

LEGISLATIVE UPDATE

May 2020



COVID-19 LEGISLATIVE UPDATE

This Legislative Update is dedicated to the novel coronavirus (SARS-CoV-2)/COVID-19 health crisis. Over the last several months, employers and employees alike have learned the devastating effect a health pandemic can have on the economy, employment, and the employment environment.

On March 19, 2020, Governor DeWine signed Executive Order 2020-05D, declaring a state of emergency in Ohio. The executive order directs the Department of Health to issue guidelines for private businesses regarding appropriate work and directs state agencies to develop and implement procedures consistent with the recommendations of the Department of Health “designed to prevent or alleviate this public health threat.” Since the executive order, Director of Health Amy Acton initially issued a Stay at Home order, which effectively shut down Ohio businesses, with the exception of “essential” businesses. The purpose of the Stay at Home order was to curtail the spread of the coronavirus/COVID-19 and protect the health of Ohioans, especially those deemed high risk. On April 27, 2020, Governor DeWine announced details of his Responsible Restart Ohio Plan, which has encompassed a staged phase-in scheme, designed to permit businesses to reopen safely during the health crisis. The first phase began May 4, 2020 and by the end of May, nearly all businesses will reopen in some form. In keeping with the goals of the Stay at Home order, Director Acton recently issued the Ohioans Protecting Ohioans Urgent Health Advisory.

While the world has experienced other SARS (severe acute upper respiratory syndrome) viruses in the past, the present virus and disease are particularly contagious and dangerous. Consequently, federal and state health authorities have taken extreme measures to control the spread of the virus and disease. Social distancing, mask wearing, sanitization, and remote work may be the norm for some time to come. Because human beings have always been gregarious, controlling the spread of the virus will be challenging. Moreover, because most industries have always survived on a business model, which involves people working in close proximity employers face the daunting dilemma of balancing safety with productivity and profitability.

To assist employers in NOHRA, this Legislative Update will provide an overview of areas of concern for employers reopening in the present health crises. The information on this subject matter is too voluminous to cover in a newsletter format. Consequently, this Legislative Update is embedded with hyperlinks to complimentary materials. Of course, if you have specific questions, please contact legal counsel.

OSHA

The Occupational Safety and Health Act requires all employers to “... 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...” (Section 5(A) (1)). The COVID-19 Pandemic is a “recognized hazard” in the workplace. Therefore, employers must address this hazard and follow recommended guidelines issued by the Occupational Safety and Health Administration (OSHA) and the Center for Disease Control (CDC) and various state and local health departments to protect as much as possible their employees. However, if an employer fails to take the necessary steps to minimize or abate the recognized hazard presented by COVID-19, it may incur liability with OSHA for violating the “General Duty Clause”.



Please refer to the [OSHA Guidance publication](#) and the [Center for Disease Control publication](#) for further guidance. For more information on General Duty Clause, review our [recent article](#) or [check out our free video](#)



Employers should be aware that typically taking an employee’s temperature at work is considered a medical examination under the Americans with Disabilities Act (ADA). Absent an undue hardship, an employer may only conduct medical examination for current employees if it is job-related and consistent with business needs. However, according to the EEOC’s Pandemic Guidance, employers may measure employees’ body temperature if a pandemic influenza becomes widespread in the community and assessed by state or local health authorities or the CDC.

ADA

The ADA prohibits employers from making disability-related inquiries and requiring medical examinations unless they are job-related and consistent with business necessity. Employers further should not disclose the name or personal information of the employee who has tested positive for COVID-19. Additional employer COVID-related ADA FAQs [can be found here](#) as well as the EEOC Pandemic Guidance linked below..

FMLA

Employees who are sick with COVID-19 may qualify for job-protected leave under the Family and Medical Leave Act (FMLA). If an employee is sick for at least 3 consecutive days and has seen a doctor and otherwise meets FMLA eligibility requirements, employers should be aware that the rules and regulations of this law would apply. Employers should remember that FMLA also applies for caregivers of individuals who are sick with COVID-19.



The Emergency Family and Medical Leave Expansion Act (EMFLEA) is a temporary amendment to the Family and Medical Leave Act of 1993 (FMLA) which was passed as part of the Families First Coronavirus Response Act (FFCRA). This offers additional FMLA benefits including circumstances where an employee is unable to work or telework due to the need to care for a minor child if the child’s *school* or place of child care has been closed or the *child care provider* is unavailable, due to a *public health emergency*. Unlike traditional FMLA, it offers paid leave. The bill became effective April 1, 2020 and ends on December 31, 2020. For more information on the EMFLEA, visit our [COVID-19 FMLA employer resource page](#) or the [Department of Labor’s FAQs on the FFCRA](#).

EEOC

The [Equal Employment Opportunity Commission \(EEOC\) created a pandemic guidance](#). The pandemic guide is now in effect. This document is technical in nature and provides information about Titles I and V of the Americans with Disabilities Act (ADA) and Section 501 of the Rehabilitation Act as well as pandemic planning in the workplace.(1) *The Pandemic Guidance document was originally issued in 2009, during the spread of H1N1 virus, and has been re-issued on March 19, 2020, to incorporate updates regarding the COVID-19 pandemic.*

The CDC has also issued [\(CDC\) Interim Guidance for Businesses and Employers](#). The guidance included an advisory against discrimination. Other COVID-19 EEOC considerations include retaliation and hiring. For more information visit our [EEOC COVID-19 Resource Page](#).

ADDITIONAL EMPLOYER CONSIDERATIONS

Some additional resources and areas that employers may want to consider reviewing as businesses reopen include:

- ⇒ [CARES Act](#) considerations,
- ⇒ [Court updates](#),
- ⇒ Employment [handbooks and policy](#) updates,
- ⇒ [Workers' compensation](#)
- ⇒ [Intentional tort](#),
- ⇒ Ohio executive and [health orders](#),
- ⇒ [Paid sick leave](#),
- ⇒ [Unemployment](#)
- ⇒ [Wage and hour](#)

EMPLOYER CHECKLIST



- Ensure minimum 6 feet between people, if not possible, install barriers;
- Employees must perform daily symptom assessment that should include taking temperature with a thermometer and monitoring for fever. Also watching for coughing or trouble breathing;
- Require employees to stay home if symptomatic;
- Consider having distributors and guests wear face coverings at all times;
- Require regular handwashing;
- Stagger or limit arrivals of employees and guests;
- Have employees work from home whenever possible;
- Daily disinfection of desks and workstations;
- Change shift patterns (e.g. fewer shifts);
- Stagger lunch and break times;
- Daily deep disinfection of high-contact surfaces;
- Space factory floor to allow for distancing;
- Regulate max number of people in cafeterias/common spaces;
- Establish maximum capacity;
- Immediately isolate and seek medical care for any individual who develops symptoms while at work;
- Contact the local health district about suspected cases or exposures; and
- Shutdown shop/floor for deep sanitation if possible.

[Click here for](#) additional checklists for consumer, retail & service industries, and general office environments.

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