



NAVIGATING UNCERTAINTY IN A COVID/POST-COVID WORLD

Return To Work – Managing New Challenges In The Workplace

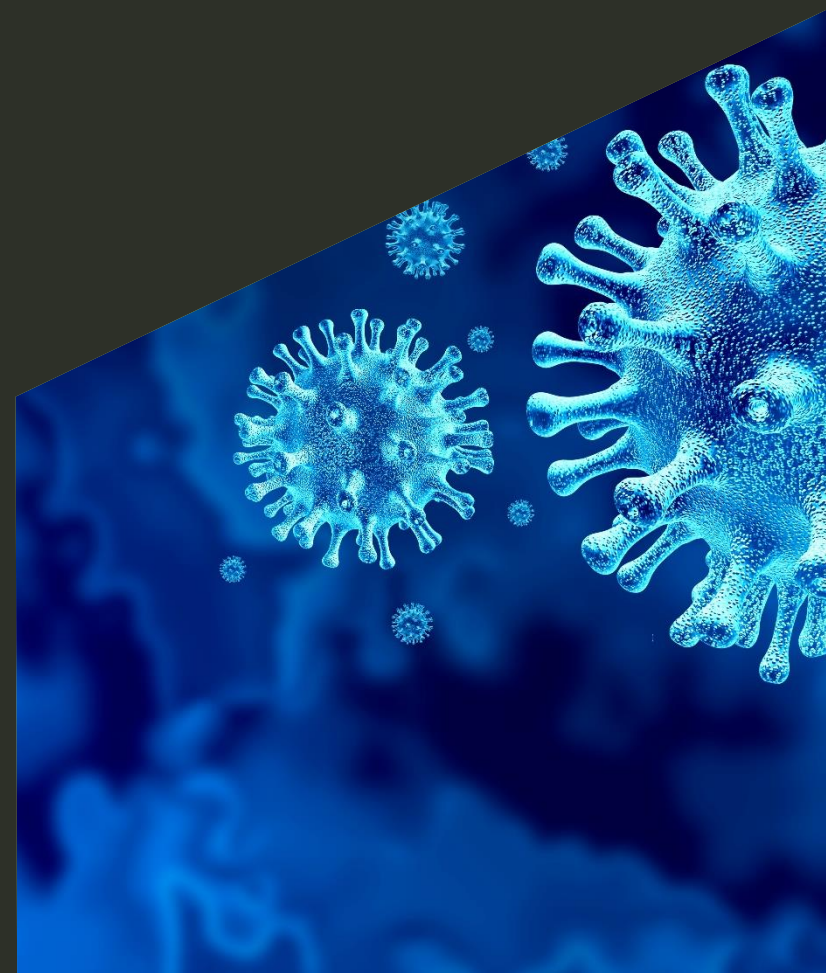
SPEAKERS:

CAROLE SPINK, PARTNER, MCDERMOTT WILL & EMERY | CHICAGO

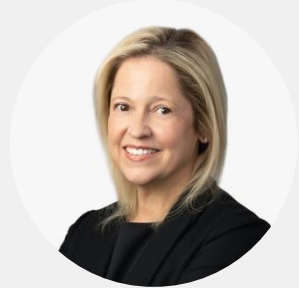
BRIAN MEAD, ASSOCIATE, MCDERMOTT WILL & EMERY | CHICAGO

CHARIS RUNNELS, ASSOCIATE GENERAL COUNSEL, BDO USA | CHICAGO

Tuesday, October 6, 2020



SPEAKERS



Carole Spink

Partner
McDermott Will & Emery

Carole Spink focuses her practice on international and domestic employment law counseling. Carole advises on appropriate employment structures, onboarding requirements, employment agreements, handbooks and policies, bonus and commission plans, expats, non-competes, reductions in force and terminations. She has extensive experience handling employment issues in mergers and acquisitions, spin-offs, corporate reorganizations, outsourcings as well as post acquisition integration matters. She also advises on cross-border employment compliance.



Brian Mead

Associate
McDermott Will & Emery

Brian Mead focuses his practice on various labor and employment issues. He defends employers, before state and federal courts and administrative agencies, in individual and class action litigation under the Americans with Disabilities Act, Title VII of the Civil Rights Act of 1964, the Family and Medical Leave Act, the Fair Credit Reporting Act, the Fair Labor Standards Act and other employment laws, including discrimination, wrongful termination, retaliation and breach of contract claims. Additionally, Brian has substantial experience in prosecuting and defending employee mobility, restrictive covenant and trade secret litigation cases on an emergency injunctive basis.



Charis Runnels

Associate General
Counsel
BDO USA

Charis Runnels is Associate General Counsel of BDO USA, LLP, the U.S. member firm of BDO International Ltd., one of the world's largest accounting and advisory organizations serving the middle market. As employment counsel with BDO since 2014, Ms. Runnels provides expertise and compliance and risk management advice to the Firm's leadership and human resources professionals on a broad range of issues, including partnership matters, recruiting, hiring, affirmative action, employee relations, discipline and terminations, internal investigations, leaves of absence, accommodations, wage and hour compliance, safety and health, immigration and contingent worker issues.

AGENDA

- Legal Update: FFCRA
- Hot Topic: Accommodations Including Remote Work
- COVID-Related Personal Injury, Workers' Compensation and Wrongful Death Claims
- Litigation on the Horizon, Including Off-Duty Conduct Claims

Note regarding Q&A: please use the Q&A feature in the Zoom window to submit your questions. All attendees will be muted and will be unable to verbally ask questions. Questions answered during the call will not be attributed to the participant who submitted the question. In the event we are unable to address all questions due to the time constraints, we will follow-up with you after the webinar.



LEGAL UPDATE: FFCRA

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

- Took effect April 1, 2020; remains in effect through December 31, 2020
- Employers with up to 500 employees are covered by FFCRA
 - Exemption from some provisions for employers with less than 50 employees
 - Reimbursable to employer through payroll tax credit
- There are two “buckets” of leave available under the FFCRA:
 - Emergency Paid Sick Leave (EPSL)
 - Provides up to 80 hours of paid leave
 - New leave entitlement that is provided in addition to any leave available under federal, state, or local law
 - Expanded Family and Medical Leave (EFMLA)
 - Provides up to 12 weeks of leave (first 2 weeks are unpaid, but an employee can use EPSL during this time)
 - Available EFMLA depends on how much FMLA leave the employee has already used during the employer’s 12-month measurement period

THERE ARE SIX QUALIFYING REASONS FOR LEAVE UNDER THE FFCRA

1. Employee subject to a quarantine or isolation order
2. Employee advised by health care provider to self-quarantine
3. Employee is experiencing COVID-19 symptoms and seeking medical diagnosis
4. Employee is caring for an individual described in **1** or **2** above
5. Employee is experiencing a substantially similar medical condition
6. Employee is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19

RECENT COURT DECISION CHALLENGING THE FFCRA – QUICK BACKGROUND

- *State of New York v. United States Department of Labor*
 - On April 14, 2020, the State of New York challenged certain provisions of the FFCRA, including the:
 - “Work-availability” requirement
 - Definition of “health care provider”
 - Employer approval requirement for intermittent leave
- On August 3, 2020, the S.D.N.Y. determined that:
 - Employees who are furloughed or out of work due to an employer closure *are* covered by the FFCRA
 - Employer approval is *not* required for intermitted leave
 - The “health care provider” exemption was too narrow, thus excluding too many workers from the FFCRA

ON SEPTEMBER 11, 2020, THE DEPARTMENT OF LABOR CLARIFIED THAT:

- The FFCRA provides relief for employees who cannot work because of the six enumerated reasons, which does not include unavailability of work from the employer
 - DOL reaffirmed FFCRA leave may only be taken if the employee has work from which to take leave and are unable to telework
- Employer approval *is* required for “intermittent leave”
- The definition of “healthcare provider” was intended broadly
 - Includes those “employed to provide diagnostic services, preventive services, treatment services, or *other services that are integrated with and necessary to the provision of patient care*”
 - Important to review any prior and current exemptions taken under this exception to ensure continued compliance with FFCRA

FFCRA PENALTIES

Remedies are the same as those allowed under the FLSA and FMLA:

- Actual damages
- Liquidated damages
- Attorney fees
- Class actions?
- Individual managers can be sued personally due to FLSA “employer” definition

FFCRA CLAIMS WE'RE SEEING

- Indiana: former employee suing large grocery company; alleging she had COVID-like symptoms and was terminated for alleged violation of attendance policy and should have received FFCRA leave
 - Novel legal theory: Although employer had more than 500 employees, plaintiff argues that it should be barred from arguing that it is exempt from the FFCRA because it voluntarily adopted a policy providing 14 days of paid leave for employees exhibiting COVID-19 symptoms
- Pennsylvania: former employee suing airline company; alleging interference with FFCRA rights and retaliation after she requested FFCRA leave to care for her child and was terminated a few days later
- New Jersey: former employee suing medical billing company; alleging denial of paid leave after being on doctor's orders to self-quarantine
- **Themes?** Denial of leave, retaliation for requesting leave, and termination

FFCRA BEST PRACTICES

- Designate an internal FFCRA expert or point person to oversee compliance
- Coordinate with outside counsel
- Train managers on how to deal with leave requests and to forward FFCRA inquiries/requests to the designated person(s)
- Make FFCRA benefit decisions fairly and consistently
- Maintain supporting documentation for each leave request, correspondence about each request, and any potential denial/adverse action



HANDLING ACCOMMODATION REQUESTS

ADA ACCOMMODATIONS

- Under the Americans with Disabilities Act (ADA), only “qualified individuals with disability” are covered
- A disability is defined as “a physical or mental impairment that substantially limits one or more major life activities” or “a history of a substantially limiting impairment”
- Nuance with COVID: individuals who may be at higher risk for developing complications from coronavirus
 - Serious chronic medical conditions such as heart disease, lung disease and compromised immunity
- Exacerbation of mental health issues like anxiety, obsessive-compulsive disorder and PTSD
- However, employees only have the right to a reasonable accommodation for their own disability
- **Make sure you obtain adequate (specifics!) documentation relating to any requested accommodation**

ADA ACCOMMODATION REQUESTS

- Common COVID-19 accommodations:
 - Temporary restructuring of marginal job duties
 - Temporary reassignment or transfer to a different position
 - Modifying work schedule or shift assignment
 - Remote work/teleworking
 - Leave of absence (or extended absence)
- Make the accommodations temporary by placing an end date
 - Specific date or when certain restrictions are lifted
 - Consider providing accommodation on temporary basis while discussing the request

The employee is not entitled to their choice of an accommodation

PRACTICAL CONSIDERATIONS

- Accommodation decisions should be funneled through one person or department to ensure consistency
 - Important all decisions are made in a fair, nondiscriminatory manner
- Determine the legal requirements surrounding any requests (ADA? FMLA? FFCRA? State / Local Requirements?)
- If telework is requested, employers should consider providing a telework agreement to ensure mutual understanding of the employee's duties and hours while working remotely
 - Specify expectations around hours, performance, availability, productivity for both exempt and nonexempt employees
 - Check in with employees regularly to ensure both employer and employee needs and expectations are met – **document any deficiencies that occur**

PRACTICAL CONSIDERATIONS CONTINUED

- Document any flex schedule or intermittent leave arrangements, and the performance expectations or issues regarding same – this includes documenting deficiencies when they occur
- Consider having employees work collaboratively on their schedules to adjust for respective childcare responsibilities
 - Some employers have considered informal “pods” of employees, wherein one employee might work in the morning while his or her coworker handles childcare responsibilities for both of their children, and in the afternoon, the other employee works
- Unpaid leave
 - Helps retain quality employees and eliminate employee turn over costs
- Subsidizing childcare costs

A WORD ON UNDUE HARDSHIP

- An employer does not have to provide a reasonable accommodation if it poses an “undue hardship” on the operation of its business
 - Significant difficulty or expense
 - May qualify now even if not in the past
 - Difficult to prove for most companies
- For extended absences, specialized positions may be harder to fill with temporary workers
- Weigh cost of the accommodation against discretionary funds
- Analysis must take into account the entire company
- Even if an accommodation would result in an undue hardship, an employer must still consider alternative accommodations

ADA & FMLA CLAIMS WE'RE SEEING

ADA	FMLA
<p><u>California:</u> former employee suing large grocery company; alleging that his coworkers and supervisors called him names and falsely accused him of having contracted COVID-19, refused to work with him, and that the behavior was so severe he was constructively terminated.</p> <p><u>Texas:</u> former employee suing construction company; alleging that he gave his employer a doctor's note stating that he was at a heightened risk for COVID-19 because of his lung condition, and that the employer terminated him the next day.</p>	<p><u>Indiana:</u> former employee suing large grocery company; alleging she had COVID-like symptoms and was terminated without receiving FMLA leave after missing work in violation of attendance policy.</p> <p><u>Illinois:</u> former employee suing health care company; alleging she was fired due to taking FMLA intermittent leave in the past and for requesting certain PPE.</p> <p><u>Ohio:</u> former employee suing financial trading company; alleging she was furloughed for taking FMLA leave previously and that the company interfered with her right to reinstatement after the leave.</p>

ADA: UNPAID LEAVE AS A REASONABLE ACCOMMODATION?

EEOC: “An employer must consider providing unpaid leave to an employee with a disability as a reasonable accommodation if the employee requires it, and so long as it does not create an undue hardship for the employer.”

Court results:

- *Nadaf-Rahrov v. Neiman Marcus Grp., Inc.*, 166 Cal. App. 4th 952 (2008) (the failure to continue extending monthly leave beyond **10 months** required reversal of summary judgment to the employer)
- *Epps v. City of Pine Lawn*, 353 F.3d 588, 593, n. 5 (8th Cir. 2003) (a **6 month** leave was all that was required. Because “Pine Lawn, a small municipality, could not reallocate Epps’s job duties among its small staff of fifteen to twenty-two police officers.”);
- *Cleveland v. Fed. Express Corp.*, 83 Fed. Appx. 74, 79-80 (6th Cir. 2003) (denying summary judgment to employer and finding that fact issues existed as to whether request for **6 months** of leave to deal with lupus constituted a reasonable accommodation);
- *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017) (finding that a **2-3 month** leave request post-FMLA “beyond the scope of a reasonable accommodation under the ADA” but that a “short leave of absence—say, a couple of days or even a couple of weeks—may, in appropriate circumstances, be analogous to a part-time or modified work schedule” that qualifies as a reasonable accommodation.)

ADA & FMLA BEST PRACTICES

ADA:

- Ask questions (and, if needed, request medical documentation)
- Discuss the recommended accommodation
- Explore alternative accommodations

FMLA:

- Designate an internal point person; consult outside counsel along the way; train managers to bring issues to HR; maintain good record-keeping.

Employer areas of pushback:

- ADA: undue hardship? Does the accommodation pose a direct threat? Is leave request indefinite?
- FMLA: medical certification, uniform return to work policy



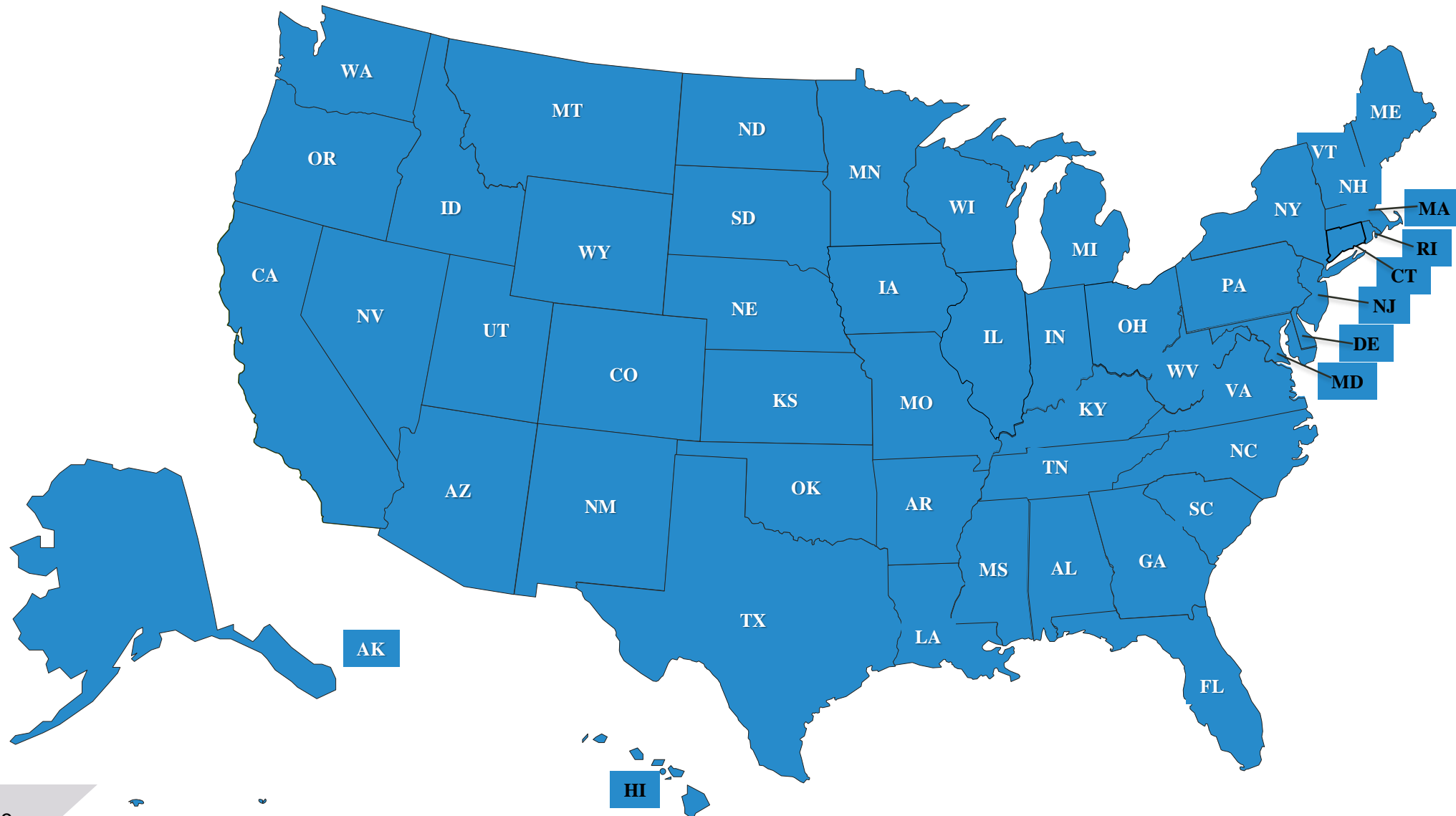
LITIGATION PERSONAL INJURY, WORKERS' COMPENSATION, AND WRONGFUL DEATH CLAIMS

GENERAL FRAMEWORK

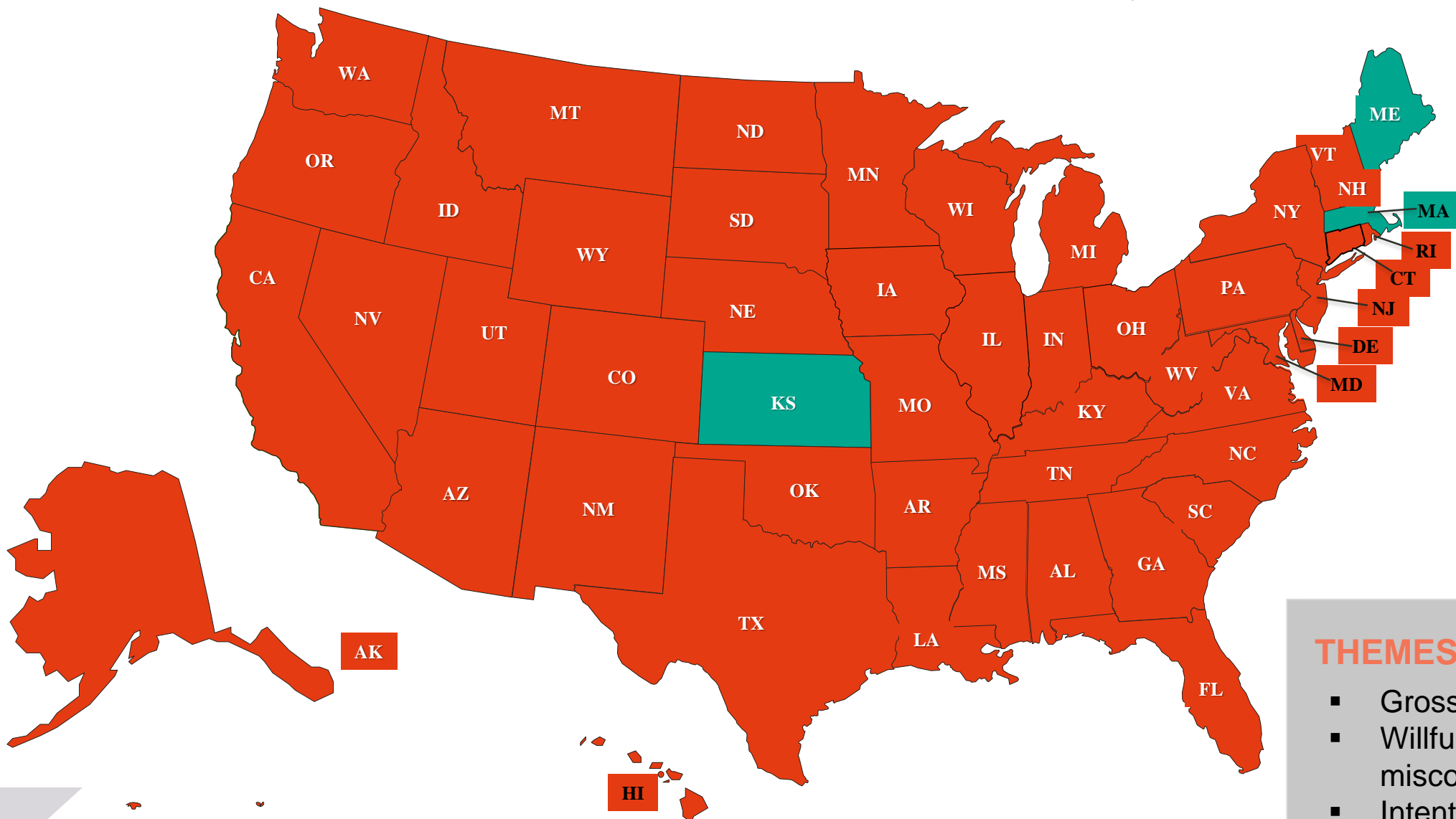
State-by-state issue with general themes:

- Claims for work-related injuries and illnesses are handled through workers' compensation insurance
- Workers' compensation coverage is mandated in each state and typically includes compensation for medical expenses and lost wages for employees who are injured or become ill in the normal course of, and as a direct result of, their employment
- May provide damages for specific injuries or even death
- **Exclusive remedy** with exceptions

Good News: All 50 states recognize occupational diseases as covered by workers' compensation or a separate occupational disease statute



Bad News: All but a few states recognize some form of exception to workers' compensation as the exclusive remedy



THEMES:

- Gross negligence
- Willful/intentional misconduct
- Intentional torts

CLAIMS WE'RE SEEING

- Illinois: family of deceased individual suing large retail store for wrongful death due to **willful misconduct**; alleging that the company failed to enforce social distancing guidelines, properly sanitize the store, provide sufficient personal protective equipment for employees, address the health concerns of workers with COVID-19 symptoms, or warn employees that they might be exposed
- Texas: family of deceased individual suing large food manufacturer for **malicious and grossly negligent conduct**; alleging that the company failed to provide PPE, negligently failed to protect employees against COVID, failed to supervise, failed to properly train, and failed to provide a safe workplace
- Texas: family of deceased individual suing large food manufacturer for **gross negligence** and wrongful death; alleging lack of PPE, lack of proper training, being told to report to work even while sick

CONDUCT THAT MIGHT MEET EXCEPTIONS?? TBD

- Failing to close a nonessential business
- Reopening a workplace without satisfying Centers for Disease Control and Prevention, Occupational Safety and Health Administration and other governmental guidelines
- Failing to monitor the health of employees before permitting them to enter the workplace
- Failing to provide personal protective gear or adequate hand-washing facilities
- Insufficient cleaning or sterilization of workplace facilities
- Failing to make necessary workplace modifications to allow for social distancing between employees or between employees and customers

BEST PRACTICES

- Promptly notify employees of suspected or confirmed workplace exposures, while protecting the privacy of sick employees by not revealing their identities
- Advising symptomatic employees to stay home
- Conducting health screenings of employees before they enter the workplace
- Providing appropriate PPE
- Frequently and thoroughly sanitizing workplaces, blocking off common areas, and possibly staggering shifts to minimize the number of workers in the workplace at the same time
- Document all of these practices, including the dates on which they were implemented
- Comply with all applicable guidelines from the CDC, OSHA, and states and cities as well as any industry-specific guidelines



LITIGATION ON THE HORIZON – INCLUDING OFF-DUTY CONDUCT CLAIMS

EMPLOYMENT LITIGATION STORM ON THE HORIZON

Some statistics:

- Nearly 800 COVID employment-related lawsuits since March 12
- Over 80 class actions
- Slow in March-May but 130-180 new cases per month in June-September

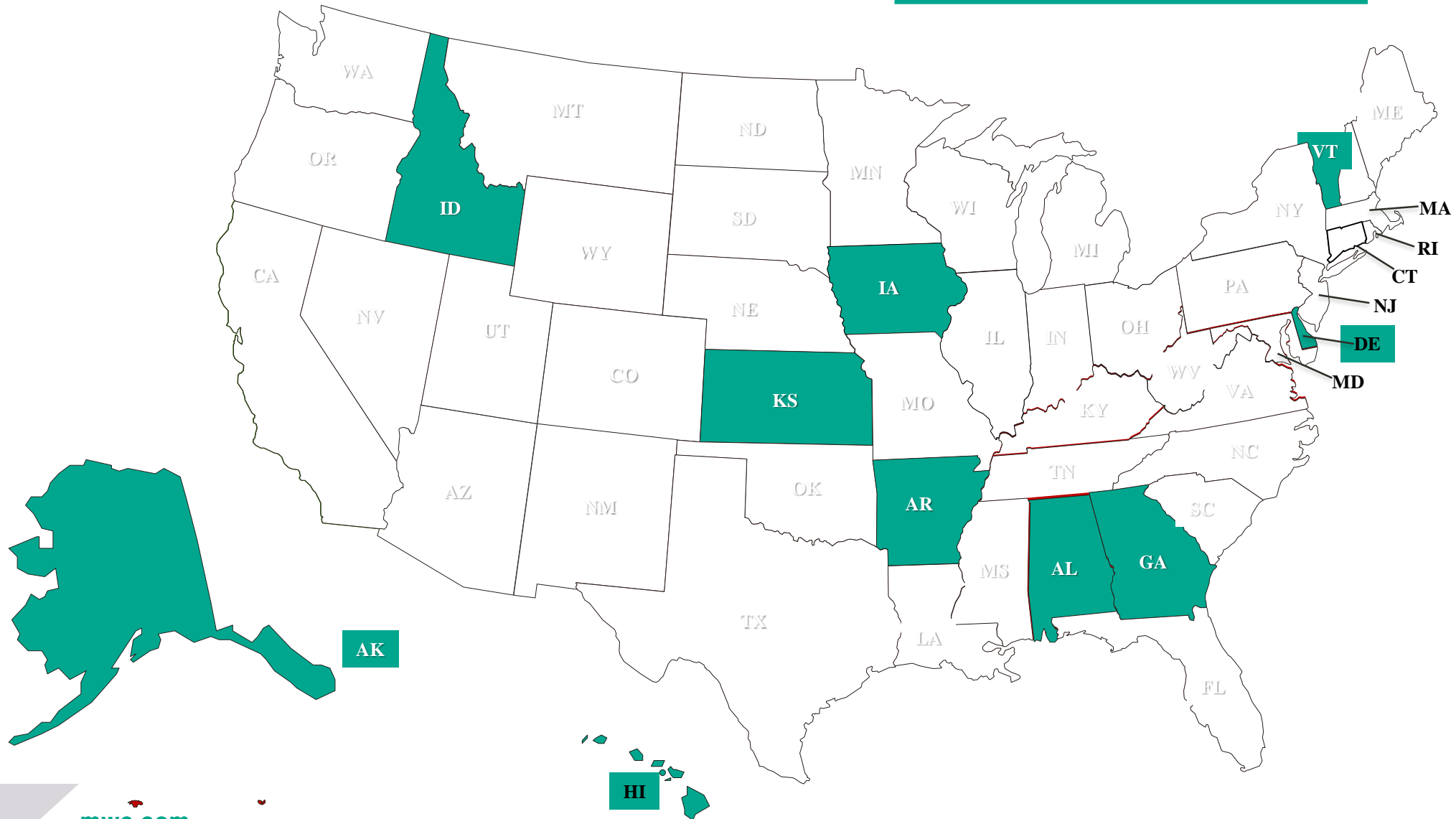
Most popular states?

- California nearly twice as many as the next highest state. New Jersey, Florida, New York, Texas, and Ohio

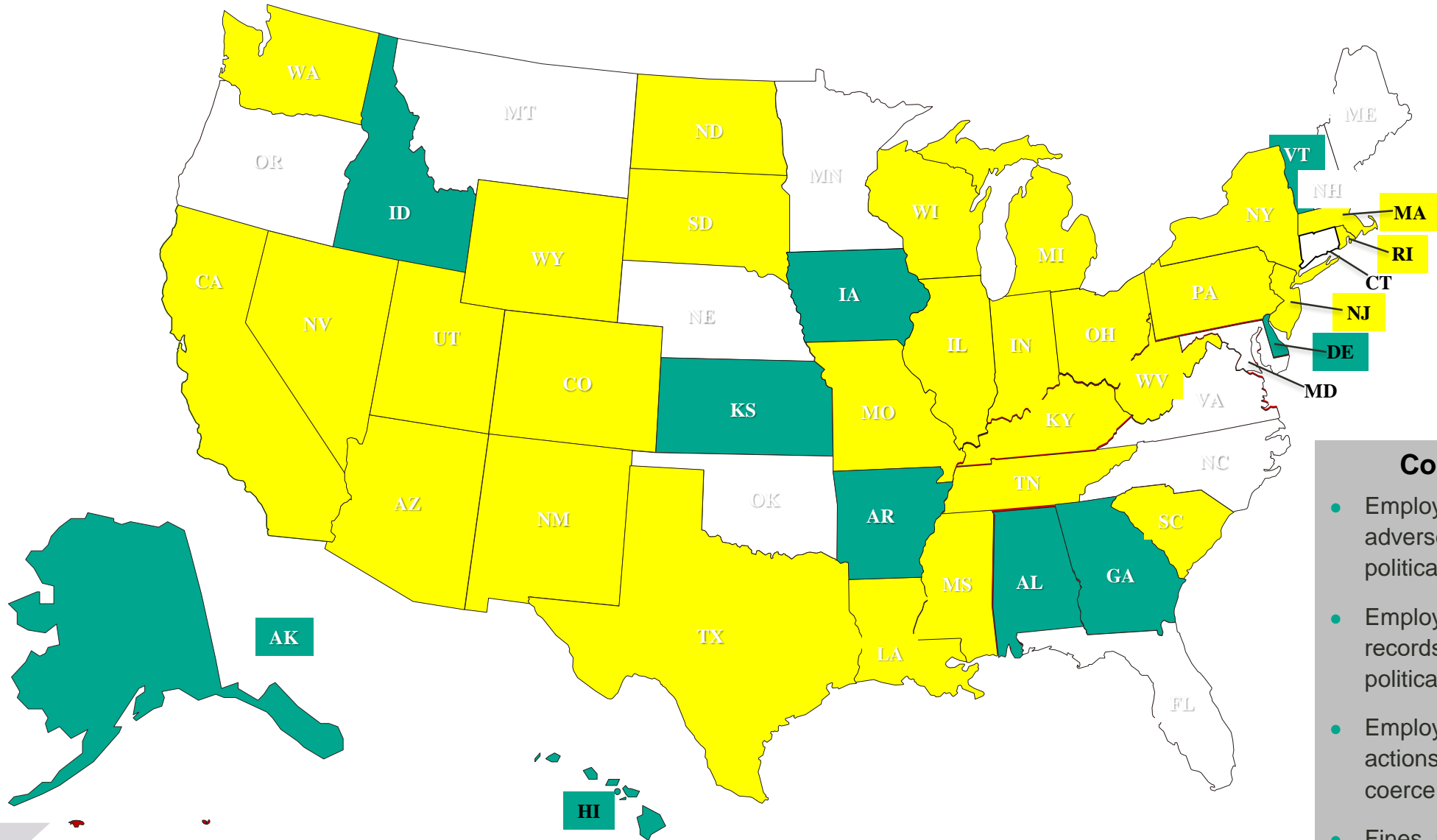
Most popular claims?

- Retaliation, wrongful termination, workplace safety, leaves of absence, and discrimination

NO LAWS AT ALL



OTHER STATES PROTECT AN EMPLOYEE'S PARTICIPATION IN POLITICS OR POLITICAL AFFILIATION



Common themes

- Employers may not take adverse actions based on political affiliation
- Employers may not keep records of an employee's political activities
- Employers may not take actions meant to influence or coerce political activity
- Fines, reinstatement, lost wages, etc.

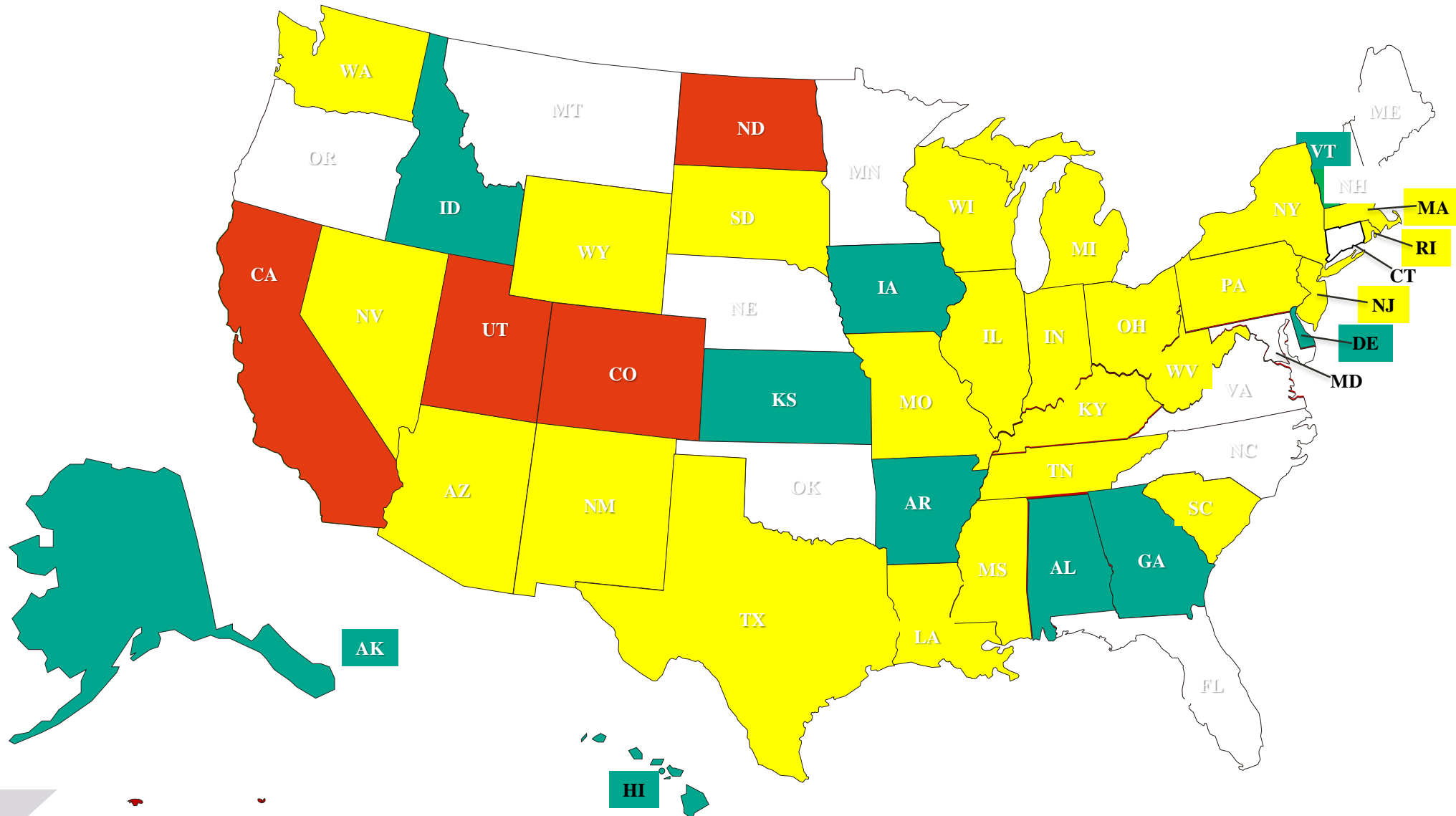
STATE LAW EXAMPLES

California: Employers may not make, adopt, or enforce any rule, regulation, or policy: controlling, directing, or tending to control or direct an employee's political activities or affiliations. Employers may not attempt to coerce or influence employees as to political action or activity by threatening discharge or loss of employment. Violations are misdemeanors, punishable by fine up to \$5,000, and employees can sue for damages. Cal. Lab. Code §§ 1101-1103.

Illinois: An employer shall not make or keep a record of an employee's associations, political activities, publications, communications, or nonemployment activities absent the employee's written submission or written consent. 820 ILCS 40/9. Employees can recover actual damages for violations.

New York: Employers cannot refuse to hire or otherwise discriminate against applicants and employees because of: **political activities** outside of work, **legal recreational activities outside** of work. Employers are subject to fines of \$300-\$500 and employees can sue for equitable relief and damages. N.Y. Lab. Law § 201-d(2).

OTHER STATES PROTECT ANY LAWFUL CONDUCT



STATES THAT PROTECT ANY LAWFUL CONDUCT

California: Employees can bring claims for reinstatement and “loss of wages as the result of demotion, suspension, or discharge from employment for **lawful conduct occurring during nonworking hours** away from the employer's premises.” Cal. Lab. Code § 96(k). The protection covers job applicants as well and comes with a penalty of up to \$10,000 per employee per violation. Cal. Lab. Code § 98.6.

Colorado: Employers may not “terminate the employment of any employee due to that employee's engaging in any **lawful activity off the premises** of the employer during nonworking hours” unless the restriction relates to a bona fide occupational requirement or is necessary to avoid a conflict of interest. Employee can recover damages and attorneys’ fees. C.R.S. § 24-34-402.5.

North Dakota: Employers can’t take adverse actions for lawful conduct off premises and during non-work hours as long as it is not in direct conflict with essential business-related interests. Back pay up to 2 years plus attorneys’ fees available. N.D. Cent. Code § 14-02.4-03.

Utah: No adverse actions based on lawful expressive activities (religion, politics, marriage, family, sexuality, personal convictions) outside of work unless in direct conflict with essential business-related interests. U.C.A. 1953 § 34A-5-112.

OTHER LAWS RELATED TO OFF-DUTY ACTIVITY AND COVID-19: STATE ORDERS

- **Illinois currently in its “Phase 4”**
 - **Gatherings:** All gatherings of 50 people or fewer are allowed with this limit subject to change based on latest data & guidance.
 - **Mask mandate:** Everyone over the age of 2 who can medically tolerate a face covering over their nose and mouth must wear one in a public place when unable to maintain a safe distance (6 feet) from others.
- **Georgia:** gatherings up to 50 people allowed with proper 6 foot distancing (enforced??). No mask mandate
- **Iowa:** gatherings of more than 10 people permitted with proper distancing (enforced??). No mask mandate
- **New York:** gatherings of up to 50 people permitted. Mask mandate
- **Texas:** gatherings of 100+ require state approval. Mask mandate for anyone 10 or older in indoor public spaces or when outside if a 6-foot distance cannot be maintained.
- **~34 states currently have mask mandates**

OTHER LAWS RELATED TO OFF-DUTY ACTIVITY AND COVID-19: LOCAL ORDERS

Chicago: Travelers from specified states (updated Tuesdays) should quarantine for 14 days upon arrival in Chicago:

- Alabama
- Arkansas
- Georgia
- Idaho
- Iowa
- Kansas
- Kentucky
- Minnesota
- Mississippi
- Missouri
- Montana
- Nebraska
- Nevada
- North Dakota
- Oklahoma
- Puerto Rico
- South Carolina
- South Dakota
- Tennessee
- Texas
- Utah
- Wisconsin
- Wyoming

The **Anti-Retaliation Ordinance** prohibits Employers from taking adverse action against Covered Employees for obeying a quarantine order, isolation order, or order from public authorities having to do with COVID-19, **and for taking care of someone subject to such an order**

The Anti-Retaliation Ordinance applies to **five types of orders**

#	Order	Issued by	Example
1	Stay at home to minimize the transmission of COVID-19	The Mayor, the Governor, or the Chicago Department of Public Health	You are a non-essential employee and there is a stay at home order in effect; or an emergency travel order mandates that you stay at home upon return from out of state
2	Remain at home while experiencing COVID-19 symptoms or sick with COVID-19	Treating healthcare provider	A doctor tells you to stay home because you have COVID-19 symptoms, such as a fever
3	Obey a quarantine order issued to the Covered Employee	Treating healthcare provider	A doctor tells you to stay home for a period of time because you might have been exposed to COVID-19
4	Obey an isolation order issued to the Covered Employee	Treating healthcare provider	A doctor tells you to stay home because you are or might be sick with COVID-19
5	Obey an order issued by the Commissioner of Health regarding the duties of hospitals and other congregate facilities	Commissioner of Health	You work at a hospital, nursing home, or other congregate facility, and your Employer is not abiding by an order to implement certain public health measures

SAMPLE OFF-DUTY CONDUCT POLICY

Other Off-Duty Conduct: As a result of the COVID-19 pandemic, it is more important than ever for employees to consider how their off-duty conduct may impact the workplace. Employees are expected to adhere to all federal, state, and local requirements and recommendations regarding social distancing, use of face coverings, limits on gathering sizes, proper hygiene etiquette, and other standards. Employee health and safety is of the utmost importance to the Company, and the Company reserves the right to inquire about employee's off-duty conduct to the extent that it **(i)** disrupts the Company's business; **(ii)** reflects publicly and poorly on the Company's reputation; or **(iii)** might endanger the health and safety of other employees. Employees are encouraged to raise any questions about this policy with their supervisors.

THANK YOU!

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For additional information, please visit:

[Return to Work Virtual Toolkit for Employers](#)

