

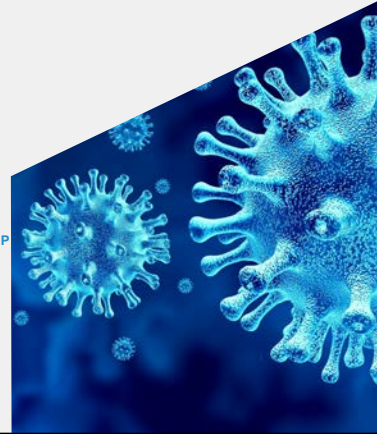
EMPLOYMENT COMPLIANCE ISSUES IN THE TIME OF COVID-19

SPEAKERS:

SARA EBER FOWLER
SEYFARTH SHAW LLP
233 S. WACKER DRIVE
SUITE 8000
CHICAGO, IL 60606
(312) 460-5938
SFOWLER@SEYFARTH.COM

PRIYA KHATKHATE
JACKSON LEWIS P.C.
150 NORTH MICHIGAN AVE.
SUITE 2500
CHICAGO, IL 60601
(312) 803-2505
PRIYA.KHATKHATE@JACKSONLEWIS.COM

KRISTIN E. MICHAELS
MCDERMOTT WILL & EMERY LLP
444 WEST LAKE STREET
SUITE 4000
CHICAGO, IL 60606
(312) 984-7707
KMICHAELS@MWE.COM



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EEOC Guidance During Covid-19

Priya P. Khatkhate
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EEOC Guidance

Balancing COVID-19 Precautions with Privacy

- Allowing employers to ensure workforce health and safety
 - Temperature checks
 - Administering a COVID-19 test
 - But NOT an anti-body test
 - Asking specific questions about symptoms
 - Asking about risk factors for COVID-19
 - Travel
 - Contact with someone diagnosed w COVID-19
 - But NOT asking if family members have COVID-19 – violates GINA
- Requiring symptomatic employees to stay home, and fitness-for-duty documentation when returning to work

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EEOC Guidance

What if an employee refuses to cooperate?

- ADA allows employer to bar employees from being in the workplace if they refuse temperature checks, COVID-19 testing, or other screening
- Consider options – including accommodations
- Reassure employees that these are steps to maintain a safe workplace, in line with federal recommendations, and care is being taken to maintain confidentiality

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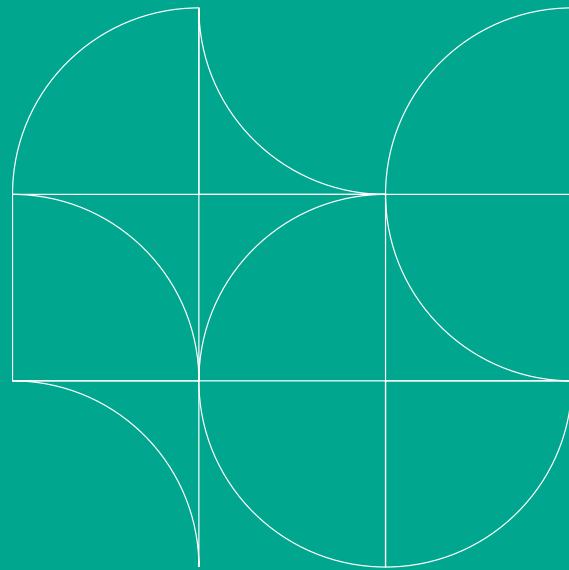
EEOC Guidance

Maintaining Confidentiality

- ADA requires employers to keep employee medical information confidential
- But what about COVID-19 reporting and contact tracing?
 - Employers may not reveal or confirm the identity of an employee who has COVID-19
 - Inform managers who discover or are told about an employee's COVID-19 illness where to report it
- It does not violate the ADA for a worker to report to their manager the COVID-19 status of a coworker

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Leaves of Absence and Accommodations During COVID-19



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Federal COVID Leave

(1) Families First Coronavirus Response Act (FFCRA)

- No extension of leave mandate; extension of tax credits for leave

(2) “Traditional” FMLA

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- **Reasons for Use**

- Employee Serious Health Condition
- Family Member with a Serious Health Condition

- **Notice/Certification**


- Same rules apply

FMLA Leave



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Serious Health Condition (Self or Family Member)



- Symptomatic
 - Only if rises to the level of “serious health condition” as defined by FMLA
- Tested Positive
 - Only if symptoms rise to the level of serious health condition
- Exposed, Asymptomatic (no)
- Only High-Risk (no) but let’s talk...
- Mandatory Quarantine (no)

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State Laws Providing COVID-19 Related Leave

Paid sick and safe time laws		Paid time off laws
State disability insurance laws	Unpaid family and medical leave laws	Paid family and medical leave

- **Group 1:** Entirely new laws / executive orders
- **Group 2:** Amendments to existing laws or regulations
- **Group 3:** General non-binding guidance regarding applicability of an existing PSL law in light of COVID-19

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Paid Sick Leave - Local Guidance

Chicago

Guidance regarding the applicability of the existing Sick Leave Ordinance for COVID-19.

Anti-retaliation Ordinance protecting employees who remain at home for complying with public health orders or for other COVID-19 related reasons from adverse action.

Cook County

Guidance regarding the applicability of the existing Ordinance for COVID-19.

Includes helpful instruction for dealing with furloughs.

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COVID-19 Accommodation Issues

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Face Coverings

- Standard interactive process; require medical documentation
- Alternative effective accommodations should be explored, like a face shield, having the employee work in an area where they don't have to wear a mask (but still must do so when going to the bathroom, coming into the location etc.)

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Leave as an Accommodation Under the ADA

- Does the employee have a “disability” as defined by the ADA?
 - Employee with COVID-19 (possibly)
 - Depends on symptoms and diagnosis; duration
 - High-risk employee (possibly)
 - Age v. Condition
 - Refer to CDC/WHO guidance
 - i.e., Diabetes, Cancer, COPD
 - Employee with fear of returning to the office because of COVID-19 (possibly)
 - No, if generalized fear
 - Maybe, if diagnosed medical condition such as anxiety
 - High risk family member (no)

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Leave as Reasonable Accommodation

- Still must engage in interactive process
- Always ask for medical documentation and it should not be vague
 - Consider providing description of the safety protocols and more information regarding the employee's position.
 - Screening, safety training, social distancing measures, mask requirements, capacity limits, etc.
- Explore alternative effective accommodations to employee's request for leave, to work remotely or other accommodation.

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A Note About Remote Work...

Will the fact that an employee worked remotely during the pandemic necessarily mean that it's not an undue hardship to have the employee work remotely post-pandemic?

- Any documentation that allowing remote work because of the pandemic?
- Document if not doing all EJP while working remotely during the pandemic and require all EJP to be performed upon return
- EEOC on March 27 stated: working from home during the pandemic could serve as a "trial run" that may obligate the employer to grant the accommodation request after the pandemic ends but recognized that but for the pandemic remote work would not have been allowed.

When could (or does) it become an undue hardship?

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COVID-19 AND REMOTE WORK: WAGE AND HOUR COMPLIANCE ISSUES

KRISTIN E. MICHAELS
MCDERMOTT WILL & EMERY LLP
444 WEST LAKE STREET
SUITE 4000
CHICAGO, IL 60606
(312) 984-7707
KMICHAELS@MWE.COM

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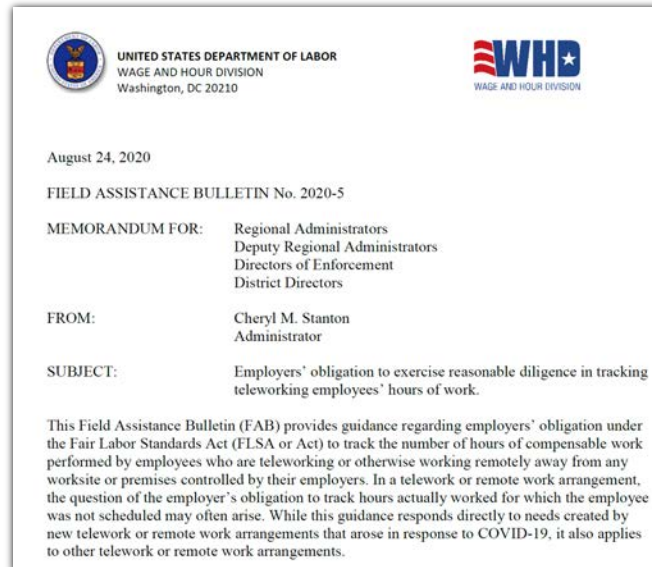
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COMMON REMOTE WORKER WAGE/HOUR CONCERNS

- Working outside scheduled hours/unexpected and unauthorized overtime
- Working during unpaid meal periods
- Rest breaks
- Reimbursement of expenses (?)

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USDOL TIMEKEEPING GUIDANCE FOR REMOTE WORKERS



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USDOL TIMEKEEPING GUIDANCE FOR REMOTE WORKERS



- Field Assistance Bulletin No. 2020-5 (Aug. 24, 2020)
 - General Rule – Employer must pay for all hours worked, including work not requested
 - The onus is on the employer to exercise control to ensure that unwanted work is not performed
 - BUT, if the employer knows or has reason to believe that work is being performed, that time must be counted as hours worked and compensated
 - **Key consideration—what should the employer have known through reasonable diligence?**

to other telework or remote work arrangements

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USDOL TIMEKEEPING GUIDANCE FOR REMOTE WORKERS



UNITED STATES DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
Washington, DC 20210



• USDOL Guidance

- Employer obligation to exercise reasonable diligence satisfied by:
 - Providing a reasonable reporting procedure (which records actual hours worked)
 - Compensating employees for all reported hours worked (even unrequested work)
 - NOT preventing or discouraging employees from reporting hours worked
- “If an employee fails to report unscheduled hours worked through such a procedure, the employer is not required to undergo impractical efforts to investigate further to uncover unreported hours of work and provide compensation for those hours”

to other telework or remote work arrangements

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USDOL TIMEKEEPING GUIDANCE FOR REMOTE WORKERS



UNITED STATES DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
Washington, DC 20210



What about other records reflecting hours worked?

“Though an employer may have access to non-payroll records of employees’ activities, such as records showing employees accessing their work-issued electronic devices outside of reported hours, reasonable diligence generally does not require the employer to undertake impractical efforts such as sorting through this information to determine whether its employees worked hours beyond what they reported.”

to other telework or remote work arrangements

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DO COURTS GENERALLY AGREE WITH US DOL GUIDANCE ON HOW FAR TO DIG?

YES

WA

- *White v. Baptist Memorial Health Care Corp.*, 699 F.3d 869 (6th Cir. 2012) (claim for time worked during meal periods denied where employee was advised to record such time worked and had done so in the past)
- *Allen v. City of Chicago*, 865 F.3d 936 (7th Cir. 2017) (employer did not need to cross-reference “phone records or supervisors’ knowledge of overtime to ensure that its employees were reporting their time correctly”)
- *Newton v. City of Henderson*, 47 F.3d 746 (5th Cir.1995) (“access to information does not constitute constructive knowledge” because holding that supervisor’s ability to investigate constituted constructive knowledge would mean that the City did not have the right to require an employee to adhere to its overtime procedures)
- *Hertz v. Woodbury County*, 566 F.3d 775 (8th Cir.2009) (“It would not be reasonable to require that the County weed through non-payroll CAD records to determine whether or not its employees were working beyond their scheduled hours . . . given the fact that the County has an established procedure for overtime claims that Plaintiffs regularly used.”)

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DO COURTS GENERALLY AGREE WITH US DOL GUIDANCE ON HOW FAR TO DIG?

No

WA

MT

ME

- *Holzapfel v. Town of Newburgh*, 145 F.3d 516 (2nd Cir.1998) (“[O]nce an employer knows or has reason to know that an employee is working overtime, it cannot deny compensation even where the employee fails to claim overtime hours”)
- *Reich v. Dep’t of Conservation & Natural Res.*, 28 F.3d 1076 (11th Cir.1994) (“A court need only inquire whether the *circumstances* ... were such that the employer either had knowledge or else had the opportunity through reasonable diligence to acquire knowledge”)

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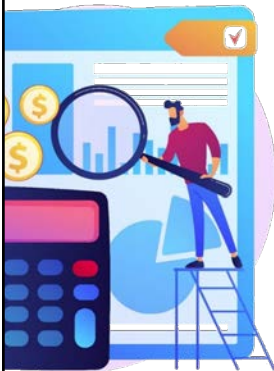
REMOTE WORKER TIMEKEEPING BEST PRACTICES

- Establish work schedules including meal periods and rest breaks
 - (In CA) Employee certifications of taking meal and rest breaks
- Establish a written policy and/or send reminders:
 - All hours worked will be recorded, including time outside schedule
 - Log start and stop times, not just total hours worked (no straight 8s)
 - Mechanism for correcting time and payroll records
 - It's okay to mandate prior authorization before working OT; however, unauthorized OT must be paid
 - Discipline okay for unauthorized work
- Train managers on policies, discipline, retaliation, etc.
- Don't turn a blind eye to off-the-clock work or records suggesting that employees are working off-the-clock



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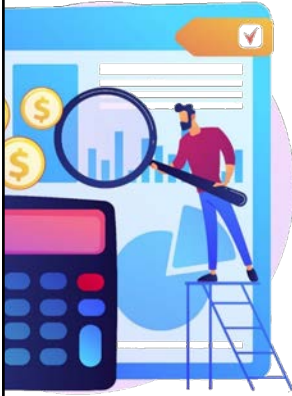
REMOTE WORKER EXPENSE REIMBURSEMENT



- California and Illinois require employers to reimburse employees for *necessary expenditures incurred by the employee during the scope of employment*
- Other states/jurisdictions – E.g., Iowa, Massachusetts, Montana, New Hampshire and Washington D.C.
- Generally applicable when employees are required to work from home; **not when voluntary**

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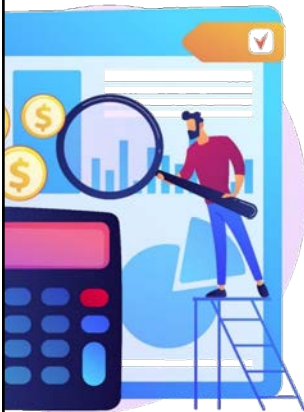
REMOTE WORKER REIMBURSEMENT DECISION POINTS



- How much of an employee's cell phone or internet bill, if any, does the employer need to reimburse?
- What about the employee's higher electric bill?
- Does an accountant need a printer? Ink? Staples?
- Ergonomic office furniture?
- What about expenses for independent contractors?
 - CA trick question?

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REIMBURSEMENT POLICY BEST PRACTICES



- Draft/update reimbursement policy and/or send reminders:
 - Define reimbursable expenses that are necessary for the performance of employees' job duties (not all jobs are the same!)
 - Set reasonable reimbursement limits for expenses and purchases and/or thresholds for advance approval
 - (In CA) Invite employees to submit additional reasonable and necessary expenses incurred beyond the pre-determined flat reimbursement
 - Detail process for submitting expenses for reimbursement
 - Set deadline for submission of expenses
- Be creative – e.g., provide employees with employer-owned equipment (e.g. cell phones, laptops, printers, hotspots, chairs, etc.)
- Train employees and supervisors on policy

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What's On The Horizon? COVID Vaccinations

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COVID-19 Vaccination Requirements



- Vaccination must be “job related and consistent with business necessity.”
- Prior Case Law
 - Mainly healthcare / hospital employer
- ADA and Title VII
- EEOC Guidance
 - Even during a pandemic, an employee “may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability ... barring undue hardship.”
 - Employees may be entitled to a **reasonable accommodation** for sincerely held religious beliefs.
- State and Local Guidance
 - Some states have more strict approach as to whether a vaccination requirement is job-related and consistent with business necessity
 - i.e., New York City and California

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EEOC Update to Technical Assistance Guide – December 16, 2020

- ADA Analysis
 - Vaccines are not medical examinations
 - Inquiring if someone has been vaccinated or not is not a disability-related inquiry
- Employers can require employees to be vaccinated IF:
 - The employees receive the vaccine from a pharmacy or health care provider that is not under a contract with the employer to administer the vaccine (and ask medical pre-screening questions)
 - Request for accommodation for religious and disability-related objections are made consistent with applicable law
- Employers are always free to encourage voluntary vaccination

Mandating the Vaccine

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Responding To Vaccine Accommodation Requests

Determination involves individualized assessment of:

- (1) duration of risk
- (2) nature and severity of potential risk
- (3) likelihood potential harm will occur
- (4) imminence of potential harm

Direct threat = conclusion that individual will expose others to virus at worksite

Even if direct threat found, cannot exclude employee from workplace unless there is no reasonable accommodation (absent undue hardship) that would eliminate or reduce direct threat.

- Must evaluate right to leave or work remotely

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Responding To Vaccine Accommodation Requests

Important to establish a process

–Potential Accommodations

- masks, testing, social distancing, working remotely, transfer to a non-public facing role
- may be scenarios where accommodation is not possible considering job duties and workplaces

–Undue hardship (ADA: significant difficulty or expense) (Title VII: de minimis cost or burden)

- consider prevalence of employees in workplace who have received COVID vaccine
- consider amount of contact person requesting accommodation would have with those whose vaccination status is unknown

–Documentation

- documentation from medical provider on medical necessity to be excused from vaccine
- documentation from employee/clergy related to objection to vaccine

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Continue Risk Mitigation Protocols

- Arrival of vaccines does not end the pandemic.
- Employers should maintain COVID-19 **mitigation protocols** during distribution of the vaccine.
 - These policies may continue for a lengthy period as the vaccine is rolled out to different groups of workers and as employers work through **accommodation requests**.
- Employers who have been operating -- e.g., social distancing, masks, etc. -- should be able to continue (and may be able to use these procedures as **ongoing accommodations** for those employees who do not receive a vaccine).

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Incentive Programs

- Form of Incentives
 - PTO, cash, gift cards...?



Recommendations:

- Continued duty to accommodate
- Proof of vaccine (only)
- Vaccines from third-party providers, not under contract

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COVID-19 AND OFF-DUTY ISSUES

KRISTIN E. MICHAELS
 MCDERMOTT WILL & EMERY LLP
 444 WEST LAKE STREET
 SUITE 4000
 CHICAGO, IL 60606
 (312) 984-7707
 KMICHAELS@MWE.COM

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HYPOTHETICAL: YOU RUN AN ESSENTIAL BUSINESS MANUFACTURING COMPANY IN NAPERVILLE, ILLINOIS THAT IS CURRENTLY IN PHASE 4 OF COVID REOPENING THAT BANS GATHERINGS OF MORE THAN 50 PEOPLE. IOWA ALLOWS LARGE GATHERINGS WITH NO RESTRICTIONS. IT GETS BROUGHT TO YOUR ATTENTION THAT OVER THE WEEKEND JOHN SMITH FROM THE MAINTENANCE GROUP ATTENDED A POLITICAL PROTEST IN IOWA WITH 150 OTHER PEOPLE. JOHN IS SET TO RETURN TO WORK ON TUESDAY. DO YOU MAKE JOHN QUARANTINE FOR TWO WEEKS BEFORE RETURNING TO WORK?

- What if John Smith attended a house party in Illinois with over 50 people?
- What if your business operated in downtown Chicago instead of Naperville?

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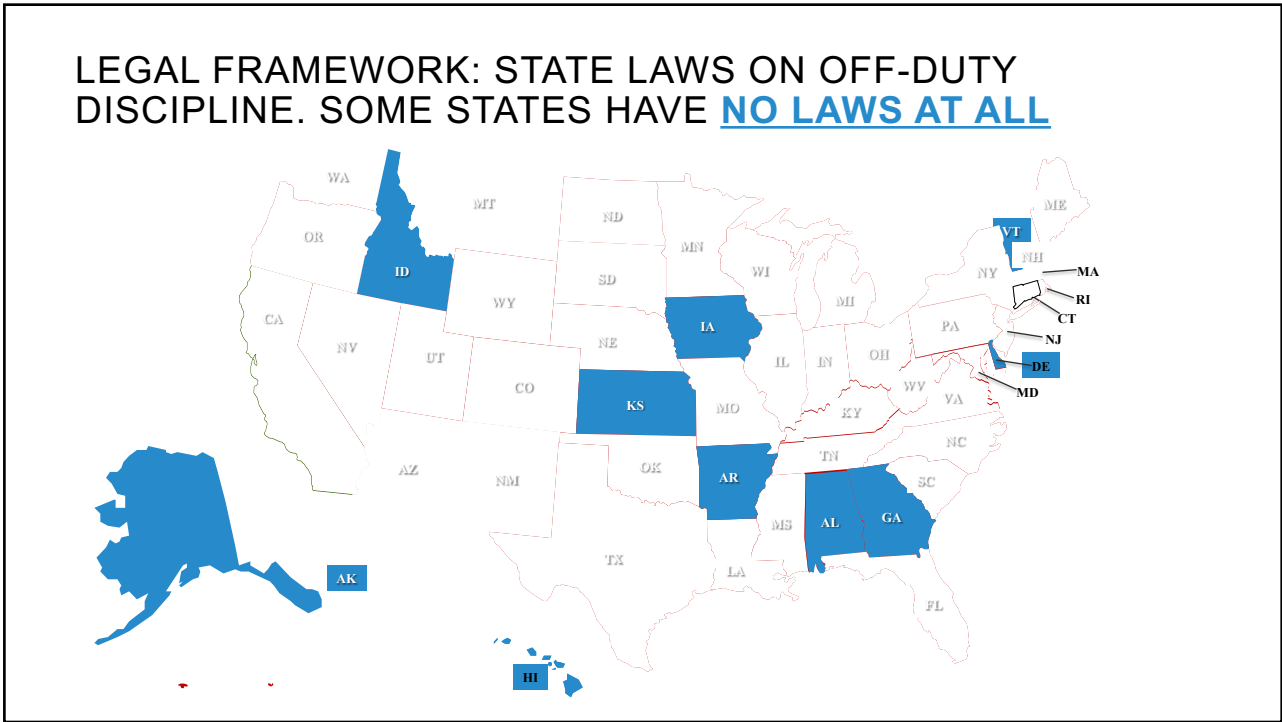
LEGAL FRAMEWORK: STATE LAWS ON OFF-DUTY DISCIPLINE

State off-duty conduct and lawful activities statutes are wide-ranging and not easily delineated. There are generally state laws covering the following off-duty activities:

- Political activities and affiliations
- Tobacco and alcohol use
- Consumable and other product use
- Recreational activities
- Personal relationships
- Gun ownership

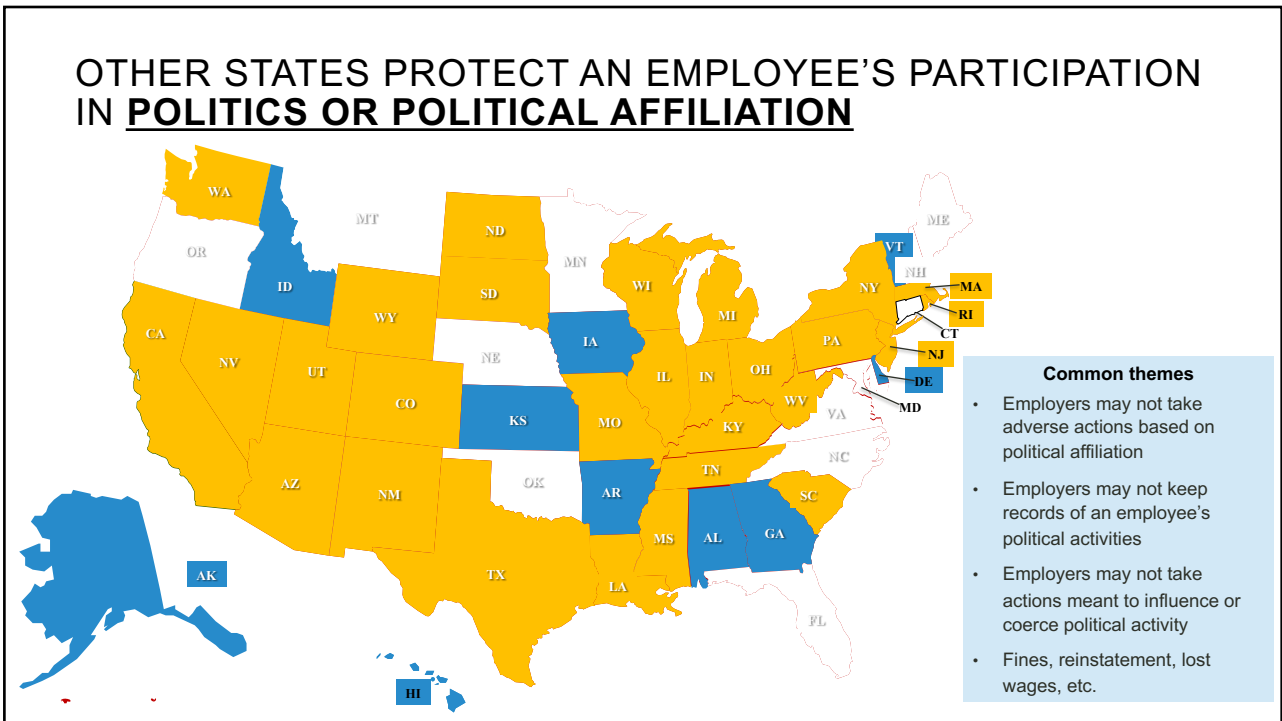
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LEGAL FRAMEWORK: STATE LAWS ON OFF-DUTY DISCIPLINE. SOME STATES HAVE **NO LAWS AT ALL**



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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.

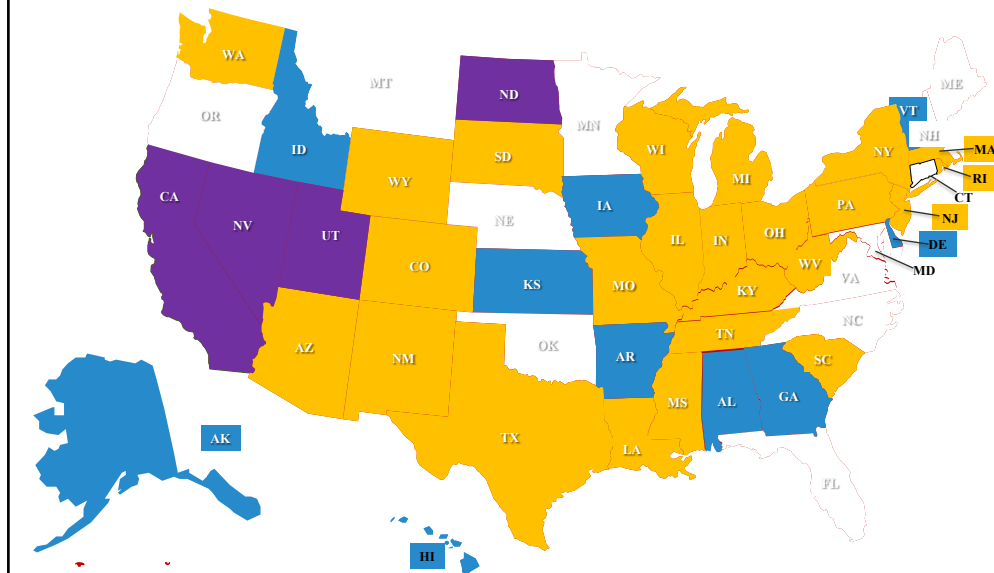
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STATE LAW EXAMPLES

- **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).

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OTHER STATES PROTECT ANY LAWFUL CONDUCT



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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.

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

- **Illinois in “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.

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

- **Chicago:** Travelers from the following states should quarantine for 10 days upon arrival in Chicago or pre-arrival negative test with strict masking, social distancing, avoidance of in-person gathering:

- | | |
|-----------------|------------------|
| • Alabama | • New Jersey |
| • Alaska | • New Mexico |
| • Arizona | • New York |
| • California | • North Carolina |
| • Colorado | • Ohio |
| • Connecticut | • Oklahoma |
| • Delaware | • Pennsylvania |
| • Florida | • Rhode Island |
| • Georgia | • South Carolina |
| • Iowa | • South Dakota |
| • Kansas | • Tennessee |
| • Kentucky | • Utah |
| • Massachusetts | • Vermont |
| • Montana | • West Virginia |
| • New Hampshire | • Wyoming |

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OSHA

Employers must:

- Provide a workplace free of known health and safety hazards & comply with OSHA standards
- Establish, update & communicate safety procedures
- “furnish to each of his employees employment and a place of employment which are free from **recognized hazards** that are causing or are likely to cause death or serious physical harm to his employees.” 29 U.S.C. § 654
 - COVID-19 is generally accepted as a recognized hazard
- Not retaliate against whistleblowers

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TIPS FOR OFF-DUTY ACTIVITY AND COVID-19

- Consider having a narrow off-duty policy to protect your workforce
- Don't make rash decisions
- Think through the issue
- Be consistent

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COVID-19 Litigation Trends

Priya P. Khatkhate

03.12.2021

Jackson Lewis P.C. • Chicago

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Litigation Trends

By the Numbers

- More than 1,700 COVID-19-related employment claims since March 2020
- California and New Jersey have seen the most complaints
- Most cases are single-plaintiff
- Most common categories of complaints:
 - Disability, Leave & Accommodation
 - Retaliation / Whistleblower
 - Discrimination / Harassment
 - Workplace Safety & Conditions

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Litigation Trends

Negligence-Related Suits

- Suits against employers for failure to implement reasonable precautions to prevent illness and spread of the virus
- What is the duty of care that is owed?
- How are these suits being proven?
- Comparative negligence
 - Apportioning damages based on various risks taken

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Litigation Trends

Disability Discrimination Claims

- “Long-haulers” - a disability under the law?
- Missing work for repeated quarantine or awaiting test results
- As more employers return to in-person work, refusals to come in to work because employee is high-risk

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Litigation Trends

Retaliation and Whistleblowing

- Employee complains about lack of PPE or alleges not enough is being done to protect employees
- Employee is later disciplined, or their employment is terminated
- Does this violate a clear mandate of public policy?
 - Difficult given changing guidance and differences among local, state, and federal authorities, especially early on

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Litigation Trends

Remote Work

- Wage-and-hour concerns with non-exempt employees
 - Tracking and recording time (accurately) daily
 - Taking required meal and rest breaks
- Reimbursement of work expenses
 - Who should pay for the faster wireless connection?
 - The home printer?
 - Office chairs and desks?