



Business Lawyers Serving Business People



Coronavirus and Employment Law – The Latest

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Modern Day Curse

“May you live in interesting times”




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Let's Recap...


A Brief History of COVID-19

- February:** most employers became aware
- March:** businesses closed in “red phase”
- March – June:** employees out/back/out
- July:** PA moves into “green phase”
- October:** here we are – employees back?




PA Health and Safety Directives

PA Department of Health Order of April 15th and FAQs updated on April 27th – and many more possibly including local and county directives; CDC guidelines




PA Health and Safety Directives


Green Phase
Work & Congregate Setting Restrictions
<ul style="list-style-type: none"> All Businesses Must Follow CDC and PA Department of Health Guidelines
Social Restrictions
<ul style="list-style-type: none"> Aggressive Mitigation Lifted All Individuals Must Follow CDC and PA Department of Health Guidelines
<ul style="list-style-type: none"> Monitor public health indicators, adjust orders and restrictions as necessary




PA Health and Safety Directives

- Ø **Telework Must Continue Where Feasible**
- Ø Businesses with In-Person Operations Must Follow Updated Business and Building Safety Requirements
- Ø All Businesses Operating at 50% Occupancy in the Yellow Phase May Increase to 75% Occupancy, Except Where Noted for Bars and Restaurants
- Ø Masks Are Required in Businesses
- Ø Child Care May Open Complying with Guidance
- Ø Congregate Care Restrictions in Place
- Ø Prison and Hospital Restrictions Determined by Individual Facilities
- Ø Schools Subject to CDC and Commonwealth Guidance





**Timing and Scope of
Restricting Employees**



Reinstating Employees Now

- Ø No particular notice is required, but be practical and considerate of employee planning



Order of Reinstating Employees

- Ø No requirement to bring back employees in the same order or reverse order of how they were laid off (but see next section on Pitfalls)



Number of Reinstated Employees

- Ø No requirement to bring back all employees, BUT. . .
- Ø You may have serious Paycheck Protection Program (PPP) loan forgiveness considerations



PPP Loan Forgiveness and Employees

Recommendation:
“Remind” management that any layoffs or salary reductions will affect PPP loan forgiveness.





Discriminating Against Employees

- Ø Age, race, disability, gender, pregnancy, etc.
- Ø Recommendation: document the reasons and develop written criteria based on non-discriminatory factors

Hiring or Replacing Employees

- Ø Are you hiring new rather than reinstating employees? Why?
- Ø Recommendation: document the reasons and develop written criteria based on non-discriminatory factors

Seniority And Other Rights

- Ø Under collective bargaining agreement
- Ø Recommendation: review the CBA, confer with Business Agent; consult policies

Wage and Hour/FLSA Concerns

- Ø Non-exempt employees still get overtime
- Ø Exempt employees still get paid for an entire week if they work any part of it, with exceptions



Wage and Hour/FLSA Concerns

- Ø Exempt employees may be paid as non-exempt if performing non-exempt work
- Ø Employees still can't be treated as independent contractors



Employers Can't Require Certain Employees To Return

- Ø ADA leave
- Ø FMLA leave
- Ø Military leave
- Ø Workers' comp



Employers Can't Require Certain Employees To Return

- Ø If employee is qualified for leave under the FFCRA (Families First Coronavirus Response Act) which has the EPSLA (Emergency Paid Sick Leave Act) and the EFMLA (expanded FMLA)



FFCRA Refresher

- Ø Effective April 1 through Dec. 31, 2020
- Ø EPSLA: Six reasons to be out for up to two weeks. (2/3 daily rate capped at \$200/day; or full daily rate capped at \$511/day)
- Ø EFMLA: One reason to be out for up to an additional ten weeks. (2/3 daily rate capped at \$200/day)



FFCRA Refresher

Intermittent Leave under the EFMLA:

Employer must agree – different from regular FMLA leave to which the employee has a right regardless of employer approval. But wait. . .

No employer approval needed for school closings of scheduled full or partial day (e.g. M-W-F in person and T-R are leave days), because that's not "intermittent leave" – but full closure and then leave request would require employer approval. (Got it?)



FFCRA Refresher

Employer cannot require advance documentation of leave, but it needs to be provided as soon as possible thereafter.



FFCRA Refresher

- Ø Employer cannot force other benefits prior to FFCRA – *employee* chooses order of benefits
- Ø Employers with 25 or more must reinstate employee after EFMLA; under 25 no requirement if employee was out due to child care or position eliminated
- Ø Business reimburses itself for 100% of the FFCRA benefits paid by keeping social security payroll taxes.



FFCRA Small Business Exception

Small business exception for less than 50 employees exempt *only* from child care benefits, *only* if an authorized officer of the business has determined that:

1. The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
2. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.



Employee Refusal: Unemployment

Pandemic Unemployment Compensation (“PUC”) benefit of \$600/wk ended on July 31, 2020



Employee Refusal: Unemployment

By the way, an employer does *not* have an affirmative obligation to contact the unemployment job center and report the rehiring of employees, but you can. The employee does.



Employee Refusal: Fear

“I’m scared I’ll catch the virus”

Recommendation/Part 1:

- Ø Medical certification?
- Ø Work it out with employee through accommodations?
- Ø Special case such as health condition or family situation?



Employee Refusal: Fear

Recommendation/Part 2:

Employee can be left on furlough, reduced hours, disciplined or fired; unemployment notified of voluntary resignation



Employee Refusal: Fear

Recommendation/Part 3:

- Ø Document the circumstances
- Ø Ask employee to sign a statement
- Ø Provide clear consequences in writing to employee
- Ø Make certain the business has complied with current local, state and federal health and safety guidelines



Employee Refusal: Ramifications

- Ø It's unknown how unemployment will view employee refusal – as a voluntary resignation?
- Ø It's unknown whether firing would be “wrongful termination” in violation of public policy (but it's doubtful)



Best Practices for the Return

- Ø Provide reasonable notice of the return to work date
- Ø Advise if permanent or temporary
- Ø Advise of salary level
- Ø Advise of change of duties



Best Practices for the Return

- Ø Advise of health and safety measures
- Ø Provide “Return to Work Plan”



Best Practices for the Return

Think twice! And be flexible.
Many requirements, deadlines, obligations, etc. have been changed or extended (e.g. COBRA payments and deadlines, tax deadlines, borrowing from 401(k) and many more)



Unknown: Employer Liability Going Forward

- Ø Direct violation of governmental health and safety directives (fines or penalties)
- Ø OSHA complaints
- Ø Whistleblower actions
- Ø Workers’ comp claims
- Ø Negligent hiring or retention of employee claim




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Company Policy Changes

Return to Work Plan

Written plan to all employees that lays out the following (although a writing is not required):


- Ø Timing of the return
- Ø Describe phases of return if applicable
- Ø Employee screening upon return
- Ø Health and safety protocols upon returning
- Ø Employee responsibilities
- Ø Contact persons at the company for questions or concerns
- Ø Statement that the Plan is subject to change without notice
- Ø Employee acknowledgment of receipt



Return to Work Plan

The Return to Work Plan does not take the place of other required or usual documents, such as medical certifications, FMLA paperwork, company policies, employee contracts, or a CBA.

If the Return to Work Plan is in writing, make sure it complies with all governmental directives!




Changes /Additions to Company Policies

- Ø Sick Leave Policy (aside from the FFCRA)
- Ø Vacation / PTO
- Ø Requirements to notify in case of illness
- Ø Visitor Policy
- Ø COVID procedures (social distancing, masks, etc.)
- Ø Dress code
- Ø Confidentiality
- Ø Recording hours / overtime

And of course. . .

- Ø Teleworking Policy






Employer FAQs

Can we ask employees to stay home if we suspect they have been exposed to coronavirus?

Employer FAQs


Can we ask employees to inform us if they have come in contact with someone who has or is suspected to have coronavirus, or is quarantined?

Employer FAQs

Can we fire employees who have the coronavirus?


Employer FAQs

Upon return to work, are we required to allow employees to take their sick, vacation, or PTO time?




Employer FAQs

Can we tell other employees about an employee who has or may have coronavirus?




Employer FAQs

Can we require employees to get an antibody test before returning to work?



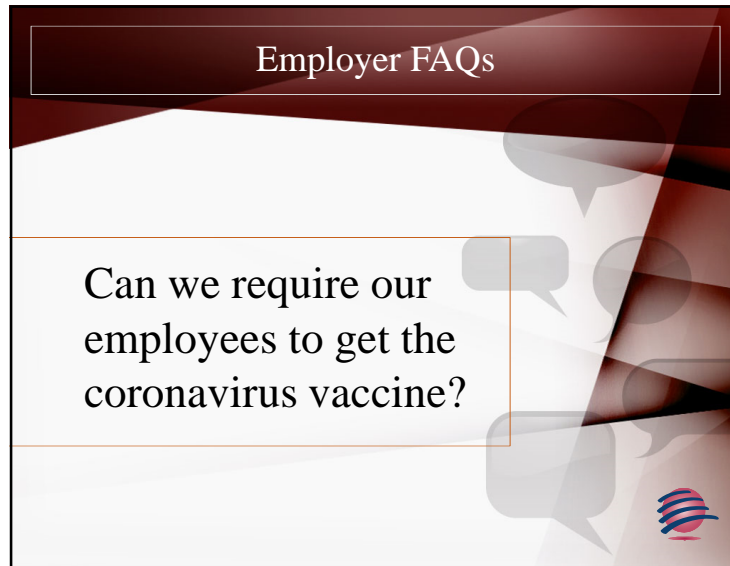
Employer FAQs

Can we require our employees to get the seasonal flu vaccine?



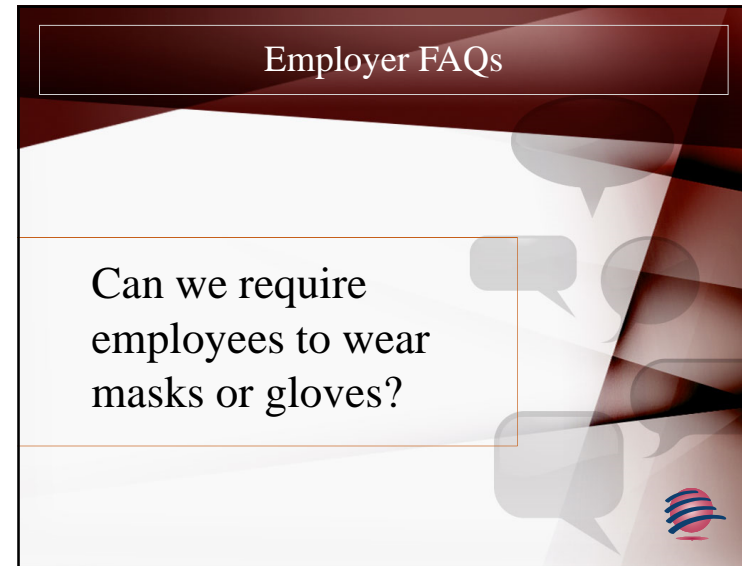
Employer FAQs

Can we require our employees to get the coronavirus vaccine?



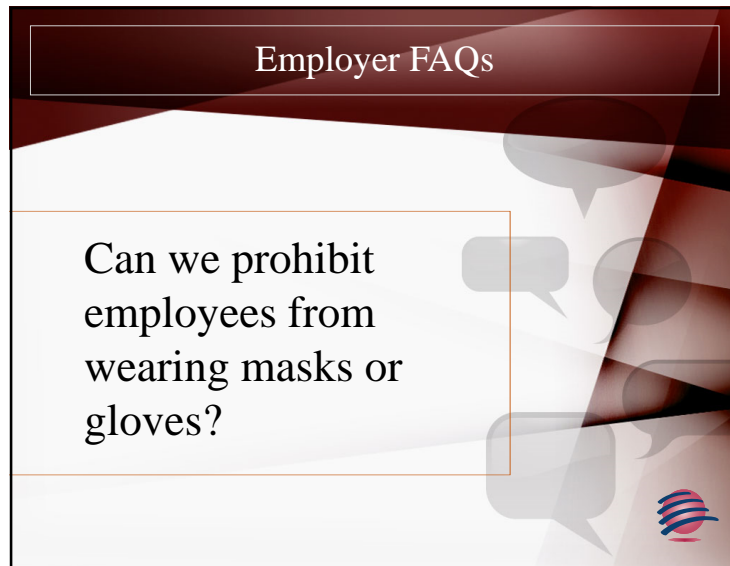
Employer FAQs

Can we require employees to wear masks or gloves?



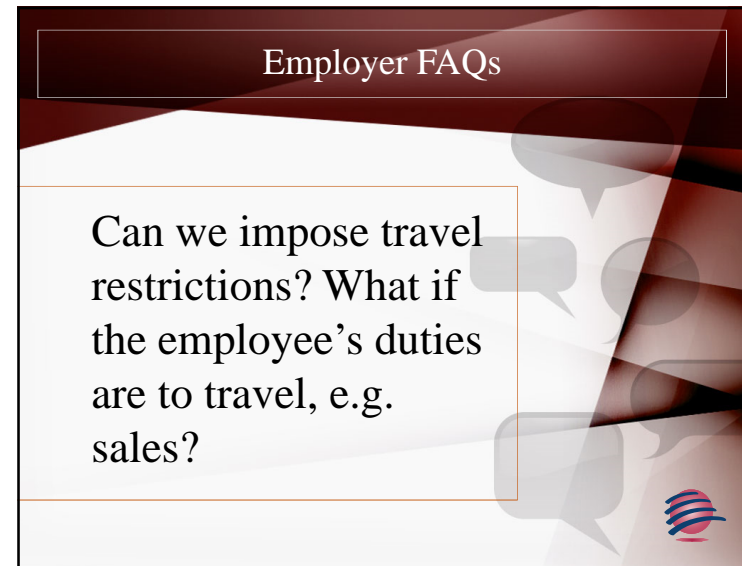
Employer FAQs

Can we prohibit employees from wearing masks or gloves?




Employer FAQs

Can we impose travel restrictions? What if the employee's duties are to travel, e.g. sales?



Employer FAQs

Must we require our employees to quarantine if they've traveled and return to PA or NJ? Well. . .



Employer FAQs

The PA Department of Health *recommends* that individuals who travel to areas with high amounts of COVID-19 cases self-quarantine for 14 days upon return, including the following 25 states:


Alabama	Mississippi	Utah
Alaska	Missouri	Wisconsin
Arkansas	Montana	Wyoming
Florida	Nebraska	
Idaho	Nevada	
Illinois	North Carolina	
Indiana	North Dakota	
Iowa	Oklahoma	
Kansas	South Carolina	
Kentucky	South Dakota	
Minnesota	Tennessee	



Employer FAQs


New Jersey also only *recommends* that individuals who travel to areas with high amounts of COVID-19 cases self-quarantine for 14 days upon return, including the following 39 states:

Alabama (added 6/24/20)	Minnesota (re-added 9/22/20) 6/24/20)	South Dakota (added 8/11/20)
Alaska (re-added 9/1/20)	Mississippi (added 6/30/20)	Tennessee (added 6/30/20)
Arizona (re-added 10/20/20)	Missouri (added 7/21/20)	Texas (added 6/24/20)
Arkansas (added 6/24/20)	Montana (re-added 9/1/20)	Utah (added 6/24/20)
Colorado (added 9/29/20)	Nebraska (added 7/21/20)	Virginia (re-added 10/13/20)
Florida (added 6/24/20)	Nevada (re-added 9/22/20)	West Virginia (added 9/8/20)
Georgia (added 6/30/20)	New Mexico (re-added 10/6/20)	Wisconsin (added 7/14/20)
Guam (added 8/25/20)	North Carolina (added 6/24/20)	Wyoming (added 9/22/20)
Idaho (added 6/30/20)	North Dakota (added 7/21/20)	
Illinois (added 7/28/20)	Ohio (re-added 10/13/20)	
Indiana (added 7/21/20)	Oklahoma (added 7/7/20)	
Iowa (added 6/30/20)	Puerto Rico (re-added 9/15/20)	
Kansas (added 7/7/20)	Rhode Island (re-added 9/22/20)	
Kentucky (added 7/28/20)	South Carolina (added 6/30/20)	
Louisiana (added 6/30/20)		
Maryland (re-added 10/20/20) 9/22/20)		
Michigan (added 10/13/20)		




Employer FAQs

Can we prevent visitors and guests from our premises if we believe they have coronavirus, or otherwise?



Employer FAQs



Is the company liable if someone catches the virus?



That's all for now. . .

. . .and hey – let's be careful out there!

–Sgt. Phil Esterhaus
Hill Street Station
1981



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