



**CONSTANGY**  
BROOKS, SMITH &  
**PROPHETE** LLP

# Navigating Employment Law Challenges During COVID-19: An update

**October 2020**

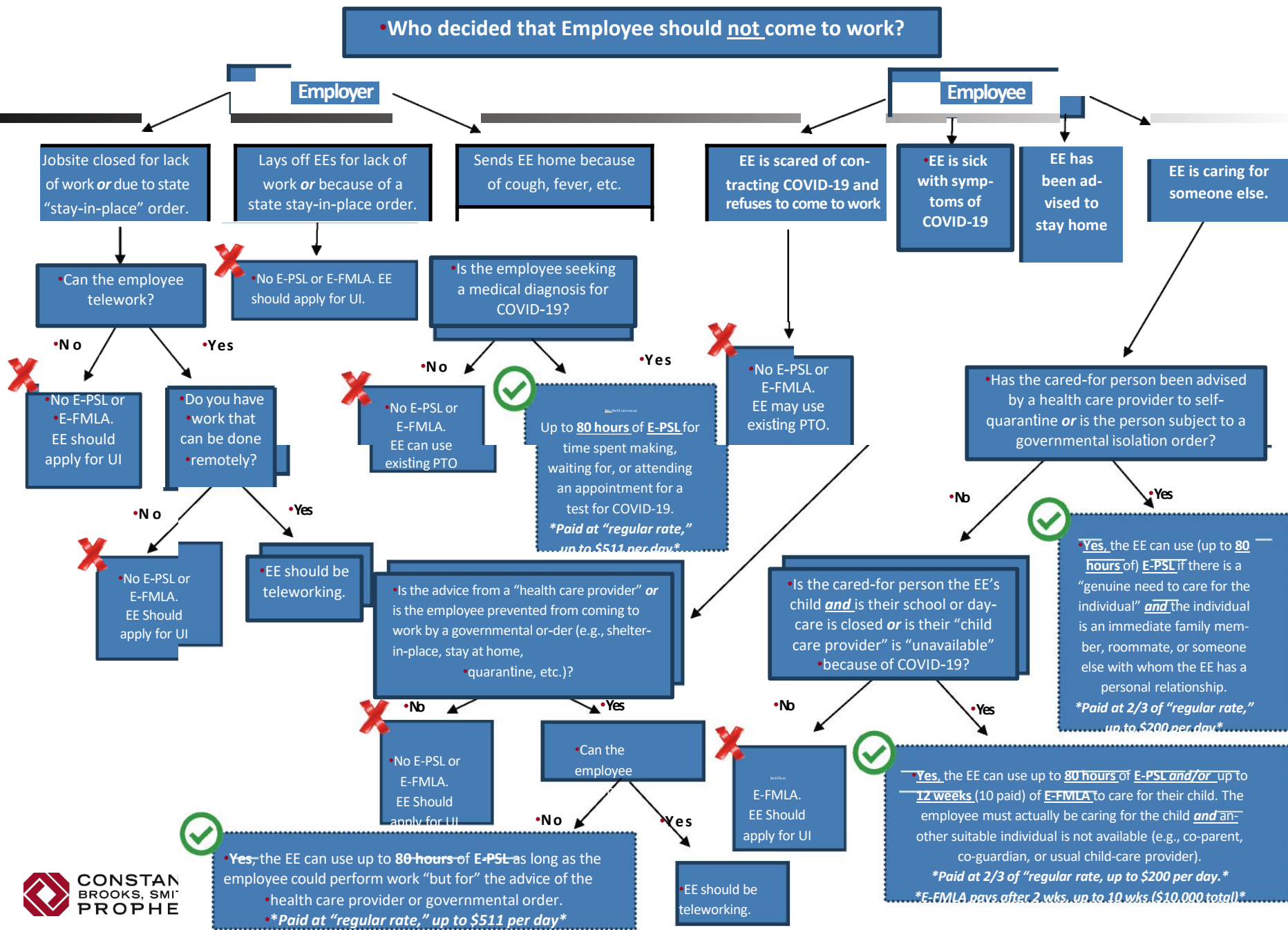
**Presented by:**

**Susan Bassford Wilson**

**Bob Ortvals, Jr.**

*A wider lens on workplace law*

# Emergency FMLA (E-FMLA) and Emergency Paid Sick Leave (E-PSL) under the FFCRA



# What we will *actually* discuss today

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1. Teleworking troubles and other wage-and-hour issues
2. Childcare concerns during COVID-19
3. Travel considerations
4. Coronavirus litigation
5. Real-life scenarios



# Teleworking troubles



# Teleworking troubles: DOL Guidance



- **COVID-19 and the Fair Labor Standards Act Questions and Answers**
  - Q. 8 - Employer may require employees to telework as an infection-control or prevention strategy
  - Q. 15 - Encourages flexibility during COVID-19
  - Q. 16 - Exempt employees may temporarily perform nonexempt duties required by an emergency without losing the exemption
- **Families First Coronavirus Response Act: Questions and Answers**
  - Q. 97 - May not use request for leave as a negative factor in an employment decision



# Teleworking troubles: DOL Guidance



## Field Assistance Bulletin No. 2020-5 (Aug. 2020):

- “An employer’s obligation to compensate employees for hours worked can therefore be based on actual knowledge or constructive knowledge...”
  - Regularly scheduled hours = actual knowledge
  - Employee reports of hours or other notifications = actual knowledge
  - Failure to report unscheduled hours worked when a formal policy or process for reporting overtime exists = no actual or constructive knowledge



# Teleworking troubles: Group discussion



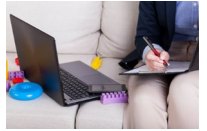


# Childcare concerns during COVID-19





# Childcare concerns during COVID-19



- The puzzle pieces include
  - The Families First Coronavirus Response Act leave
  - Flexible schedules
  - Fully remote operations
  - Reduced hours
  - Additional leave
  - Providing childcare subsidies or onsite childcare services
  - Job sharing



# Childcare concerns during COVID-19



- FFCRA leave documentation
  - Child's name;
  - Name of school, place of care, or childcare provider that has closed or become unavailable; and
  - Statement from employee that no other suitable person is available to care for the child.
- Does FFCRA childcare leave still fit the current situation of schools either fully or partially reopening?



# Childcare concerns during COVID-19



- Childcare is positioned to be a significant company culture issue:
  - Disproportionately impacts women and persons of color
  - Companies have overwhelmingly responded by focusing on allowing remote work and flexible work hours.
  - While employers often view this as a childcare accommodation, employees don't.
  - 22% of working parents are unlikely to return or unsure whether they will return to their pre-COVID work situation.
  - The less flexible the job, the more likely employees are to value onsite or paid childcare.



# Childcare concerns during COVID-19: Group discussion



# Travel considerations



# Travel considerations



- Per the CDC, “Staying home is the best way to protect yourself and others from COVID-19.”
- OSHA General Duty Clause
- Business v. personal travel
- In general:
  - Check national, state, and local travel restrictions for destinations
  - Permitting v. requiring
  - Mitigating and safety measures
  - Consider precautionary quarantine



# Travel considerations



- Wage-and-hour impact from increased travel PPE and waiting time
- ADA accommodation implications if an employee doesn't want to travel
- FMLA leave requests by employees who don't want to travel?
- Practical responses to employee concerns





# Travel considerations: Group discussion



# COVID-19 litigation



# COVID-19 litigation



- COVID-19 suits are increasing exponentially.
- Popular suits filed to date include:
  - **Contracts:** Often filed as class actions, cases seeking refunds for services not provided as a result of the COVID-19 pandemic, e.g. flights, tuition, etc.
  - **Insurance:** Often seeking coverage for business interruption losses.
  - **Employment:** Trending topics include failure to pay minimum wage or overtime, failure to provide reasonable accommodations, FFCRA litigation, and retaliation/whistleblower claims.



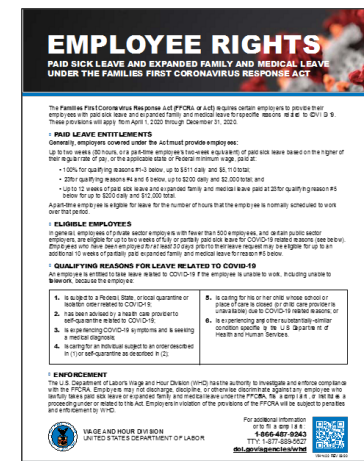
# COVID-19 litigation: Group discussion



# COVID-19 litigation



- Communicate with employees early and often.
- Establish clear expectations with regard to policies and procedures for returning to work (employee health screens, remote work requirements, etc.).
- Post and/or publish revised and new policies and procedures related to COVID-19.
- Establish system where employees can report concerns or violations of health and safety procedures.
- Pay attention to reliable guidance.



# “IRL” scenarios

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- Can we refuse to permit an employee to return to work if the employee has an underlying medical condition that might increase the risk of serious illness if exposed to COVID-19?
- Can we refuse to permit an employee to return to work if the employee has traveled to a COVID-19 hotspot/traveled on a plane/traveled anywhere?
- Can we require employees to sign a waiver of the right to sue if they return to work and subsequently contract COVID-19?





# “IRL” scenarios

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- Can we require that an employee report if they test positive for COVID-19 or they become aware that they have been in close contact with someone who has tested positive or is suspected of having COVID-19?
- Can we require that employees use their own laptop, cell phone or tablet while working from home but without any additional special payment?
- What are strategies available to respond to employee with childcare issues because of COVID-19 who wants to work 20 hours per week instead of 40 hours?







**CONSTANGY**  
BROOKS, SMITH &  
**PROPHETE** LLP

**QUESTIONS?**

**Susan Bassford Wilson**

**(314) 925-7275 or [swilson@constangy.com](mailto:swilson@constangy.com)**

**Bob Ortvals, Jr.**

**(314) 925-7270 or [rortvals@constangy.com](mailto:rortvals@constangy.com)**

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