



HOTEL • MOTEL • RESTAURANT • ASSOCIATION • INC.



EMPLOYMENT LAW Q & A

COVID Issues from Leave to Liability



Whiteford|Taylor|Preston^{LLP}

COVID Issues from Leave to Liability



moderated by



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COVID Issues from Leave to Liability



presented by



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Its Still Real – The Curve Has Not Yet Flattened



- Worcester County --- 54 Cases
- Wicomico County --- 340 Cases
- Sussex County --- 2114 Cases (A Rising Hotspot) !!
- Message From O.C. Mayor Meehan :

*Ocean City is in the Business of Welcoming People . . .
. . . But Not Right Now.*
- A real concern for the availability of health care facilities if pandemic were to hit OC hard.



Maryland Still Under Executive Order



- Only “**Essential Services**” may remain open.
- Masks required for all customers and employees working in any “**Retail Establishments.**”

All retail establishments shall require staff to wear . . . Face coverings while working in areas open to the general public and areas in which interactions with other staff are likely.

All food service establishments shall require staff who interact with customers to wear face coverings while working

- 6 Foot Distancing also required in Retail Establishments

What's the Story on Paid E-FMLA Leave



- 100% For 2 Weeks if reason **#1 - #3** (maxed at \$511/day)
- 66.6% For 2 Weeks if reason **#4 – 6** (maxed out at \$200/day)
- 66.6% For 12 weeks if reason **#5** (maxed out at \$200/day)

- 1.** is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- 2.** has been advised by a health care provider to self-quarantine related to COVID-19;
- 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);

- 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
- 6.** is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services.

A Short Break For Any Questions



What If This Happens?



What If A Person Says “I am Too Scared to Come to Work”?



- Is employee being called in to an Essential Service?
- Lodging.
- Building and property maintenance companies, including janitorial firms, plumbers, electricians, HVAC service companies, roofers, environmental services companies,
- Exterminators, arborists, and landscapers.
- Selling supplies and materials for maintenance of commercial residential buildings, including “big box” home improvement supply stores, plumbing
- Laundromats, dry cleaners, and laundry services.
- Commercial and residential construction companies.
- Self-storage facilities.
- Food provision/ carryout food/liquor stores.

What If A Person Says “I am Too Scared to Come to Work”?



- If not an **Essential Service** - - Is the person being directed to perform a permitted **“Minimal Function”**? (Hogan order 3/30/2020)
- Facilitating remote working (a/k/a/ telework) by other staff;
- Maintaining essential property;
- Preventing loss of, or damage to property, including preventing spoilage of perishable inventory;
- Performing essential administrative functions, including picking up mail, processing payroll, caring for live animals; continuing to sell retail products on a delivery basis.

Most Recent Order – April 20: Hair Services



- Barbers/Salons are required to remain closed. However, Office of Legal Counsel recommends enforcement action not be taken if:
 - The Barber/Salon requires an appointment basis.
 - Allows one Customer in the establishment at a time.
 - The services performed must be necessary for the Customer to meet documented grooming standards established **by the Customer's Employer.**
 - The Customer must provide the Barber/Salon with written documentation of the Employer's grooming standard.
 - Both the Customer and Barber/Salon staff must wear Face Coverings

What About Unemployment Eligibility?



- Must be out of work for a **Qualifying Reason**
- Mere choice not to come to work is not sufficient, if work is available, either on site, or by telecommuting.
- Caused by Employer, not by Employee preference.
- Exception If the Employee can show a valid reason or compelling circumstance
- Obligation to notify State Unemployment Agency if there is a failed recall.

Will My Unemployment Account Be Charged?



- Unemployment is charged on a rolling three year look-back of claims made by former employees
- Current Federal “kicker of \$600/week” will not be charged back to employers But
- The normal basis will be charged --- HOWEVER there is in the current State writings, that the State may be receptive to requests to waive charges caused by the pandemic --- waiting to see

How About These Folks?



What About Testing Employees Who Want to Work



- Normally the ADA would disfavor intrusive testing or questioning of employees, but times have changed ---

EEOC March 18 Directive

- *Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.*

What About Testing Employees Who Want to Work



- Normally the ADA would disfavor intrusive testing or questioning of employees, but times have changed ---

EEOC March 18 Directive

- *During a pandemic, ADA-covered employers may **ask such employees** if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.*

What About Requiring An Antibody Test?



- Issue of Availability of Testing Kits:
- Understand What Antibody-Testing shows:
- Testing antibodies in blood isn't the same as testing to see if employees are infected with the virus that causes COVID-19.
- An antibody test can determine if someone has been infected and recovered, whereas a molecular test – a "PCR" test that usually uses a nose or throat swab – shows whether that person is infected at the time the test was taken.
- Antibodies are the body's way of remembering how it responded to an infection so they can attack again if exposed to the same pathogen. If an employee has antibodies in blood, that means she has immune cells available to fight the virus, which lowers the risk of getting sick.

What About Requirements To Return To Work?



- There are no current hard-and-fast rules issued by the State or Federal Authorities
- It seems logical that for employees that the employer has not seen for a while, to take some action –
 - To Confirm Health Status
 - To Allay the Concerns of Co-Workers
- **Final recommendation** – A questionnaire sheet to employees to complete whereby the employer can determine if there is a basis for return concern



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16 OFFICES THROUGHOUT THE MID-ATLANTIC

QUESTIONS?



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