



# Employee Health in the Workplace:

Challenges During and After COVID-19



Rosemary Gill Kenyon

October 13, 2020

EXPECT EXCELLENCE®





# Moving Forward in the Midst of COVID-19

What stage are you operating now?

- Operating on-site fully
- Operating on-site partially with some employees working remotely
- Operating totally remotely

# Make a Plan for Moving Forward

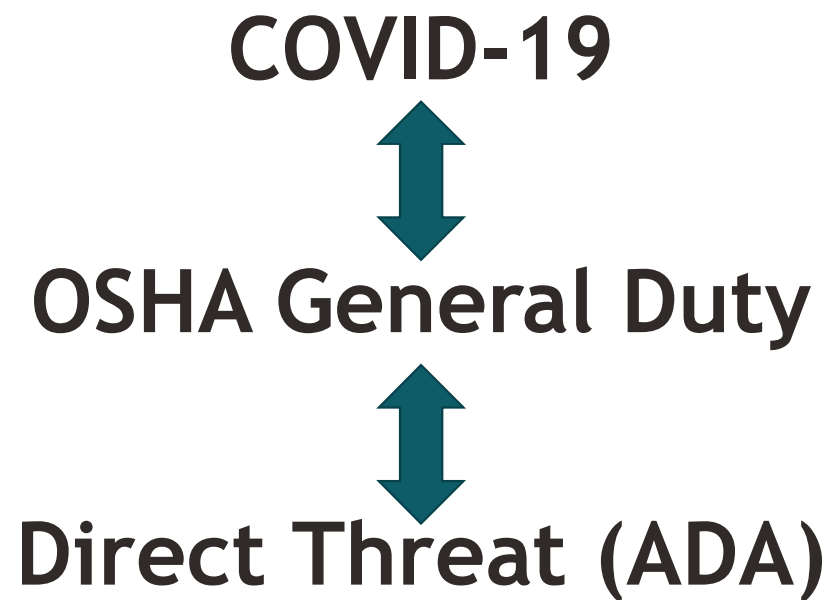
## Comprehensive Operational Plan

- Resource for employer and employees to understand operational standards
- Address various scenarios
- Provide flexibility
- Keep employees informed about the future to minimize anxiety

# Unique Considerations for Operating During a Pandemic

• OSHA General Duty Obligations	• Business Need to Operate
• CDC Guidance	• Feasibility of Remote Work
• Government Orders	
• COVID-19 Exposures and Community Spread	
• Employee Morale and Health	

# Unique Obligations When Operating In Person



## Infectious Disease Policies

- Must develop and enforce
  - Safety protocols
  - Baring sick employees from workplace

# Testing and Health Inquires Allowed During COVID-19

- Daily Health Screens
  - CDC recommends and required in some places
- COVID-19 Testing
  - Periodically, as a condition to return to work, when reasonable basis exists (e.g., exhibits symptoms, exposed, household member diagnosed or has symptoms, recovered from COVID-19)
- Medical documentation for requests for accommodations or leave or fitness for duty

# Testing and Health Inquires Allowed During COVID-19

## Employer Dos and Don'ts:

- Keep confidential and private
- Do not discriminate
- Use medically reliable processes
- Stay within parameters of CDC or other official guidance



# Moving Forward under the ADA

## Use traditional ADA analysis

- Is there a covered disability? Request medical documentation.
- Can the employee perform the essential functions of the job?
- Is there a reasonable accommodation?
- Use the interactive process!

# Moving Forward under the ADA

## Reasonable Accommodations

- Review and reconsider what are *essential functions* vs. *marginal functions* in the COVID-19 and post-COVID-19 era.
- Making exceptions during COVID-19 will not necessarily bind an employer down the road, if proper justification is provided.

# Moving Forward under the ADA

- Reasonable Accommodations
  - Be creative
  - Remote work is not the only answer
  - Extra PPE, barriers, shift work, other

## Higher Risk Workers - CDC Categories

- Pre-existing conditions are likely disabilities
- Cannot bar from workplace unless the individual presents a “direct threat” to him/herself or to others (high standard) and no other reasonable accommodation is available

## Higher Risk Workers - Age

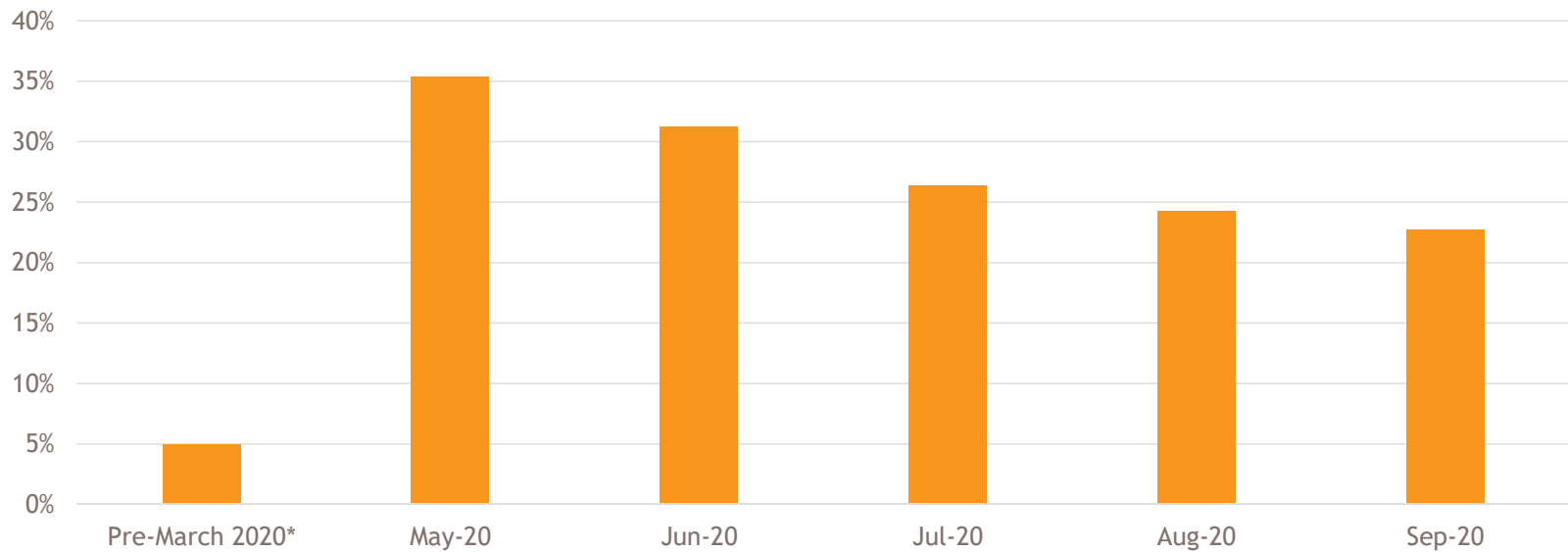
- Being 65 or older is identified as a risk category by the CDC
- Not a disability in itself
- Employers may offer flexibility to older workers even if not offered to younger employees
- Employer may not bar older workers from workplace

## Sensitive Cases

- Family member at higher risk
- Anxiety and mental health issues

See, *Mental Health, Substance Use, and Suicidal Ideation During the COVID-19 Pandemic*,  
Center for Disease Control and Prevention,  
<https://www.cdc.gov/mmwr/volumes/69/wr/mm6932a1.htm>

# Remote Work as an Accommodation During and Post-COVID-19?



**Percent of Employed Workforce Teleworking**

U.S. Bureau of Labor Statistics

\*Cushman & Wakefield, Global Office Impact Study & Recovery Timing, September 2020

## Remote Work as an Accommodation During and Post-COVID-19?

- When litigated pre-COVID-19, courts ruled in favor of employers who denied this accommodation about 70% of the time
- Lessons learned from teleworking during COVID-19:
  - Much work may be done remotely
  - Some work still cannot be done remotely - healthcare, manufacturing, retail
- What is the future for in-person attendance requirements?



# COVID-19 - Vaccines and Antibodies Tests

- May an employer:
  - Require a flu vaccine?
  - Require a COVID-19 vaccine?
  - Require a COVID-19 antibody test?
- It depends - the landscape is evolving
- Subject to potential accommodations for medical and religious reasons

# Moving Forward Enforcing Safety Rules

## ***Wearing a mask violates my rights!***

- Medical or religious accommodations should be considered, if appropriate
- Employer does not have to dispense with safety rule - compliance is an essential function
- If employee believes requirement is unsafe (e.g., vaccine)
  - Explain safety reasons behind requirement
  - Proceed cautiously to minimize OSHA retaliation claims

# Managing Anxiety about Returning to Work

## What is your game plan?

- Keep employees informed
- Explain safety precautions and protocols
- Employers may ask employees if they need a reasonable accommodation in advance

# Managing Leave Laws in the Midst of COVID-19

- State and Local Laws (proliferating)
- ADA and FMLA
- Emergency federal legislation

# Managing Leave Laws in the Midst of COVID-19

## Families First Coronavirus Response Act (FFCRA), March 18, 2020

- Covered employers <500 employees
- Effective - April 1 - December 31, 2020

# Managing Leave Laws in the Midst of COVID-19

## Expanded FMLA Leave (Paid after 2 weeks)

- Eligible employee -- worked 30 days
- Parents of children whose school or childcare is closed or unavailable
- Not an add-on to 12 week allotment of traditional FMLA leave taken
- Subject to other FMLA rules (e.g., offer health care benefits, no retaliation, no interference)

## Emergency Paid Sick Leave (EPSL)

- All employees eligible
- 6 reasons for leave
- 2 weeks or up to 80 hours
- No retaliation

# Managing Leave Laws - FFCRA Leave

- **U.S. Department of Labor**
  - Regulations, April 2020
  - Revised Regulations, September 2020
  - Guidance and Qs and As

## Managing Leave Laws - FFCRA Leave

- Leave is required only if work is available - affirmed in revised regulations
- No leave if:
  - If employer has closed or ceased operations
  - If employee may telework
  - If employer is closed due to government stay-at-home order or employee can work because exempted as essential worker



# Leave for Parents

## Every Employer's Challenge

- Regular FMLA does not cover the unavailability of school or childcare
- Consider state and local leave laws
- Many employers are being flexible
- Many parents, particularly women, are dropping out of workforce

## FFCRA Leave - Parents

### FFCRA leave is available for school or childcare closures

- Leave due to intermittent school closures is not considered “intermittent” leave, so employer consent is not required under revised DOL regulations. Each full day closure is a new reason for leave.
- A school is considered closed if it is not offering in person classes even if offering virtual classes.
- If an employee chooses virtual classes when in person classes are available, not entitled to leave.

## FFCRA Leave - Healthcare Worker Exclusion

- DOL Revised regulations narrowed definition of healthcare worker who could be excluded from coverage
- New definition covers:
  - Healthcare workers as defined under traditional FMLA, and
  - Healthcare workers who are employed in diagnostic services, preventative services, treatment service or other services that are integrated with and necessary to the provision of patient care which, if not provided, would adversely impact patient care.

## FFCRA Leave - Employer Leave Policies

### Emergency Paid Sick Leave

- Employee has discretion to use EPSL or any accrued paid leave from employer - up to 80 hours

### FMLA Leave Expansion

- Initial two weeks, employee may elect to use employer provided paid leave, but employer may require it to be counted against overall FMLA entitlement
- So, employee may use EPSL, employer provided leave, or both to top off to 100%

# Managing Leave Laws - FFCRA Leave

## Practice Pointers:

- Very technical law and details matter
- Tax credits may not be available if employer provides more leave than is allowed
- Avoid claims, including retaliation claims
- Over 70 lawsuits filed already, and more are anticipated

## COVID-19 Enforcement and Employment Litigation

- Expect aggressive EEOC, DOL, OSHA and state agency enforcement.
- Expect huge numbers of charge and complaint filings for discrimination, retaliation, denial of leave, whistleblower, etc.
- Over 700 employment related lawsuits due to COVID-19 already filed nationwide.

## Post-COVID-19 Trends

- What will the new normal look like and when will we return to it?
- How will employers balance telework and in person attendance?
- Will there be permanent paid leave legislation at the federal level?
  - Business getting frustrated with patchwork of state and local leave laws.

## Resources

- EEOC: <https://www.eeoc.gov/>
- DOL: <https://www.dol.gov/>
- State agencies





**Stay Safe and Healthy!**



# Employee Health in the Workplace:

Challenges During and After COVID-19



Rosemary Gill Kenyon

October 13, 2020

**EXPECT EXCELLENCE®**

