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Focusing on Alabama, Georgia, Florida, Louisiana, and Mississippi

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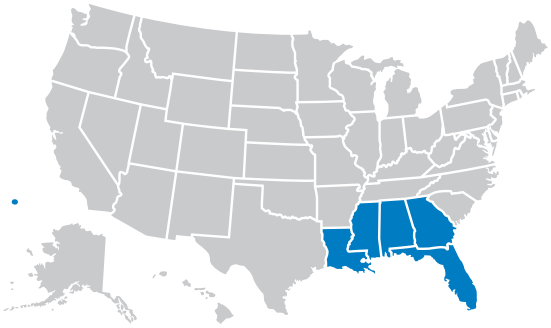

EMERGENCY PREPAREDNESS

Preparing for a hurricane amid pandemic

AL | FL | GA | LA | MS

by Glenn Rissman, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

While we're all busy thinking about ways to safeguard ourselves, our families, and our businesses during the coronavirus pandemic, let's not forget hurricane season has just kicked off. It started June 1 and runs through November 30. Unfortunately, the National Oceanic and Atmospheric Administration (NOAA) has predicted a busy 2020 Atlantic hurricane season with a forecast of 13 to 19 named storms. There's no time like the present to get prepared.

Where to start

A comprehensive hurricane plan to protect your business is always a good start. Review the plan annually for needed changes and improvements. Before a storm hits, consider your risks: Can your business operate without computers, copiers, files, electricity, water, or Internet access? How will you make payroll? Will employees be able to get to work?

Next, develop a plan to address the risks and safeguard your employees, business, and equipment. Remember to order storm equipment and supplies early, such as batteries, water, file boxes (waterproof?), plastic sheeting, extra garbage bags, and duct tape. Here are other good steps to take:

- Update employee, client, customer, and vendor contact information and print copies in case you can't access the material electronically. Remember, you may be forced to use cell phones and personal e-mail addresses to communicate during and after a storm.
- Designate an emergency response team and provide members with a list of employees for whom each is responsible for contacting after the storm has passed.
- Provide information on the company's voicemail system and website so employees can check the status of the business's operations and receive updates.

Hurricane FAQs

Hurricane-related questions begin to percolate this time of year. Here are a few you may be asking.

Many of my employees are currently working remotely because of the pandemic. What additional issues must I consider? Establish a policy for employees to follow regarding your expectations for securing and protecting any business equipment at their home, which may include locking file drawers, safeguarding papers, unplugging and turning off computers, covering equipment with plastic, and placing it in a safe place.

Do your essential employees have an analog telephone and landline available if the power is out? They also may need to have battery backups or chargers for their laptops and cell phones.

▼ What's Inside

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Performance
5 ways to maximize remote workers' productivity
https://bit.ly/2XzUaJu

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Do exempt employees get paid during a hurricane? Exempt employees are entitled to their entire weekly salary for any week in which they have performed work. If your business closes for a few days during a hurricane and the employee performed any work during that week, he is entitled to his entire weekly pay. You are permitted, however, to require the employee to use paid time off (PTO) for days when no work was performed, but if he has no unused PTO, you must pay him.

If your business remains open and an exempt employee chooses not to come to work, you don't need to pay her for the day. You can treat the day off as a personal absence and either dock the full day's pay or require her to substitute paid leave for the absence. If she does *any* work from home that day, you must pay her the full day's salary.

What about nonexempt employees? Nonexempt employees must be paid for all hours they actually work, including any labor from home. Be sure to establish a good timekeeping policy, even for work at home and especially during a hurricane.

Keep in mind that if you can't provide work to an employee because of a hurricane, you aren't required to pay wages. But, as with exempt employees, any nonexempt employees paid under a fluctuating workweek salary must be paid their full weekly salary for any week in which they perform work.

What about waiting time? Employees are entitled to be paid for waiting time. If you ask an employee to go into work to wait for something (e.g., to turn on the air conditioning for a delivery), the time must be paid.

Can employees volunteer their time? Be wary of permitting employees to volunteer their help after a hurricane. You must pay them for the volunteer services if they're performing any duties regularly performed by employees. Also, they must be paid for assisting with any office cleanup activities.

Can employees donate unused PTO to coworkers in need? Now is a good time to consider whether your business will permit PTO donations and, if so, what the implications may be. Have a policy, and stick to it.

Must my business close during a hurricane? The Occupational Safety and Health Administration (OSHA) requires you to provide employees with a place of employment "free from recognizable hazards . . . likely to cause death or serious harm" to them. Use your best judgment to determine whether a hurricane would impose a substantial threat.

Keep in mind hurricanes don't relieve you of the obligation to comply with the Americans with Disabilities Act (ADA), the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), Title VII of the Civil Rights Act of 1964, and other laws. You must continue to pay employee wages, keep proper records, and make employment decisions free of unlawful discrimination.

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REGULATIONS

President signs order to limit COVID-19 enforcement actions

AL | **FL** | **GA** | **LA** | **MS**

by Martin J. Regimbal, The Kullman Firm

President Donald Trump has signed an Executive Order (EO) designed to ease federal agency enforcement actions against employers attempting in good faith to comply with the host of new statutes, regulations, and guidance issued during the COVID-19 pandemic.

What the president's EO covers

The president's order, signed on May 19, said U.S. policy will be to combat COVID-19's economic consequences "with the same vigor and resourcefulness with which the fight against [the virus] itself has been waged." Specifically, the order called on federal agencies to address the "economic emergency" by rescinding, modifying,

waiving, or providing exemptions from regulations and other requirements that may inhibit the recovery.

The EO suggested the agencies could "give businesses, especially small businesses, the confidence they need to reopen" by:

- Providing guidance on what the laws and regulations require;
- Recognizing businesses's efforts to comply with the often complex regulations in complicated and swiftly changing circumstances; and
- Committing to fairness in administrative enforcement and adjudication.

Other details and notable directives

Enforcement discretion. The EO asked all agency heads to consider whether to formulate and make public policies of "enforcement discretion." Under the approach, the agencies would decline enforcement against persons and entities that "have attempted in reasonable good faith to comply with applicable statutory and regulatory standards."

CDC and other health guidance. To stem the spread of the coronavirus, the U.S. Department of Health and Human Services, including the Centers for Disease Control and Prevention (CDC) and other agencies, have issued "multitudinous guidance." Accordingly, the EO instructed federal agency heads to "consider a situation in which a person or entity makes a reasonable attempt to comply" with the guidance, which it reasonably deems to be applicable to the circumstances. In those situations, the agencies should decline enforcement under other COVID-era statutes and regulations.

Innocent until proven guilty. A section of the EO titled "Fairness in Administrative Enforcement and Adjudication" stated the government should bear the burden of proving an alleged violation of the law. In other words, the target of the enforcement action "should not bear the burden of proving compliance." In addition, the order said penalties should be proportionate, transparent, and "imposed in adherence to consistent standards and only as authorized by law."

More regulations in crosshairs. The EO directed federal agency heads to identify any regulatory standards that may inhibit economic recovery and "consider taking appropriate action, consistent with applicable law." The order suggested their responses could include issuing proposed rules to temporarily or permanently rescind, modify, waive, or exempt persons or entities from the requirements. When regulations have been temporarily modified, the agency leaders should then "determine which, if any, would promote economic recovery if made permanent."

Compliance assistance. The order called on all agency heads (excluding the U.S. Department of Justice) to accelerate the procedures by which a regulated person or entity may receive a preenforcement ruling. That way, the enforcement target could learn "whether [its] proposed conduct in response to the COVID-19 outbreak, including any response to legislative or executive economic stimulus actions, is consistent with statutes and regulations administered by the agency."

Takeaway

President Trump's order should provide some solace to employers attempting in good faith to comply with an ever-changing regulatory landscape. Nevertheless, the elephant in the room remains the prospect of aggressive legal action pursued by plaintiffs' lawyers and other employee advocacy groups. The EO obviously won't have any legal effect on such private actions, and we'll have to wait and see if Congress or state legislatures enact tort reform or other protectionist legislation to shield employers from liability for actions taken or not taken in response to the pandemic.

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EMERGENCY RELIEF

Employers get guidance on PPP loan forgiveness

AL | FL | GA | LA | MS

by Christina L. Moore, Taylor English Duma LLP

Many employers were eager to take advantage of a provision in federal coronavirus relief legislation that provided loans to help businesses meet payroll and cover certain other costs during the COVID-19 crisis. Those loans will be forgiven provided employers keep workers employed or call them back to work quickly. But it wasn't immediately clear what had to be done to qualify for loan forgiveness. Now, however, the Small Business Administration (SBA), in consultation with the U.S. Department of the Treasury, has issued the Paycheck Protection Program (PPP) Loan Forgiveness Application, which provides some answers.

Relief for employers

The PPP was one of the provisions of the Coronavirus Aid, Relief, and Economic Security (CARES) Act signed into law by President Donald Trump on March 27. The PPP provided loans for payroll costs, rent obligations, mortgage interest expenses, and utilities incurred and paid during an eight-week period beginning on the date a PPP loan was funded.

The SBA application is the first guidance that helps borrowers track and calculate loan forgiveness. Following is a summary of the notable forgiveness application terms relevant to many businesses.

Forgiveness for payroll and nonpayroll costs

The SBA's application form and related instructions clarify the much-debated "incurred *and* paid" language of the PPP. Specifically, borrowers are eligible for forgiveness for both the payroll costs paid *and* those incurred (with some qualifications as noted below) during the eight-week period, giving them some flexibility in their calculations:

- Payroll costs are considered *paid* on the day paychecks are distributed or the borrower originates an automated clearing house (ACH) credit transaction.
- Payroll costs are considered *incurred* on the day the employee's pay is earned.

Significantly, payroll costs incurred but not paid within the eight-week period are eligible for forgiveness if paid on or before the next regular payroll date. The flexibility means payroll costs to be forgiven can be calculated in a manner that maximizes the potential benefit based on payroll timing.

Also, a borrower may achieve forgiveness for eligible *nonpayroll* cost amounts—rent, mortgage interest, and utilities—that were either paid during the eight-week period *or* incurred during the period and paid on or before the next regular billing date, even if the latter date is after the eight-week period. Again, the effect is to maximize the potential amount to be forgiven.

How to count employees

For headcount purposes, the PPP provisions in the CARES Act didn't provide a definition of what would constitute a "full-time equivalent" (FTE) employee. But the SBA application instructs borrowers to enter the average number of hours paid per week *per* employee, divide by 40, and round the total to the nearest tenth. Therefore, the agency has determined an FTE is an individual who works 40 hours a week.

FTE/salary cuts can reduce forgiveness

Forgiveness of costs incurred and paid during the eight-week period can be trimmed because of certain factors, one factor being a reduction in the borrower's FTE headcount during the period. If you are a borrower, the application instructions clarify you should look at the weekly average FTE, not the monthly average.

The guidance confirms you may compare the eight-week FTE headcount against the average weekly FTE during either (1) February 15, 2019, to June 30, 2019, or (2) January 1, 2020, to February 29, 2020, to determine whether the headcount has been reduced that would require a cutback in the amount forgiven.

Further, the guidance confirmed:

- A "safe harbor" would allow you to avoid a reduction for headcount if you restore your FTE level no later than June 30, 2020, to your FTE levels during the pay period that included February 15, 2020.
- You may exclude FTE reductions caused by (1) any position for which you made a good-faith, *written* offer to rehire during the eight-week period that an employee rejected (best practice would be to obtain any rejection in writing) or (2) any employee who during the eight-week period was fired for cause, voluntarily resigned, or voluntarily requested and received a reduction in hours (again, obtain and keep written evidence of the individual's circumstances).
- A borrower's forgiveness amount may be reduced if an employee's total compensation during the eight-week period is cut by more than 25 percent. You must compare the individual employee's eight-week average annualized salary or hourly wages against his average during the period from January 1, 2020, through March 31, 2020. If he was unemployed or furloughed during the comparison period, the impact of any reductions would be minimized.

Finally, the guidance again offers a safe harbor to borrowers for cutting compensation, provided they can get an employee's annual salary or hourly wages back up by no later than June 30, 2020.

Firing an employee who intends not to return from FMLA leave

by Martin Regimbal, The Kullman Firm

Q ***If an employee on Family and Medical Leave Act (FMLA) leave submits a letter signaling her intent to resign at the end of her leave, do we have to wait until her leave is over, or can we terminate her employment now?***

Under the FMLA, you must maintain an employee's coverage under any group health plan as you would if she weren't on FMLA leave. You are also required to place an employee returning from FMLA leave back in her same position or an equivalent position with equivalent benefits, pay, and other terms and conditions of employment.

But if an employee gives unequivocal notice during the leave of her intent not to return to work, your obligations under the FMLA to maintain health benefits and restore her cease, and you may terminate her employment. Such notice from an employee, however, should be distinguished from a notice in which she merely indicates she may be unable to return to work but expresses a continuing desire to do so.

In this latter circumstance, the obligations to maintain health benefits during the leave and restore her back to her same position or an equivalent position upon conclusion of the leave continue, and you may not terminate her employment.

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Employer action items

Consult with your accountant, legal counsel, and SBA lender on PPP loan forgiveness and completion of the application form.

Borrowers who may not qualify for forgiveness in whole or in part should consult with counsel on how to balance the use of the money to maximize forgiveness during the eight-week period while also keeping their business in operation through permitted use of the funds during the remaining term of the loan.

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WORKFORCE DEMOGRAPHICS

EEOC puts off EEO-1 surveys until 2021

AL | FL | GA | LA | MS

by Mark Adams and Maggie Spell, Jones Walker LLP

Because of the COVID-19 pandemic, the Equal Employment Opportunity Commission (EEOC) has announced it won't require private-sector employers to submit EEO-1 data this year.

But don't throw away your 2019 data

Ordinarily, all private-sector employers with at least 100 employees—plus those with 50 or more employees that also have at least one federal contract or subcontract worth at least $50,000—must respond to the EEO-1 survey annually by March 31. In the survey, covered employers must report the number of employees by race and gender in each of 10 job categories, ranging from service workers to their top executives, who were employed in a pay period of the employer's choosing between October 1 and December 31 of the previous calendar year.

Covered employers won't get a complete pass, however, on having to report their 2019 EEO-1 data. In the same announcement, the EEOC said it now plans to open the survey for both 2019 and 2020 data in March 2021. Thus, if you're required to respond to the survey, be sure to hold on to your 2019 data, and be prepared to report it along with your 2020 data when the survey reopens next year.

New report form hasn't been released yet

Earlier this year, the EEOC announced an indefinite postponement of the March 31 deadline for reporting 2019 EEO-1 data. The earlier postponement was caused by the agency's decision last year to discontinue the EEO-1 Component 2 pay data collection report and seek approval from the Office of Management and Budget (OMB) for a new EEO-1 report form for Component 1 basic information.

As of the EEOC's recent announcement (made on May 7), the new EEO-1 report form hadn't been released. Presumably, the new form will receive final approval from the OMB before the 2019 and 2020 survey opens next March.

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COMMUNICABLE DISEASES

Weighing whether to use waivers in time of coronavirus

AL | FL | GA | LA | MS

by Deborah A. Ausburn, Christina L. Moore, and Mitzi L. Hill, Taylor English Duma LLP

As stay-at-home orders were being lifted across the country, many businesses began considering liability waivers for clients and/or customers to sign. To date, no courts have reviewed any waivers specifically in light of COVID-19, but here are some general principles to follow in deciding whether they make sense for your enterprise.

Liability waivers are limited

Courts generally won't enforce waivers that contravene public policy (we don't yet know where the coronavirus falls), excuse intentional conduct, or attempt to avoid liability for gross negligence. So, while a liability waiver is a good idea, it cannot substitute for following the standard of care for your industry.

In the coronavirus context, "standard of care" means you at least need to follow the Centers for Disease Control and Prevention (CDC) and Executive Order guidelines for your business. If your industry has a national governing body or trade group, it also may have guidelines you need to follow.

Being able to say you followed the prevailing legal requirements and/or industry standard (whichever is stricter) will be helpful. Your insurance policy and insurance broker may be able to provide additional guidance. Also, remember, best practices may change over time, depending on the severity of any outbreak in your area.

Don't overpromise

In any waiver, website, or other publicly available documents, be careful what statements you make about precautions your business is taking.

For example, if you say on your website you are following all guidelines but you miss a few, then you may have a harder time enforcing a liability waiver. Only promise what you can do, and do what you promise.

Be very clear

If you ask your lawyer to draft a waiver for you, be sure clients and customers will read and understand all of it. The more legalese the waiver contains, the harder it will be to understand and enforce. If you don't understand it, then the people signing it won't get it either. Don't hesitate to send it back and ask for a version you can understand.

Furthermore, be very clear what rights a person is waiving. The waiver should include all claims as well as costs and expenses. If there is any confusion, a court will construe the waiver against your business.

It's a two-way street

Finally, reiterate that individuals signing the waiver also have a responsibility related to their health. Take the opportunity to have them reaffirm they (1) have no symptoms, (2) haven't traveled to areas of known infection in the last 14 days, and (3) haven't come in contact during that stretch with anyone showing symptoms. Getting through the coronavirus will be a group effort, and the people signing the waiver need to be part of the team.

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FITNESS FOR DUTY

Bridge over troubled water: Commercial diver with cancer can take ADA claim to trial

AL	GA	FL	**LA**	MS

by Jason Culotta, Jones Walker LLP

A federal district court in New Orleans found a jury must decide if a commercial diver was discriminated against after being terminated for chemotherapy and cancer treatments based on Association of Diving Contractors International (ADCI) standards. The opinion demonstrates the difficulties employers face in accommodating employees and following industry standards.

Facts

A marine services company hired the commercial diver to provide underwater welding, propeller repairs, and inspections. In late 2015, the diver was diagnosed with cancer. From mid-December 2015 to early January, he received daily chemotherapy and radiation while still working full-time under restricted duties.

In April 2016, the diver learned he would need extensive surgery and additional treatment to remove the cancer. As a result, he applied for and took unpaid leave under the Family and Medical Leave Act (FMLA). Following successful surgery, the diver's oncologist performed an ADCI medical exam and determined the diver would be cleared to return to work within four weeks. The diver communicated the news to his employer, who, in turn, terminated him.

The company told the driver he was being terminated because (1) he had cancer treatments and (2) the ADCI standards provide that individuals aren't qualified to dive if they have "untreated or persistent/metastatic or other significant malignancies including those that require chemotherapy and/or radiation therapy unless five years after treatment with no evidence of recurrence."

The diver insisted the oncologist would clear him to work, but the employer relied on the industry guidelines and refused to engage in the interactive process to determine whether he was fit for duty. A month later, the diver was cleared to work, hired by another diving company, and deemed fit for work based on another ADCI medical exam.

In March 2017, the diver filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging the employer engaged in disability discrimination under the Americans with Disabilities Act (ADA) by firing him because of his cancer and treatment. The EEOC conducted an investigation and found reasonable cause the company violated the ADA by firing him without first engaging in the interactive process to determine whether he could perform the essential job functions with or without a reasonable accommodation. The agency subsequently filed this lawsuit on the diver's behalf.

Swimming against the legal tide

The ADA prohibits employers from discriminating "against a qualified individual on the basis of disability." A qualified individual is one who can "perform the essential functions of the job in spite of his disability" or show "a reasonable accommodation of his disability would have enabled him to perform the essential functions." An employer can refute the individual's qualifications by showing:

- He was a direct threat to himself or others; or
- He failed to meet an imposed qualification standard that is job-related and consistent with business necessity.

The marine services company filed a request seeking judgment in its favor, claiming (1) the diver failed to meet the ADCI qualification standards and therefore posed a direct threat to himself and (2) his termination was consistent with business necessity because his cancer treatment deemed him unqualified under the same standards.

To rely on the direct-threat defense, an employer must perform an individualized assessment of the employee, according to the court. In the present case, however, the employer didn't engage in the interactive process or have the diver submit to a fitness-for-duty exam. Therefore, the court ruled the company couldn't use the defense.

Next, the court determined a jury must decide whether the ADCI standards were job-related and consistent with business necessity. Under that defense, an employer can impose a qualification (like the ADCI standards) to screen out individuals with disabilities if the standards are (1) uniformly applied, (2) job-related for the position in question, (3) consistent with business necessity, and (4) can't be met by a person with the employee's disability even with a reasonable accommodation.

The court found questions of fact prevented summary judgment (dismissal without a trial) regarding the uniform application of the ADCI standards. In reaching its conclusion, the court relied heavily on the facts that the diver worked full-time during his initial round of chemotherapy and radiation and another diving company subsequently hired him based on an ADCI fitness exam after his successful surgery. *EEOC v. T&T Subsea, LLC*, No. 2:19-cv-1284 (April 29, 2020, Ashe, B.).

Takeaways

The ruling—specifically, the court's questioning of the uniform application of industry standards—should concern employers. The marine services company thought it was doing everything right by following industry standards rather than engaging in the interactive process.

Employers cannot stop with just adopting industry standards. You must constantly monitor the standards for changes and diverging applications to ensure uniform application.

Furthermore, you should always take the time to engage in the interactive process. The process, which is generally quick and inexpensive, likely will shield you from potential ADA liability, while failure to engage will almost always land your company in hot water.

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AGE DISCRIMINATION

No, age changes don't work like sex changes

AL | **FL** | **GA** | **LA** | **MS**

by Destiny S. Washington, FordHarrison LLP

Is age simply a number? One man in the Netherlands thought so and tried to get a court to drop his age by 20 years. But regardless of how the legal battle turned out (spoiler alert: it didn't end well for him), Dutch laws will still shield him from age discrimination, just as U.S. employees are protected by the Age Discrimination in Employment Act (ADEA).

I am 69, going on 49

In the fall of 2018, Dutch media personality and self-proclaimed "positivity trainer" Emile Ratelband garnered worldwide attention by petitioning a Dutch court to change his age by 20 years. He was born in 1949 and wanted to change his year of birth to 1969. Why not? He claimed:

- His health was more similar to that of a 49-year-old, and he said he even looks closer to 49 than 69;
- He got more attention on dating apps as a 49-year-old as opposed to a 69-year-old;
- At 69, he was subject to age discrimination; and
- An age change is akin to a sex change. Since people are allowed to determine and change gender, why not age?

In December 2018, the court ruled against Ratelband, acknowledging age is tied to social identity but reasoning that allowing such a change would lead to further complications with regard to reliance on (and monitoring of) a particular date to determine the origin of rights and obligations, such as marrying, drinking alcohol, and being licensed to drive a car. Conversely, the existence of a right to declare oneself younger could lead to a right to declare oneself older, which would bring a whole new meaning to "threenagers," "old souls," and "13 going on 30."

Since the decision, Ratelband appears to have abandoned the legal effort to lower his age and will just have to deal with the cards he was dealt. Significantly, age discrimination is prohibited in the Netherlands, and the court acknowledged he could avail himself of those protections. Likewise, it's prohibited in the United States via the ADEA and various state laws.

ADEA guards against age bias

The ADEA targets age discrimination in employment against persons 40 or older, while some states, such as New York and Florida, protect younger persons. To make an age claim under the ADEA, an individual must

show she is 40 or older and qualified for the position, the employer took an adverse job action (e.g., termination) against her, and she was replaced by (or treated less favorably than) a younger employee. The employer would then have an opportunity to articulate a legitimate nondiscriminatory reason for its action.

But what if there are jobs people of a certain age cannot perform? The ADEA provides an affirmative defense to liability when age is a "bona fide occupational qualification" (BFOQ). Employers may use the defense only if they can establish:

- The imposed age limit is reasonably necessary to the essence of the business; and
- All or substantially all individuals excluded from the job involved are in fact disqualified *or* some of the excluded people possess a disqualifying trait that cannot be ascertained except by reference to age.

A very limited defense, BFOQ is often asserted in cases in which there is an explicitly stated age range or limit for a particular job (e.g., in public safety positions).

Further, the law provides an extra layer of protection for current and potential ADEA litigants who agree to waive their claims. The Older Workers Benefit Protection Act of 1990 (OWBPA) requires employers to provide specific information and consideration periods to an individual from whom they're seeking a waiver of claims under the ADEA.

Bottom line

It appears we're stuck with our chronological ages, at least for now. Nevertheless, you can take positive actions to improve what Yale medical school researcher Morgan Levine calls your "biological age," which means how old a person seems based on how one's body functions are performing versus average health or fitness levels. So, Ratelband may be in luck after all!

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LITIGATION

Sometimes once is enough: Sexual harassment, retaliation claims head to jury

AL | FL | GA | **LA** | MS

by Maggie Spell, Jones Walker LLP

A federal court in Louisiana is sending sexual harassment and retaliation claims by a motel guest services representative to a jury. A big factor in the court's decision was how her employer handled the complaint and the quick termination of her employment after she made it. Let's take a look at what happened here and how you can avoid a similar headache.

Not a warm welcome

Quawana Brandon alleged that on her very first shift as a guest services representative at a Bossier City motel, she was sexually assaulted by a coworker who "cornered her and exposed himself to her." According to her, she was working in a small laundry room when the coworker entered and asked her to teach him some words in Spanish, asked her to say something sexy in Spanish, repeatedly tried to show her a naked picture of himself on his cell phone, and then told her to look down and see what she was "doing to him," motioning toward his erect penis. He then grabbed her arm and attempted to make her touch his penis, but she managed to exit the laundry room.

The following day, Brandon met with local management to discuss what happened. According to her, she asked not to be scheduled with the coworker, but she was required to work with him that day anyway. Corporate management then came in to take written statements from her and her coworker. He denied the allegations in his written statement but resigned his employment the very next day.

According to Brandon, when she explained she was uncomfortable around the coworker, the general manager accused her of making it all up and bringing it on herself because she talked with the coworker on one occasion.

Management gives employee the cold shoulder

Brandon further alleged that following her complaint, the general manager began retaliating against her by scheduling her to work shifts at the last minute and to work overnight shifts immediately followed by morning shifts. On one occasion, she was accused of not working the night shift even though she had been told to go home.

Brandon then complained about the general manager and asked to transfer to the company's Shreveport location but claimed she never heard back about the transfer. She alleged that shortly thereafter, she was never scheduled to work again, but her employer asserted her employment was terminated for failing to appear for two scheduled shifts in a row.

Employee fights back

Brandon filed a lawsuit against her former employer alleging sexual harassment and retaliation. Following discovery (pretrial exchange of evidence) to flesh out the facts supporting her claims and her employer's defenses in the lawsuit, the motel filed a request for summary judgment (dismissal without a trial) asking the court to rule in its favor.

On the sexual harassment claim, the motel didn't dispute that Brandon was subjected to unwelcome harassment and that it was based on sex. The motel argued, however, she couldn't show the harassment affected a term, condition, or privilege of her employment. In particular, it argued the single encounter was not severe or pervasive enough to affected a term or condition of her employment.

Court sends case to jury

The court disagreed, pointing to Brandon's testimony that she subjectively perceived the harassment as severe, which the court found was objectively reasonable. The court explained the coworker's alleged attempts to engage her in a sexual manner, including grabbing her arm and trying to force her to touch his penis, attempting to kiss her, exposing his penis to her, showing her a naked photograph of himself, and persisting in those endeavors even after she declined his advances, constituted evidence of severe harassment, which could have been perceived as physically threatening. The court commented it was difficult to imagine any scenario in which his alleged actions wouldn't objectively constitute severe harassment, and thus, if believed by a jury, her allegations concerning the single incident were egregious enough to support a finding of unlawful harassment. As a result, the court denied the motel's motions and decided to send the claim to the jury.

The motel also argued Brandon couldn't show it knew or should have known of the harassment in question and failed to take prompt remedial action. She claimed, however, she was required to work with the coworker twice after the alleged harassment occurred. She also said he continued to visit the motel and speak to her, and she was told to keep working after she complained. She further alleged the motel knew of a previous sexual harassment claim against the same coworker. The court didn't need to decide whether the employer failed to take prompt remedial action, however, since this claim is going to the jury regardless.

Turning to the retaliation claim, the motel admitted Brandon engaged in protected activity and suffered an adverse employment action, but it argued she couldn't establish a causal connection between her complaint against her coworker and her termination. The court disagreed.

Brandon was fired less than two weeks after the motel learned of the alleged harassment. Further, the general manager—who was the final decision maker—also was tasked with investigating her complaint and thus had knowledge of the protected activity.

The motel was able to demonstrate a legitimate nonretaliatory reason for Brandon's discharge, however, because she failed to appear for work as directed on two consecutive days. The burden then shifted back to her to show the stated reason was a pretext (excuse) for unlawful retaliation. While she didn't disagree that she missed two of her scheduled shifts, she contended the general manager instructed her not to come to work on one of those days, such that her employment was terminated for reasons that were false or "unworthy of credence."

Finally, there was evidence that the termination might have deviated from the motel's normal termination policies and practices and that the general manager and Brandon discussed her allegations against the coworker immediately before the termination. Accordingly, the court sent the retaliation claim to the jury, too. *Quawana Brandon v. Woodspring Suites Shreveport-Bossier City L.L.C., et al.*, Case No. 5:18-cv-00848 (W.D. La., April 13, 2020).

Avoiding missteps that sent case to the jury

Let's start at the beginning. When you receive a sexual harassment complaint, it should be taken seriously and investigated. That's especially true when, as here, there has been a prior allegation against the same employee. Management should be trained on how to respond to complaints, where to refer them (preferably HR or whoever handles those functions) for investigation, and what to say—or, most relevant here, what not to say.

Just as important, management must be instructed not to take adverse employment actions against an employee who has recently engaged in protected activity without ensuring there's no retaliatory animus and without having solid grounds for doing so. When you're still not sure how to proceed, consult with your employment counsel.

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COMMUNICABLE DISEASES

Childcare, PTO, and other practical issues triggered by return to work

AL | FL | GA | LA | MS

by Cory J. King and Jack Schaedel, FordHarrison LLP

As America begins returning to work, employers are facing new HR issues like never before. Some situations require new solutions, but it's important to remember the basics still apply and often provide the best answer.

Childcare conundrum

In many states, governors' initial orders in mid-March 2020 included mandatory shutdowns of all public schools. Two months later, almost all schools nationwide remained closed, and 40 states had announced plans to stay shut for the remainder of the academic year.

Traditional leave laws such as the Family and Medical Leave Act (FMLA) provide leave for a birth or adoption or when a child has a serious health condition. But none of the laws anticipates a widespread school closure.

In March, Congress enacted the Families First Coronavirus Response Act (FFCRA). Basically, employers with fewer than 500 employees must provide two weeks of paid sick leave and, if school closures require employees to provide care to their children, up to 10 additional weeks of partially paid sick leave (up to $200 per day). Employers with fewer than 50 employees might be exempt if providing the leave would jeopardize their ability to go on.

During the pandemic, you may or may not have had your employees use and exhaust the new emergency federal benefits (although all employers covered by the FFCRA are required to notify workers of the available help). But even if the benefits were used, employees whose children are shut out of school or childcare won't necessarily be able to return to work just because your business can reopen. You must be prepared to address the situations on a case-by-case basis, recognizing many states have laws against discrimination based on family status:

- If a reduction in business and revenue necessitates only a partial reopen with less than the full pre-pandemic complement of employees, some workers' need for a reduced schedule or additional leave (possibly unpaid) might present an unexpected win-win.
- To create the social distancing required to minimize or eliminate the spread of COVID-19, you may consider establishing multiple shifts to let more employees work without coming into contact with one another, which also could provide an opportunity for them to do their jobs during nonschool hours.
- Look into whether remote-working solutions used during the pandemic can be kept in place until school and daycare options become viable again.

Other solutions may include creating new benefits plans or reminding employees of existing plans (such as dependent care reimbursement) they may not have previously needed. Finally, if you have the appropriate facilities, you could consider engaging a childcare provider to offer onsite services.

Bottom line. Obviously, no single solution is "the answer" for every employer, but a combination of creative approaches can help you provide childcare relief for the greatest number of employees while navigating the complex network of new and existing laws.

'But I've had this trip booked for months!'

During coronavirus-related layoffs, furloughs, and shutdowns, many employees were focused on their immediate need for money to pay bills and employers worked hard to provide them with sources of income. In addition to the federal government's push to put money in employees' hands, many of them tapped vacation or paid time off (PTO) accounts for extra income.

When employees return to work, it's very likely they'll want to take time off for events or trips planned long before COVID-19 turned their lives upside down—and drained the vacation or PTO time they intended to use for the occasion. What obligations exist, and what options are available to employers to deal with such a circumstance?

Creative options include unpaid leaves of absence and "vacation/PTO debt." As you attempt to rebuild your business, however, you may need to make hard decisions, and each option comes with its own set of legal complexities.

Bottom line. While you must evaluate each situation separately, a little planning and preparation now will pay dividends later.

Best practices for reemployment

Speaking of basics, one of your initial considerations will be deciding if workers are still employees or were actually terminated. Were they furloughed or laid off? And regardless of the terminology you use, what were they told about their return-to-work expectations? To be sure no breach-of-contract claims arise, you should address any actual or implied obligations to employees, which likely were made and communicated to them during the pandemic's chaotic early days.

Next, remember that long-established discrimination, retaliation, and privacy laws still apply. Decisions about reemployment (including who comes back first), duties, wages, and benefits must be carried out in accordance with the applicable laws and based on legitimate nondiscriminatory grounds. Some states and cities have enacted "return-to-work" legislation requiring employers to reward seniority even if they are nonunion and haven't used a seniority system in the past.

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RETURNING TO WORK

Pandemic sparks unexpected question: What if workers unwilling to return?

AL | GA | FL | LA | MS

Restrictions put in place because of the COVID-19 pandemic are beginning to ease in many parts of the country, and employers are starting to call back the millions of workers who joined the ranks of the unemployed a few months ago. Many workers are champing at the bit to get back to work, but others are hesitant. And that can put already-struggling employers in a bind.

Why not return to work?

Workers have a variety of reasons for not wanting to return to work. Many are fearful of catching the virus since it remains a threat. Others have taken on childcare responsibilities that haven't changed just because their employer has resumed operations. Others are caring for members of their household stricken with COVID-19. Still others are happy to continue collecting unemployment benefits.

A hasty decision to fire someone who doesn't want to return can turn into trouble. First, the employer would need to understand whether the employee qualifies for some type of legally protected leave—perhaps paid leave under the new Families First Coronavirus Response Act (FFCRA) or maybe leave as an accommodation under the Americans with Disabilities Act (ADA) or some other federal, state, or local legislation.

Employers faced with workers refusing to return to work need to evaluate each case to determine whether a reluctant employee has a legally protected reason for not going back to work. For example, an employee suffering from medically documented extreme anxiety or some other condition that would qualify as a disability under the ADA may be entitled to a reasonable accommodation, which might mean allowing the employee more time off.

An accommodation doesn't have to be time off. Telework is often a suitable accommodation. But employers aren't required to provide an accommodation if it presents an "undue hardship"—one that presents a "significant difficulty or expense" for the employer.

Many employees reluctant to return to work may cite anxiety, but that may not qualify them for leave or unemployment benefits. Unless the anxiety rises to the level of a disability as that term is defined in the law, state labor agencies are likely to consider an employee who refuses to return to work as voluntarily unemployed and therefore ineligible for benefits.

If an employee doesn't have a qualifying reason for not going back to work, you can terminate him, but you must treat similarly situated employees the same and not retaliate against employees for any protected activity, such as taking legally protected leave.

High-risk workers

The Equal Employment Opportunity Commission (EEOC) has issued guidance on accommodations for higher-risk individuals. The Centers for Disease Control and Prevention (CDC) has identified certain individuals as being at risk of a severe case of COVID-19. Those factors include people 65 and older, those with chronic lung disease, serious heart conditions, obesity, diabetes, or chronic kidney or liver disease, and those who are immunocompromised.

People deemed at higher risk may request an accommodation related to their underlying medical condition, but EEOC guidance says you shouldn't exclude them from the workplace unless they have a disability that poses a "direct threat" to their health that can't be eliminated or reduced by reasonable accommodation. The EEOC guidance notes that the "ADA direct threat requirement is a high standard" that can't be based solely on the condition being on the CDC's list.

Unintended consequence

Some workers have enjoyed the unemployment benefit provided in the Coronavirus Aid, Relief, and Economic Security (CARES) Act so much that they're not eager to go back to work. Among other things, that law adds an extra $600 a week to a state's regular unemployment benefit through July. That bonus means some recipients are receiving more in unemployment than they earned from their jobs.

The extra bonus benefit is quickly coming to an end, but some workers may want to run out the time on that extra $600 a week before going back to work, even if they are called back sooner. Those employees need to be informed that you will report to the state labor agency that an employment offer has been made. An employee who doesn't have a qualifying reason for staying off the job will likely be denied unemployment.

Bottom line

Although restrictions are being eased, the pandemic conditions are fluid, and new guidance from various agencies may continue to be issued. Also, each employee and employer situation must be evaluated case by case, so you are advised to consult with counsel as you navigate the return-to-work process. ■

BUSINESS RECOVERY

Getting back to 'normal'? Here are some points to consider

AL **GA** **FL** **LA** **MS**

As employers look to a postpandemic recovery, they're shifting their attention toward getting back to "normal." But normal isn't what it used to be, and you now have to focus on keeping employees healthy—and keeping your operations legally compliant. It's not going to be as simple as telling people to resume their work as they did before COVID-19 struck. Thoughts of personal protective equipment (PPE), engineering and administrative controls, discrimination risks, and more are now front and center.

OSHA guidance

The Occupational Safety and Health Administration (OSHA) has issued various informational documents since COVID-19 outbreaks began. In its "Guidance on Preparing Workplaces for COVID-19," OSHA

emphasizes that a lack of planning "can result in a cascade of failures." The agency classifies employers as low, medium, and high or very high risk and provides guidance for each type as well as steps you can take to reduce risk. Here are a few:

- **Develop an infectious disease preparedness and response plan.** Such a plan needs to address the level of risk associated with worksites and job tasks.
- **Prepare to implement basic infection prevention measures.** You should implement hygiene and infection control practices, including the promotion of frequent hand washing, encouraging workers to stay home if they are sick, encouraging employees to cover coughs and sneezes, and cleaning and disinfecting surfaces and equipment.
- **Develop policies and procedures for prompt identification and isolation of sick people.** You should encourage employees to self-monitor and report COVID-19 symptoms. You also may provide face masks in addition to isolating ill employees.
- **Develop, implement, and communicate about workplace flexibilities and protections.** The guidance urges employers to encourage sick employees to stay home and ensure sick leave policies are flexible and consistent with public health guidance. It also urges policies that permit employees to stay home to care for a sick family member.
- **Implement workplace controls.** The guidance suggests both engineering and administrative controls. Engineering controls include installing high-efficiency air filters, increasing ventilation, installing physical barriers such as clear plastic sneeze guards, and installing drive-through windows for customer service. Administrative controls include minimizing contact among workers, clients, and customers; reducing the total number of employees in a facility at a given time and allowing them to maintain distance from one another; and providing workers with education and training. Implementing safe practices by providing hand soap, hand sanitizers, and disinfectants and promoting regular hand washing also help. You also should consider providing PPE, such as gloves, goggles, face shields, and masks.

EEOC guidance

The EEOC also continues to release guidance related to reopening. One issue that worries many employers is what steps they can take to protect employees without running afoul of the Americans with Disabilities Act (ADA) or other antidiscrimination laws.

For example, you may be nervous about screening returning employees. Before COVID-19, employers wouldn't have considered taking employees' temperature and asking disability-related questions, but those steps are allowed under the ADA if they are job-related and consistent with business necessity. You are able to meet that standard if those steps are necessary to keep an employee from posing a "direct threat," which the guidance explains is a "high standard."

EEOC guidance says direct threat is to be determined "based on the best available objective medical evidence." Guidance from the Centers for Disease Control and Prevention (CDC) and other public health authorities constitutes such evidence. "Therefore, employers will be acting consistent with the ADA as long as any screening implemented is consistent with advice from the CDC and public health authorities for that type of workplace at that time," the EEOC guidance states.

Employers also may wonder how far they can go in requiring workers to wear PPE and engage in infection control practices. The guidance states you may require such steps, but if an employee with a disability needs a reasonable accommodation, such as nonlatex gloves, a modified face masks, or gowns designed for people who use wheelchairs, you should enter into the interactive process to find a reasonable accommodation.

A trickier question involves what to do if you know an employee has one of the conditions identified as posing a higher risk for severe illness but the employee hasn't requested an accommodation. The EEOC guidance says the ADA doesn't allow you to exclude the employee or take other adverse actions *solely* because of her disability. "Under the ADA, such action is not allowed unless the employee's disability poses a 'direct threat' to his health that cannot be eliminated or reduced by reasonable accommodation," the guidance says.

Bottom line

As businesses reopen, you're likely to have more questions than answers since the reopening process will need to be tailored to each workplace. Therefore, you will need to stay in touch with counsel as the process unfolds. ■

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