mandate social distancing measures
    - require masks where distancing is not assured
    - provide access to hand washing/sanitizing
    - adopt robust sanitation procedures
    - ensure appropriate air handling systems
    - require notification to employees w/in 24 hours if a coworker tests positive
  - Train employees in Medium, High and Very High risk workplaces



# Protections to Consider

- **Implement COVID-19 Exposure Control Plan / Response Plan**
- Implement engineering and administrative controls
- Temp. PPE Hazard Assessment (consider gloves, gowns, respirators)
- Signage/communication for employees/guests re: hygiene practices
- ID and require sick employees to stay home
- Limit workforce / staggered and rotating shifts
- Provide adequate supply alcohol-based hand sanitizer, cleaning supplies, and hand soap
- Enhance workplace housekeeping program
- Discourage use of other workers' phones, desks, offices, tools and equipment





# Written COVID-19 Exposure Control and Response Plans

## ***Written Exposure Control Plan***

- Overall plan to address a significant hazard (like your Lockout/Tagout Program or Haz/Com Program)
- Should be tailored to your specific site
- OSHA asks for and likes them and many states are even requiring them
- Effective communication tool so your employees know you care and can see what you're doing

# Social Distancing

- Signage and communication
- Hall monitors
- Modify/move workstations
- Stagger shifts/breaks/meals
- Reconfigure breakrooms/add new areas
- One-way halls/pathways

# Pre-Shift Health Screening

- As a global pandemic, COVID-19 is a “direct threat” to the workplace, so employers may take employee temps
- May also ask employees about their symptoms
- Consider where, how to, and who will conduct screening
- Protect the temperature-taker from exposure
- Screening implicates record preservation obligations:
  1. Employers must maintain personal info about employee illness as ***confidential*** medical record under ADA for 1 year
  2. ***Possibly*** covered by OSHA’s 1910.1020 – 30+ year retention
- Do not document actual temperature or symptoms - just ✓/X, or Enter/ Do Not Enter



# Sanitizing & Disinfecting

- Enhanced daily cleaning
  - Focus on high touch point areas
  - Common areas (tasting room, breakrooms, restrooms)
  - Shared equipment (PITs, LOTO locks, taps, tanks, kettles, vessels, etc.)
- Regular deep cleaning
  - Weekly or bi-weekly
  - In response to confirmed case
  - Third party professional service
- Develop checklist and maintain logs
- Check state & local guidance re: disinfecting & cleaning



# Respirators, Face Masks and Face Coverings

# OSHA Face Covering, Mask, and Respirator Guidance

- **Face covering (cloth mask/bandanas)** – not considered PPE and employer does not have to pay for them under 1910.132
- **Surgical/dental mask** – not PPE if being used *only* as source control (i.e. not to protect workers against splashes and sprays) and employer does not have to pay for them under 1910.132
- However, OSHA has expressed that Sec. 5(a)(1) of the OSH Act may require employers to provide and pay for such masks, as they are intended as a feasible means of abatement in a control plan
- So, we recommend employers provide and pay for masks



## Requiring Employees to Wear Masks

- **What if an employer has distributed face coverings, but an employee fails to bring their face covering to work?**
  - Employer should have extra at work, and the employee should not be permitted to work on-site until s/he is able to obtain a face covering
- **What if employees want to use their own face coverings?**
  - Must make sure the coverings meet the CDC's requirements and that they clean them correctly
  - Employers should provide employees a reimbursement or subsidy for material and cleaning costs
  - Must be work appropriate and cannot feature offensive images or content

## Responding to Confirmed Cases

- Immediately isolate and remove the employee from the workplace, and advise the employee to see a doctor and self-quarantine
- Conduct deep cleaning/disinfecting of areas where the employee worked
- Contact tracing to ID others who had close contact w/ infected employee
- Notify those who may have had close contact w/ infected employee while maintaining confidentiality of infected employee
- Those who had close contact should be isolated, removed, and directed to self-quarantine and get tested
- Those w/ minimal contact and no symptoms may remain at work w/ preventive actions (hygiene, masks, monitoring for symptoms)
- Develop return to work protocol (Negative test? Time w/out symptoms?)



# Recording and Reporting of COVID-19 Cases

## ***FAQ: Is a confirmed COVID-19 diagnosis of one of my employees recordable on my 300 Log?***

- Although OSHA's recordkeeping rule exempts cold/flu, OSHA has explicitly stated that COVID-19 can be a recordable illness
- Employers only have to record a COVID-19 case if:
  - It is a **confirmed case** of COVID-19 (at least 1 respiratory specimen that tested positive for SARS-CoV-2 virus)
  - It results in 1 or more **general recording criteria** (treatment beyond 1<sup>st</sup> aid; days away; etc.)
  - It is determined to be **work-related** as defined by 1904.5

### **Recording workplace exposures to COVID-19**

OSHA recordkeeping requirements at 29 CFR Part 1904 mandate covered employers record certain work-related injuries and illnesses on their OSHA 300 log.

While 29 CFR 1904.5(b)(2)(viii) exempts recording of the common cold and flu, **COVID-19 is a recordable illness** when a worker is infected on the job.

# Work-Relatedness Guidance

- Employers must undertake a case-by-case work-relatedness analysis to determine whether it is *more likely than not that an exposure in the workplace caused the illness*
- Employers “not expected to undertake extensive medical inquiries” and may consider only reasonably available evidence
- OSHA listed types of evidence that make COVID-19 illnesses “likely work-related” if:
  - Infected soon after close contact w/ confirmed case, *and no alternate explanation*
  - Several cases among workers w/ close contact, *and no alternative explanation*
  - Job duties include frequent exposure to general public in area w/ ongoing community spread, *and no alternate explanation*



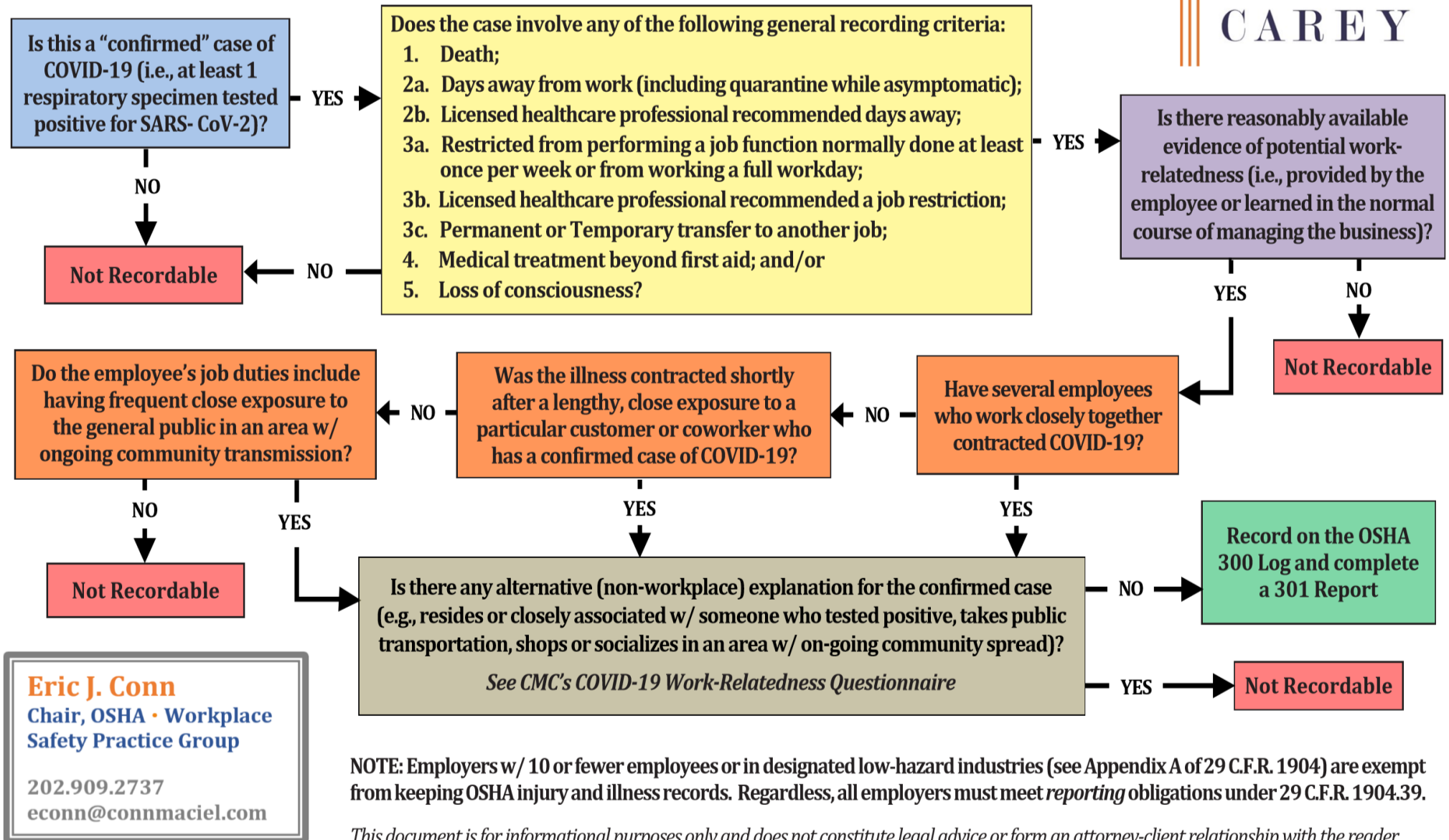
## ***FAQ: Same question, but reporting to OSHA?***

- Same analysis for work-relatedness applies
- Report only where there is a death or in-patient hospitalization
- Hospitalization is reportable only if the employee is formally admitted to the in-patient service of the hospital for treatment ***w/in 24 hours of the work-related exposure*** that caused the illness (extremely unlikely)
- Fatality is reportable only if it occurs w/in 30 days of the work-related exposure (possible)

# COVID-19 OSHA Recordkeeping Flow Chart

Use this flow chart to assess whether to record an employee's COVID-19 illness on the OSHA 300 Log.

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# Liability From COVID-19 Related Claims in the Workplace

# Liability From COVID-19 Related Claims in the Workplace

- Employers must follow all applicable guidance from the CDC, state and local authorities, and OSHA, including the overriding legal duty employers have to maintain a workplace free of recognized serious hazards, or they will risk tort liability.
- Exceptions to workers' compensation exclusivity bars:
  - Ex: if an employer is found to be grossly negligent by failing to take any steps to mitigate COVID in the workplace, the employer could be susceptible to suits by employees.



# COVID-19 Liability Relief Legislation

- Senate bill expected to be introduced by Majority Leader McConnell (R-KY) and Senator Cornyn (R-TX).
- Defendants would only be liable for COVID-19 based claims if they failed to make reasonable efforts to comply with public-health guidelines and instead exhibited gross negligence and intentional misconduct.
- The legislation would also protect employers from liability for injuries arising from workplace coronavirus testing
- The law would also amend the WARN Act to give employers more flexibility given the economic downturn caused by the pandemic.

# Liability Resulting From COVID-19 Claims in the Workplace

- Since March 17, there have been 364 lawsuits (including 46 class actions) filed against employers due to alleged labor and employment violations related to the pandemic.
  - 100 complaints in May;
  - 141 complaints in June; and
  - 64 complaints as of July 16.
- California leads with 59 cases, with Florida (47), New Jersey (38), and New York (34) following closely behind.
- The most common complaints have been retaliation (116), wrongful termination (107), discrimination (72), and workplace safety (69).

# Liability Resulting From COVID-19 Claims in the Workplace

- Employers should take the following actions if an employee exhibits COVID-19 symptoms:
  - Quarantine the employee immediately;
  - Conduct contact tracing to identify other employees who had contact with the infected employee; and
  - Inform such employees of potential infection and send COVID-19 positive employees home until cleared by a medical professional.
- Employers should be transparent with their employees and actively engage with employees who are quarantined or who have tested positive.

# Contact Tracing and Data Privacy

- What data is collected, how long, data security, whether data is shared with third parties, and what sort of notice and consent are required.
- Develop policies that describe how the technology works, what is collected, how the data and app will be used, requisite disclosures/consent under applicable laws, and any rights to reimbursement.
- Choose tech apps that collect as little data as possible or store data for short periods of time.
  - Certain apps have demonstrated privacy by design principles that collect very little data, geofence the workplace, store data for 30 or less days, and store data on encrypted platforms.
- Ensure confidentiality.

## Are Liability Waivers Enforceable?

- Likely not against claims of negligence b/c it implicates public policy – like contracts for employment.
- Courts may strike them down if employees and customers have not had a chance to bargain over the terms.
- Consider having your employees sign an acknowledgment that they understand what steps your company is taking to ensure a safe workplace and they commit to following policies and procedures w/ a risk of discipline if they do not

# Conn Maciel Carey COVID-19 Task Force Resources

**COVID-19 TASK FORCE**

As employers around the country grapple with the employment law and workplace safety implications of the 2019 Novel Coronavirus, "COVID-19," Conn Maciel Carey has formed a multi-disciplinary legal and regulatory task force comprised of our dedicated Workplace Safety, Labor and Employment Law, and Litigation attorneys to help our clients across all industries manage the multitude of pandemic-related issues employers are facing and prepare for potential litigation that is around the corner. We have produced a comprehensive database of resources to guide employers through this uncharted territory and the unique workplace challenges presented by the presence of a new health hazard in our nation's workplaces.

**Members of CMC's COVID-19 Task Force**

Eric J. Conn OSHA Chair	Kara M. Maciel Labor and Employment Chair	Bryan A. Carey Partner	Nicholas W. Scala MSHA Chair
Kate M. McMahon OSHA Partner	Jordan B. Schwartz Labor and Employment Partner	Andrew J. Sommer Cal/OSHA and Employment Partner	Aaron R. Gelb OSHA and Employment Partner
Amanda Strainis-Walker OSHA Partner	Mark M. Trapp Labor and Employment Partner	Lindsay A. DiSalvo Associate	Megan S. Shaked Associate

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**COVID-19 FAQs for Employers**

As the COVID-19 Pandemic continues to evolve, we have created an [extensive index of frequently asked questions](#) about HR, employment, and MSHA/OSHA related regulatory developments and guidance from federal agencies and the CDC. Conn Maciel Carey's COVID-19 Task Force will be updating our list of FAQs frequently, but please reach out to us for the most up to date information.

- [Employee Layoffs & Reduced Working Schedules](#)
- [The CARES Act](#)
- [Vacation, Paid Time Off & Sick Leave](#)
- [OSHA Recordkeeping and Reporting of COVID-19 Cases](#)
- [Temperature Checks for Employees](#)
- [Personal Protective Equipment](#)
- [Preventing Exposure in the Workplace](#)
- [Annual Physical Requirements](#)
- [Space Restrictions in Retail](#)
- [On-Site Inspection Activities](#)
- [Employer-Employee Confidentiality](#)
- [Emergency Infectious Disease Rule / NEP](#)
- [Offer Letters & Flexible Start Dates](#)
- [Employer Liability](#)

**COVID-19 OSHA Recordkeeping and Reporting Resource Guide**

CMC's COVID-19 Task Force has prepared a series of resources to assist employers in assessing whether a COVID-19 diagnosis for one of its employees is reportable to OSHA and/or recordable on the company's OSHA 300 Log, and if so, "how to" record it on the log. The toolkit includes a COVID-19 OSHA Reporting Flow Chart, a COVID-19 OSHA Recording Flow Chart, a one-pager on "How to record" COVID-19 cases on the log, and a detailed "Work-Relatedness Questionnaire." For more information about the OSHA reporting and reporting implications of COVID-19, [read this detailed article](#).

**COVID-19 FAQs for Employers**

# Kara M. Maciel

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**Kara M. Maciel** is a founding partner of **Conn Maciel Carey LLP** and Chair of the Labor • Employment Practice in representing employers in all aspects of the employment relationship:

- Defends employers in litigation at both the federal and state levels, including matters related to ADA, FLSA, FMLA, Title VII, and affirmative action/OFCCP regulations
- Counsels employers on compliance with federal and state law, including issues related to hiring, discipline, internal investigations, and termination
- Advises unionized and non-unionized workplaces regarding the employer's rights under the National Labor Relations Act

# Eric J. Conn

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**Eric J. Conn** is a founding partner at **Conn Maciel Carey LLP** and Chairs the Firm's national OSHA • Workplace Safety Practice Group:

- Practiced 11 years alongside the former first General Counsel of OSHRC
- Focuses on all aspects of occupational safety & health law
- Represents employers in inspections, investigations and enforcement actions involving OSHA, state OSH Plans, CSB, MSHA, & EPA
- Manages investigations of catastrophic industrial, construction, and manufacturing workplace accidents, including explosions and releases
- Litigates OSHA citations and criminal prosecutions to minimize penalties, abatement requirements, and the impact on tort actions and operations
- Conducts safety training & compliance counseling
- Co-Chair of Conn Maciel Carey's COVID-19 Task Force

# Check out our blogs:

## the **OSHA DEFENSE** report



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## the **EMPLOYER DEFENSE** Report



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## ... **2020 Labor & Employment WEBINAR SERIES** ...

California Employment Law Update for 2020

Wednesday, January 15th

Illinois and DC Area State Law Update

Tuesday, February 18th

Whistleblower / Retaliation Issues and Strategies

Wednesday, March 25th

Impact of the #MeToo Movement: Enforcement and State Law

Wednesday, April 22nd

Are Your Websites ADA Compliant? What Employers Need to Know

Wednesday, May 12th

Withdrawal Liability and Pensions

Wednesday, June 24th

The State of the Law Regarding Marijuana and Drug Testing

Wednesday, July 15th

OSHA and Labor & Employment Issues: Employee Discipline

Tuesday, August 19th

NLRB Update

Wednesday, September 16th

Conducting Background Checks: Federal, State and Local Law

Tuesday, October 13th

Federal Wage and Hour Update

Wednesday, November 11th

Delaying Retirement: Impact of America's Aging Workforce

Wednesday, December 16th

# the **OSHA** DEFENSE report



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## ... **2020 OSHA WEBINAR** series ...

OSHA's 2019 in Review and 2020 Forecast

Thursday, January 23rd

OSHA Settlement Tips and Strategies

Tuesday, February 25th

Strategies for Responding to Whistleblower Complaints

Wednesday, March 25th

Annual Cal/OSHA Update

Thursday, April 16th

E-Recordkeeping and Injury Reporting Update

Wednesday, May 20th

OSHA's PPE Standards - Top 5 Risks and Mistakes

Tuesday, June 16th

What You Need to Know About OSHA's General Duty Clause

Thursday, July 23rd

Employee Discipline - OSHA and Labor & Employment Issues

Wednesday, August 19th

Privileged Audits and Investigations and OSHA's Self-Audit Policy

Tuesday, September 22nd

Impact of the Election on OSHA

Thursday, October 22nd

Updates about OSHA's PSM Standard and EPA's RMP Rule

Tuesday, November 17th

Impact of America's Aging Workforce on OSHA and Employment Law

Wednesday, December 16th

# QUESTIONS?

