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RESPONSIBILITIES AND RIGHTS OF EMPLOYERS AND EMPLOYEES DURING THE COVID-19 PANDEMIC

Joseph Maya, Julia Audibert, Zachary Sipala, Caroline Vandis, Calvin Carson
MAYA MURPHY P.C. 266 Post Road East, Westport CT, 06880

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The Occupational Safety and Health Administration (OSHA), Fair Labor and Standards Act (FLSA), Equal Employment Opportunity laws (which encompass the Americans with Disabilities Act and the Rehabilitation Act), and Title VII of the Civil Rights Act of 1964 are long-standing pillars of employment law in this country. Collectively, they aim to ensure individual privacy, safe work environments, and equal treatment free from discrimination in the workplace. Given their appealing and sensical nature, it seems axiomatic that these statutes and agencies operate in concert. However, complying with their provisions during a global pandemic requires navigating murky waters. In practice, these laws present sometimes competing demands for many employers and employees trying to understand the new reality imposed by COVID-19. Striking an effective balance between these rights and responsibilities during the upheaval caused by COVID-19 incurs a host of relatively novel challenges. In this article, the attorneys at Maya Murphy, P.C. demystify how to serve the best interests of employers and employees and offer a comprehensive analysis of legal guidelines, both old and new, to inform our readers how to best achieve that balance.

I. PROTECTING PRIVACY AND SAFETY IN THE WORKPLACE

Introduction

Occupational Safety and Health Administration (OSHA) standards, the Equal Employment Opportunity Commission (EEOC), the Americans with Disabilities Act (ADA), and the Rehabilitation Act, together with the Families First Coronavirus Response Act, promulgate labor rules and regulations governing privacy and safety concerns during the COVID-19 pandemic (the pandemic). Note that these laws do not preclude employers from adhering to the guidelines set forth by the Centers for Disease Control and Prevention (CDC) or state and local public health authorities. The rapidly evolving body of knowledge behind these guidelines results in their frequent adjustment.[1] Accordingly, staying informed and prepared is critical if one is to manage both known risks and unpredictable scenarios created by the pandemic. The high rate of transmission and long incubation period inherent to COVID-19 present challenges for both employers and employees striving to prevent the virus's spread, implement required accommodations both in and outside of the workplace, and remain economically viable. If a worker contracts COVID-19, the employee, co-workers, and employer will all undoubtedly have

[1] *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. Equal Employment Opportunity Commission (Jun. 17, 2020), https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

questions regarding their rights and responsibilities. In this section you will find the most up to date answers to common questions regarding privacy and safety in the workplace.

A. FOR EMPLOYERS

1. Best Practices to Mitigate the Impact of COVID-19 in the Workplace While Protecting Employees' Privacy Rights

Employers can best protect employees during the COVID-19 pandemic in four primary ways:

1. Monitor symptoms known to be associated with COVID-19 and track the number of infected employees;
2. Inform employees of possible work-related exposure;
3. Create a safe work environment; and
4. Dissuade travel.[2]

Monitoring the Presence of COVID-19 in the Workplace

Monitoring COVID-19's presence is paramount to preventing its spread. Employers should keep track of the number of infected employees, where and with whom (at the workplace) the infected person was physically present and came into contact during the fourteen days prior to testing positive, and when the employee began experiencing symptoms.[3] To accomplish this, employers are permitted to ask employees if they are experiencing symptoms associated with COVID-19 and why an employee decided to take sick leave.[4] While self-reporting is common, it is not required in all workplaces. Employees are not legally required to inform their employer if they contract COVID-19, save certain exceptions for health care and essential workers, unless their employer directly inquires.[5] Employees cannot be mandated to report to their employer if a coworker is experiencing symptoms. Rather, confidential self-reporting mechanisms should be administered.

Informing Employees of the Presence of COVID-19

When an employer learns that an employee tested positive for COVID-19 the employer has an affirmative obligation within fourteen days of the positive test result to inform all employees who, within that fourteen day window, were in close proximity to, or in

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[2] *Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019*, CDC (May 6, 2020) https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html.

[3] *Id.*

[4] *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, *supra* note 1.

[5] Rachel Feintzeig and Chip Cutter, *The Coronavirus and Your Job: What the Boss Can—and Can't—Make You Do,* The Wall Street Journal (Mar. 12, 2020), https://www.wsj.com/articles/the-coronavirus-and-your-job-can-my-boss-make-me-do-that-11583981316?mod=article_inline.

contact with, the infected employee.[6] Privacy laws prohibit disclosure of a COVID-19-positive worker's identity to coworkers.[7] The employer should, however, notify employees that they may have been exposed to the virus if they worked in close proximity (*e.g*. on the same floor) to the infected employee within the past fourteen days.[8] The infected employee's name may be reported to a public health agency by the employer (the healthcare provider is required by law to disclose positive cases so employers are not duty-bound to do so).[9]

Workplace Safety

A safe work environment is essential to mitigating the virus' spread with the added benefit of raising employee morale during this tumultuous time. Respecting privacy rights does not absolve employers of other affirmative duties to protect the safety of employees when they possess direct knowledge that an employee is infected with COVID-19. For example, the employer:

- May not withhold from certain coworkers that they may have been exposed to the virus;
- Must provide proper personal protective equipment (PPE); and,
- Cannot ignore safety regulations.

Employers are also advised to follow Occupational Safety and Hazard Administration (OSHA) standards and Centers for Disease Control and Prevention (CDC) recommendations. Specific guidelines are discussed in Section VI: Workplace Safety.

Dissuading Travel

Discouraging unnecessary travel by employees during working hours is an effective tool employers can utilize to protect their businesses and employees. However, an employer cannot prevent employees from traveling where they please during their personal time.[10] Employers may cancel previously granted vacation leave unless language in an existing employment contract prevents the employer from doing so.[11] Although legal, blurring the boundaries between personal life and work can have a detrimental effect on employee morale and makes this option troublesome. Consequently, educating employees on potential risks associated with travel, including denial of re-entry into the country or state, is a more attractive means to dissuade employees from visiting high-

[6] Feintzeig, *supra* note 5.
[7] *General Business Frequently Asked Questions*, CDC (Jul. 11, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html.
[8] Feintzeig, *supra* note 5.
[9] *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, *supra* note 1.
[10] Feintzeig, *supra* note 5;
[11] *Id*.

risk zones. In fact, several states, including Connecticut, have imposed a fourteen-day quarantine for travelers seeking to enter or return from high-risk areas.[12]

Business trips should be cancelled whenever possible.[13] The Connecticut Supreme Court held that an employer's responsibility to provide a safe workplace extends to any geographical location an employee may work and is not limited solely to Connecticut work sites, nor to work sites under the control of the employer.[14]

Furthermore, the Connecticut Supreme Court considers local travel advisories when determining the relative danger to an employee traveling to a high-risk area.[15] Thus, if an employer orders an employee to travel to a high-risk zone identified in an active travel advisory, the employee may refuse. Under Connecticut law, if the employee is subsequently fired based on this refusal, the employee may have grounds to sue the employer for wrongful discharge.[16]

B. FAQs FOR EMPLOYEES

1. If I test positive for COVID-19 or experience COVID-19-like symptoms, am I entitled to leave from work?

Generally, yes. The Families First Coronavirus Response Act (FFCRA) requires certain employers to grant medical leave to employees for specific COVID-19-related reasons.[17] The Family Medical Leave Act (FMLA) may also offer leave if an employee is unable to work. The types and availability of work leave are discussed in Section II: The Families First Coronavirus Response Act.

2. If I contract COVID-19 while at work, can I sue my employer?

While it is possible to sue an employer if an employee contracts COVID-19 in the workplace, it is exceedingly rare due to the reasons explained below. In Connecticut, the Connecticut Workers' Compensation Act (CWCA) is the remedy for any injury or illness sustained while working.[18] However, if an employer either harms an employee intentionally or engages in willful or serious misconduct where injury to the employee

[12] Conn. Executive Order No. 7III, (Jul. 21, 2020); *See Travel Advisories,* Travel.State.Gov (Jun. 5, 2020) https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories.html/ (last visited Jul. 5, 2020) for a list of high-risk areas identified by the U.S. Dept. of State.
[13] *See Travel During the COVID-19 Pandemic,* CDC (Aug. 11, 2020), https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-during-covid19.html.
[14] *Parsons v. United Technologies Corp.*, 243 Conn. 66, 81 (1997).
[15] *Id.* at 84.
[16] Conn. Gen. Stat. §§ 31-49, 31-370 (2019).
[17] *Families First Coronavirus Response Act: Employee Paid Leave Rights*, U.S. Dept. of Labor https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave (last visited, Jun. 20, 2020).
[18] *Jett v. Dunlap*, 179 Conn. 215, 217 (Conn. 1979).

was substantially certain to occur, the employer loses the protection afforded by the CWCA.[19]

Intentional Harm and Serious Misconduct

Intentional Harm	Serious Misconduct
For the harm to be intentional the action must be done consciously and deliberately for the purpose of producing an injury.[20]	An employee must demonstrate that the employer intentionally acted in such a way that the injury sustained by an employee was "substantially certain" to result from the employer's conduct.[21] "Substantial certainty exists when the employer cannot be believed if it denies that it knew the consequences were certain to follow."[22]

COVID-19 and Intentional Harm

Unless an employee can adduce proof that the employer was intentionally trying to infect the employee with COVID-19, that employee will not be able to recover in a lawsuit brought against the employer.

COVID-19 and Serious Misconduct

While meeting the standard of serious misconduct requires more than a cavalier attitude,[23] it is unlikely that an employee would be able to prove substantially certain misconduct in cases involving COVID-19.

Establishing coworkers were in close physical proximity to a fellow employee who tested positive for COVID-19 does not guarantee courts will find sufficient certainty of workplace transmission or exposure necessary to be successful in a civil action against the employer.

If an employer fails to follow proper precautions, a court may find the inaction qualifies as "substantially certain" grounds for causal contraction of the virus for future COVID-19-positive employees' claims. The case against an employer is stronger when:

- A previously infected employee disclosed his or her positive test results to the employer;
- Brought the risks his or her own diagnosis poses to coworkers to the employer's attention; and,

[19] *Binkowski v. New Haven Board of Education*, 184 A.3d 279, 283-284 (2018).
[20] *Id.* at 284.
[21] *Id.*
[22] *Id.* (quoting *Sorban v. Sterling Engineering Corp.*, 830 A.2d 372 (Conn. 2003)).
[23] *Id.* at 285-286.

- The employer failed to respond appropriately for self-serving reasons (e.g. profitability considerations).

3. Am I eligible to receive workers' compensation if I contract COVID-19?

Contraction of an infectious disease like COVID-19 is a compensable injury in Connecticut.[24] Ordinarily, if a worker suffers an injury during the course of employment, the employee is entitled to workers' compensation benefits.[25] Connecticut law prescribes that an injury is deemed causally related to employment if the injury is "definitely located as to the time when and the place where the accident occurred."[26] For example, a Connecticut preschool teacher who contracted pink eye from one of her students was found to have a compensable injury after her ophthalmologist wrote a letter stating the infection most likely originated at the preschool.[27] The key difference between this case and a potential COVID-19 workers' compensation claim is that the former claimant was able to ascertain the concrete instance that exposed her to the infection. The ability to discern with some degree of certainty is far more challenging when the injury is contracting the coronavirus.

The nature of COVID-19 makes it difficult to definitively trace when and where exposure occurred. So, the higher the number of places where an employee spends time outside the workplace makes it less likely he will be able to prove he contracted COVID-19 in the workplace.

In Connecticut, workers' compensation claims are handled by the Department of Administrative Services.[28] Procedurally, if the injury is disputed, a hearing is administered by the Connecticut Workers' Compensation Commission and can be appealed to the court system.[29] Prior to the COVID-19 pandemic, employees were required to file a claim within one year of the date an injury was sustained. Notice of denial or first payment was required within 28 calendar days after an employee filed a complaint.[30] However, given the disruption surrounding the pandemic, Governor Lamont has indefinitely waived all statutes of limitations pertaining to workers' compensation claims until further notice.[31]

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[24] *Doe v. Stamford*, 241 Conn. 692, 696 (1997).
[25] Conn. Gen. Stat. § 31-275(16)(A) (2019).
[26] Conn. Gen. Stat. §31-275(1)(B) (2019).
[27] *Walker v. City of Hartford*, 4605 CRB-1-03-1 (December 30, 2003).
[28] *Workers' Compensation Rights, Responsibilities, and Claims*, Ct.gov, https://portal.ct.gov/DAS/Workers-Comp/DAS-Workers-Compensation/Workers-Compensation-Rights-Responsibilities-and-Claims (last visited Aug. 9, 2020).
[29] *Id.*
[30] *What to Do if You are Injured on the Job*, Workers' Compensation Commission, https://wcc.state.ct.us/gen-info/if-injured/todo.htm (last visited Aug. 9, 2020).
[31] Conn. Executive Order No. 7K, (Mar. 23, 2020).

Employees may not be discharged or discriminated against if they file a worker's compensation claim.[32] The claim may be subject to a collective bargaining agreement's grievance and arbitration procedures put in place by the employer, but such a policy will not deprive the complainant from his day in court.[33]

If a worker's compensation claim is tried before a jury, the burden of proof is the same as the burden used in an employment discrimination claim.[34] This means that the employer must provide a legitimate business reason for the adverse action, but it is the responsibility of the employee to show that this reason is pretextual.[35] A plaintiff's failure to provide facts that dispute the legitimate business reason provided by the employer will result in a dismissal of the case.[36] Thus, it is in the benefit of the employer to protect employees from COVID-19 as much as possible per the OSHA recommended guidance to show that they have taken all necessary measures to protect employees, and it was out of their control as to how the employee contracted the virus. OSHA recommended guidelines are discussed further in Section VI: Workplace Safety.

On July 24, 2020, Governor Lamont, in an Executive Order, declared that workers who missed a day or more of work between March 10, 2020 and May 20, 2020, because they were diagnosed with COVID-19 or experienced symptoms of COVID-19, are presumed to have contracted the virus as an occupational hazard of being in the workplace. This rebuttable presumption requires an employee:

> i. to have worked, at the direction of the employer, outside the home during at least one of the fourteen days immediately preceding the date of injury, and had not received an offer or directive from said employer to work from home instead of from his or her place of employment;
>
> ii. if the date of injury was more than fourteen days after March 23, 2020, such employee was employed by an employer deemed essential by the Department of Economic and Community Development pursuant to Executive Order 7H;
>
> iii. the contraction of COVID-19 by such employee was confirmed by a positive laboratory diagnostic test within three weeks of the date of injury or diagnosed and documented within three weeks of the date of injury by a licensed

[32] Conn. Gen. Stat. § 31-290a (2019).
[33] *Shea v. Town of Stratford,* 37 Conn. L. Rptr. 150 (Conn. Super. Ct. 2004).
[34] *Ford v. Blue Cross & Blue Shield of Conn., Inc.,* 578 A.2d 1054, 1060-1061 (Conn. 1990).
[35] *Barrett* v. *Hebrew Home & Hosp., Inc.,* 807 A.2d 1075, 1080 (Conn. App. 2002).
[36] *Id.*; *Raia v. Sonitrol Communications Corp.,* 873 A.2d. 269 (Conn. App. 2005).

physician, licensed physician's assistant, or licensed advanced practice registered nurse, based on the employee's symptoms;

and iv. a copy of the positive laboratory diagnostic test results or the written diagnosis required by subdivision (iii) of this subsection shall be provided to the employer or insurer.[37]

[37] Conn. Executive Order No. 7JJJ (Jul. 24, 2020).

II. THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

Introduction

The United States Congress enacted the Families First Coronavirus Response Act (FFCRA) to traverse the formidable challenges facing the American workforce as a result of the pandemic. The FFCRA requires covered employers to offer paid sick leave in certain COVID-19 related circumstances and expands the Family and Medical Leave Act of 1993. Employers will be reimbursed for providing paid time off to employees. The regulations are designed to provide additional sick leave to employees for reasons related to the pandemic and to ease the financial burden associated with offering leave from work for employers. The United States Department of Labor enforces adherence to this legislation.

A. THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

Overview

On April 1, 2020, the United States Department of Labor (DOL) announced an expansion of leave provisions under the Families First Coronavirus Response Act (FFCRA or Act), to be effective April 2, 2020, through December 31, 2020.[38] The two primary components of this temporary expansion are the Emergency Family Medical Leave Expansion Act and the Emergency Paid Sick Leave Act.[39] The Emergency Family Medical Leave Expansion Act affords employees additional time away from work by expanding the leave provisions of Title I of the Family and Medical Leave Act.[40] The Emergency Paid Sick Leave Act provides additional paid sick leave for workers unable to work because of circumstances related to the pandemic and reimburses employers for leave taken under the act.[41] The FFCRA also assures those taking leave will retain their current position or be assigned a near-equivalent title.[42] Layoffs and furloughs due to financial exigencies experienced by employers because of the pandemic do not fall under the provisions of the FFCRA. Thus, leave taken under this Act does not entitle an employee to collect unemployment benefits while on leave.[43]

Covered Employers

The FFCRA applies to private employers with less than five hundred employees.[44] Private employers with less than fifty employees may seek an exemption if granting leave under the FFCRA would jeopardize their businesses.[45] Public employers are generally covered by both the Emergency Paid Sick Leave Act and the Emergency Family Medical Leave

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[38] *Temporary Rule: Paid Sick Leave Under the Families First Coronavirus Response Act*, U.S. Dept. of Labor, https://www.dol.gov/agencies/whd/ffcra (last visited Jul. 11, 2020).
[39] *Families First Coronavirus Response Act: Employee Paid Leave Rights*, *supra* note 17.
[40] *Families First Coronavirus Response Act: Questions and Answers*, U.S. Dept. of Labor, https://www.dol.gov/agencies/whd/pandemic/ffcra-questions (last visited Aug. 9, 2020).
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Families First Coronavirus Response Act: Questions and Answers*, *supra* note 40.
[45] *Id.*

Expansion Act, but *federal* employees are typically not entitled to leave afforded by the Emergency Family Medical Leave Expansion Act provisions.[46] Healthcare providers and emergency responders may be exempt from the FFCRA at their employer's discretion.[47]

Leave Provided by the FFCRA

To be eligible for leave under the FFCRA (leave), an employee must be currently employed as a full-time, part-time or temporary employee.[48] Employees of businesses that have ceased or suspended operations are not eligible for FFCRA leave.[49] If an employee's workplace closes while the employee is on leave, the employee is eligible to receive paid leave for that taken prior and up to the business's closing.[50]

When requesting leave, employees must provide employers with their name, dates of leave, the reason for leave, and an affirmative statement by the employee that the reason for requesting leave renders him or her unable to work.[51]

1. The Extended Family and Medical Leave Act

The FFCRA expands Title I of the Family and Medical Leave Act (FMLA). Under the Extended Family and Medical Leave Act, employees who have been employed for thirty calendar days prior to requesting leave are entitled to up to ten weeks of leave to care for a child whose regular place of care is unavailable due to COVID-19.[52] Employers are not required to pay employees for the first two weeks of leave taken under such circumstances; however, employees may use vacation time, paid leave accrued under

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[46] *Families First Coronavirus Response Act: Questions and Answers*, *supra* note 40, ("If you are a Federal employee, you are eligible to take paid sick leave under the Emergency Paid Sick Leave Act. But only some Federal employees are eligible to take expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act. Your eligibility will depend on whether you are covered under Title I or Title II of the Family Medical Leave Act. Federal employees should consult with their agency regarding their eligibility for expanded family and medical leave.); *See Fact Sheet: Federal Employee Coverage under the Leave Provisions of the Families First Coronavirus Response Act (FFCRA)*, U.S. Office of Personnel Management (Mar. 18, 2020) https://www.opm.gov/policy-data-oversight/covid-19/opm-fact-sheet-federal-employee-coverage-under-the-leave-provisions-of-the-families-first-coronavirus-response-act-ffcra.pdf if you are a federal employee and are attempting to determine your eligibility.

[47] *Families First Coronavirus Response Act: Questions and Answers*, *supra* note 40, (The FFCRA defines a healthcare provider as "anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity," and defines an emergency responder as "anyone necessary for the provision of transport, care, healthcare, comfort and nutrition of such patients, or others needed for the response to COVID-19.")

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] The U.S. Dept. of Labor defines a "place of care" as a physical location in which care is provided for a child. The physical location does not have to be solely dedicated to such care. A place of care could be a day care, preschool, summer camp, school program a home, or any sufficiently similar place. See *Families First Coronavirus Response Act: Questions and Answers*, *supra* note 40.

their employer's policy, or paid leave available under the Extended Paid Sick Leave Act.[53] If the leave extends beyond two weeks, employees must be paid no less than two-thirds their regular rate of pay, capped at $200 per day ($10,000 in total).[54]

Employees may be required to use sick days or paid time off (PTO) while taking extended leave under the Extended Family and Medical Leave Act. Leave taken under the Emergency Paid Sick Leave Act does not offset any sick leave provided by other federal law, state laws, employment policies or collective bargaining agreements.[55] The State of Connecticut provides employees with one paid hour of sick leave for every forty hours worked, for a maximum of forty hours per year.[56]

The FFCRA entitles employees of covered employers to:

- Two weeks (up to eighty hours) of paid sick leave at the employee's regular pay rate when they are unable to work because of quarantine or if the employee is experiencing COVID-19 symptoms and seeking a diagnosis.[57]

- Two weeks (up to eighty hours) of paid leave at two-thirds of the employee's regular pay rate when the employee is unable to work because of a legitimate need to care for an individual subject to quarantine who is an immediate family member, regularly resides in the employee's home, or where the relationship between the employee and the individual creates the expectation of care and the individual in need of care depends upon the employee. Employees may also utilize leave to care for a minor whose school or childcare provider is unavailable due to COVID-19.[58]

An additional ten weeks paid expanded family and medical leave, at two-thirds of the employee's pay rate, is allowed if the requested leave is to care for a child whose school or place of care is closed, or a child care provider is unavailable, due to COVID-19.[59] This entitlement is subject to the employee having been employed for at least 30 days prior to when the leave is requested.[60]

[53] *Families First Coronavirus Response Act: Questions and Answers*, *supra* note 40.
[54] *Id.*
[55] *Id.*
[56] Conn. Gen. Stat. § 31-57s (2019).
[57] *Families First Coronavirus Response Act: Employee Paid Leave Rights, supra note* 17.
[58] *Id.*
[59] *Id.*
[60] *Families First Coronavirus Response Act: Questions and Answers*, *supra* note 40.

2. The Emergency Paid Sick Leave Act

The Emergency Paid Sick Leave Act permits employees who take sick leave for a qualifying reason, such as being subject to quarantine under federal or state law, being instructed by a healthcare provider[61] to self-quarantine, being diagnosed with COVID-19, or experiencing COVID-19 symptoms and seeking a diagnosis, to be eligible for the greater of their regular rate of pay, the federal minimum wage in effect under the FLSA, or the applicable state or local minimum wage.[62] The maximum amount an employee may collect under the Emergency Paid Sick Leave Act of the FFCRA is $511 per day ($5110 in total for the duration of leave).[63] Alternatively, if an employee requires leave because he or she is caring for an individual who has been quarantined, or a child whose care provider is unavailable for COVID-19-related reasons, they are entitled to two-thirds of the greater of his regular rate of pay, the federal minimum wage, or the applicable state or local minimum wage.[64] The maximum an employee may make during leave for these reasons is $200 per day ($2000 for the two week period).[65]

Leave under the Emergency Paid Sick Leave Act can be taken irrespective of whether the employee exhausted leave provided by the FMLA.[66] At the employer's discretion, employees may supplement paid sick leave wages with preexisting paid leave capped at the employee's normal earnings.[67] However, an employer may not require employees to use accrued paid time off prior to requesting leave under the Emergency Paid Sick Leave Act.[68] An employee can only take family and medical leave for a total of twelve weeks during the twelve month employment cycle set by the employer.[69] For example, if an employee took six weeks of family and medical leave starting in January, and the employer's family and medical leave cycle resets on December 31st, the employee would be eligible for another six weeks of leave under the Extended Paid Sick Leave Act.

As of July, 2020, any "wage replacement benefits paid under Sections 31-307 or 31-308(a) of the Connecticut General Statutes shall be reduced by the amount of any paid sick leave available to an employee through the Emergency Paid Sick Leave Act set forth in sections 5101 et seq. of the [FFCRA]…or through another paid sick leave program specifically available in response to COVID-19 and separate from any accrued paid time off regularly available to the employee."[70]

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[61] *Families First Coronavirus Response Act: Questions and Answers*, *supra* note 40.
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] Conn. Executive Order No. 7JJJ (Jul. 24, 2020).

Wages and Hours

An employee's regular rate of pay is the average of his "regular rate" over the past six months.[71] An employee's "regular rate" is the total compensation received by the employee in the workweek divided by the total hours worked by the employee during the week.[72] Part-time employees are entitled to paid leave for the amount of hours they would normally be scheduled to work in a two week period.[73] If the employee does not have a regular schedule, his or her hours can be calculated by averaging the amount of hours worked per two week period during the six months prior to the leave.[74] Employees that have not worked for their employer for six months are entitled to the amount of hours they were hired to work.[75]

Non-exempt employees may receive more than forty hours of paid sick leave in a week if they were scheduled to work more than forty hours.[76] However, an employee is only entitled to eighty hours total paid sick leave and does not receive a premium rate for overtime hours while on leave.[77] Employees who received paid leave prior to the Act taking effect are still eligible for two weeks of paid leave at their normal rate, and ten weeks of paid leave at two-thirds of their rate.[78] Paid sick leave under the FFCRA may be taken intermittently while teleworking.[79] FFCRA paid sick leave must be taken in increments of a full day when working at an employee's normal jobsite.[80] If an employee is taking FFCRA paid sick leave because he is experiencing COVID-19 symptoms and seeking a diagnosis, subject to a quarantine, or taking care of an individual subject to a quarantine, the paid sick leave must be taken continually until the employee no longer has a qualifying reason for the sick leave, or the paid sick leave is exhausted.[81] If an employee is taking paid sick leave to care for a child whose care provider is unavailable due to COVID-19, the paid sick leave may be taken intermittently.[82]

Employer Reimbursement

In addition to providing leave, the FFCRA grants businesses tax credits to reimburse them for the expense of FFCRA leave taken by employees.[83] Qualified health plan expenses and Medicare taxes on qualified leave wages are also reimbursed.[84] The credits can be claimed

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[71] Conn. Executive Order No. 7JJJ (Jul. 24, 2020).
[72] *Fact Sheet #56A: Overview of the Regular Rate of Pay Under the Fair Labor Standards Act (FLSA)*, U.S. Dept. of Labor, https://www.dol.gov/agencies/whd/fact-sheets/56a-regular-rate (last visited Aug. 9, 2020).
[73] *Id.*
[74] *Families First Coronavirus Response Act: Questions and Answers*, *supra* note 40.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *COVID-19-Related Tax Credits: General Information FAQs*, IRS, https://www.irs.gov/newsroom/covid-19-related-tax-credits-general-information-faqs (last visited Jul. 11, 2020).
[84] *Id.*

on an employer's federal employment tax return or be used to reduce their federal employment tax deposit.[85] If the credit is larger than the federal employment tax deposit, an advance payment can be requested.[86] Employers must retain documentation related to any employee's granted request for leave. These documents include: Form 941, Employer's Quarterly Federal Tax Return, Form 7200, Advance of Employer Credits Due To COVID-19, and any other applicable filing made to the IRS requesting the credit.[87] Qualified health plan expenses and Medicare taxes on qualified leave wages will also be reimbursed.[88]

[85] *COVID-19-Related Tax Credits: General Information FAQs*, *supra* note 83.
[86] *Id.*
[87] *Id.*
[88] *Id.*

III. WAGES

Introduction

Both employees and employers are facing challenges to provide financially for their families while keeping their livelihoods afloat during the pandemic. The job market is volatile and unemployment rates are soaring to levels not seen since the Great Depression, leaving the nation's workforce grappling with uncertainty and anxiety. The economic downturn has forced many employers to make the difficult decision to reduce the size of their workforce. If an employer institutes a temporary or permanent reduction in its number of workers, it must do so in accordance with the law. Those joining the masses of recently unemployed Americans are turning to the overwhelmed unemployment benefit system of their respective states for financial assistance. To aid unemployed workers during this turbulent time, the government expanded unemployment benefits' availability for eligible individuals.

A. LAYOFFS, FURLOUGHS, AND REDUCTIONS IN FORCE

Layoffs	Furloughs	Reductions in Force
A layoff is typically the severance of the employment relationship due to lack of work or inability to pay employees because of insufficient cash flow.[89] Employers may choose to lay off employees with the hope of rehiring them when economically feasible (this is known as a "temporary layoff").[90] Temporary layoffs resemble furloughs but for the definiteness of an exact return date and, in an effort to maintain goodwill with their employees, employers may allow continued receipt of benefits for a finite period of time after laying off employees.[91]	Furloughs can involve either a reduction in hours, a finite number of unpaid days away from work, or a single block of unpaid leave.[92] During the pandemic, employers often furlough employees for a duration of time to comply with federal or state quarantine and shelter-in-place orders. A furloughed employee may be entitled to collect both unemployment benefits and uninterrupted employment benefits throughout the employee's absence from work, depending on the reasons for the furlough.[93]	A reduction in force occurs when the employment relationship is terminated permanently and entirely.[94] Layoffs can become reductions in force when employers realize the disheartening reality that rehiring employees is no longer possible.[95]

[89] *COVID-19-Related Tax Credits: General Information FAQs, supra* note 83.
[90] *Id.*
[91] *What is the difference between a Furlough, Layoff, and Reduction in Force?,* SHRM, https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/furloughlayoffreductioninforce.aspx (last visited Aug. 17, 2020).
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*

1. The Warn Act

The Worker Adjustment and Retraining Notification (WARN) Act governs when businesses engage in mass layoffs, furloughs, or reductions in force. The WARN Act requires employers with one hundred or more full-time employees who have been in the employ of the business for at least a trailing six-month period to provide notice to employees no later than sixty calendar days prior to:

- Closing a worksite that will affect fifty or more employees; or,
- Instituting a mass laying off that will impact either:
  - At least fifty employees comprising one third of the worksite's total workforce; or,
  - Five hundred or more employees at a single worksite during a ninety-day period.[96]

The notice may be sent via any reasonable method of delivery designed to ensure the employees' receipt of the notice.[97] If "faltering companies, unforeseen business circumstances, or natural disasters" vitiate employers' abilities to provide notification sixty-days in advance, they shall issue notification as soon as possible.[98] Notice to employees of anticipated furloughs is required if it is expected to endure more than six months.[99] Due to the nature of the COVID-19 pandemic, the sixty day notice is likely to be waived as an employer should easily be able to demonstrate that the reason for the terminations was unforeseeable.[100] However, a business still must provide as much notice as possible and include a statement of the reason a sixty day notice was not given.[101] Notice must also be provided when a temporary furlough that is not expected to last longer than six months becomes reasonably foreseeable to extend past six months.[102]

2. Work-Mandated Leave

The applicable pay rate during work-mandated leave depends on the circumstances of employment. In the absence of a contract, work-mandated leave is likely unpaid.[103]

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[96] 29 U.S.C. 2101(a)(3)(B) (2018); *Worker Adjustment and Retraining Notification Act Frequently Asked Questions,* U.S. Dept. of Labor, https://www.dol.gov/sites/dolgov/files/ETA/Layoff/pdfs/WARN%20FAQ%20for%20COVID19.pdf (last visited Jul. 15, 2020).
[97] 29 U.S.C. 2107 (2018); 20 CFR § 639.8 (2020).
[98] 20 CFR § 639.9 (2020).
[99] 20 CFR § 639.6 (2020).
[100] *Worker Adjustment and Retraining Notification Act Frequently Asked Questions, supra* note 96, at 4.
[101] 20 CFR § 639.7 (2020).
[102] *Id.*
[103] Mark A. Lies, II, and Daniel Birnbaum, *Coronavirus Information and FAQs*, SHRM (Feb. 27, 2020) https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-information-and-faqs.aspx.

Exempt employees must be paid for the entire work week if they work for any part of the week.[104] Non-exempt employees need only be paid for the actual number of hours they work.[105] An employer may refuse to allow employees to use their PTO while on work-required leave. It is important to note that there is neither a federal nor state requirement for paid vacation time.

In Connecticut, PTO is a "fringe benefit" and is not included as part of an employee's wages.[106] Vacation policies are drafted by employers and may be as expansive or narrow as they so choose.[107] It is common for employers to retain the power to deny vacation leave at any time. There are exceptions for how vacation policies can be utilized in this context. An employer cannot enforce the policy in a discriminatory manner, nor cause an employee to lose previously earned vacation time due to an employment policy change. Employees are subject to their employer's policies in place prior to the pandemic.

B. UNEMPLOYMENT ELIGIBILITY IN CONNECTICUT

Layoffs, furloughs, and reductions in force are often compensable under Connecticut's unemployment laws. To be eligible for unemployment in Connecticut an individual must:

- Be fully or partially unemployed;
- Be unemployed through no fault of their own [the law imposes disqualifications for certain types of separations from employment];
- Be physically and mentally able to work full time;
- Be available for full-time work;
- Be registered with the American Job Center;
- Be actively seeking work by making reasonable efforts to find employment each week*;
- Participate in selected reemployment services if the employee is identified as a dislocated worker by the profiling system;
- File weekly claims as directed.[108]

[*The Connecticut Department of Labor has temporarily waived the "actively seeking work" requirement when filing for unemployment provided the applicant is ready to work

[104] *Id.*
[105] *Fact Sheet #70: Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues*, U.S. Dept. of Labor (Sep. 2019) https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs70.pdf.
[106] Conn. Gen. Stat. § 31-76k (2019); *Wagmeister v. Condor Air-Sea Transport, Ltd.*, 1995 WL 631001 (Conn.Super.,1995).
[107] *See* Conn. Gen. Stat. § 31-71f.
[108] *Unemployment Insurance Frequently Asked Questions (FAQs)*, CT Dept. of Labor, https://www.ctdol.state.ct.us/progsupt/unemplt/new-faqui.htm (last visited Jul. 15, 2020).

once the Governor declares the public health emergency over and, accordingly, lifts the suspension of the work search requirement.[109]]

Financial Eligibility

An individual must meet additional financial criteria to be eligible to receive unemployment benefits. Basic eligibility requirements include:

- Earning sufficient wages over a base period;
- "Proper" nature of separation from employment;
- Availability to work;
- Registering with the American Job Center;
- Being physically and mentally capable of performing work;
- Actively seeking employment;
- Participating in certain reemployment services if called upon; and,
- Filing weekly unemployment benefit claims.[110]

The base period for earnings is typically the first four of the last five trailing calendar quarters.[111] The weekly benefit rate is one twenty-sixth of the average of total wages paid during the two highest quarters in the base period.[112]

Employees whose hours are reduced such that their status changes from full-time to part-time may apply for partial unemployment benefits. To be eligible for partial benefits, an applicant is required to:

- Be able and available to work as defined by applicable Connecticut law;
- Work less than the number of hours which customarily constituted full-time employment for position's requirements per the employer's policy; and,
- Not refuse additional hours.

[109] *Waiver of Work Search Requirements for Unemployment Insurance Claimants*, CT Dept. of Labor, (Mar. 19, 2020), http://www.ctdol.state.ct.us/COVIDFAQWorkSearchRequirements.pdf.
[110] *Unemployment Insurance: A Guide to Collecting Benefits in the State of Connecticut*, CT Dept. of Labor, http://www.ctdol.state.ct.us/progsupt/unemplt/claimant-guide/uc-288.pdf at 8 (last visited Aug. 9, 2020).
[111] *Id.* at 9.
[112] *Id*.

Partial unemployment benefits are calculated by an employee's weekly benefit rate, reduced by two-thirds of the wages earned from part-time employment.[113] The maximum amount of state unemployment benefits an individual may receive is $649 per week, plus an additional $15 per dependent.[114]

Eligibility for Unemployment Benefits when Termination is "For Cause" or by an Employee's Voluntary Severance

If employees are let go for good cause or choose to quit their job, it is unlikely that they will qualify to receive unemployment benefits.[115] When workers leave employment of their own volition, typically they are precluded from collecting unemployment benefits unless they can show one of two things: (1) that the reason behind their departure was for good cause attributable to the employer's actions; or (2) leave was necessary to care for a child, spouse or parent with an illness or disability.[116] "Good cause" attributable to the employer requires a substantial change to the terms of employment (such as hours or wages) or to the nature of employment such that the change results in an adverse impact on the employee's health.[117] If employees wish to quit their position but remain eligible to receive unemployment benefits, they must take reasonable measures to address the issue with the employer. If an employee puts forth a good faith effort to resolve the matter(s) in question and the parties are unable to reach a mutually agreeable resolution, the employee may retain eligibility.[118] The employee bears the burden to show good cause,[119] and, as such, all interactions and attempts to resolve the matter should be documented. An employee who voluntarily leaves a job due to COVID-19-related reasons may receive financial relief as provided by the CARES Act.

[113] *Filing for Benefits While Working Part-time*, CT Dept of Labor, https://www.ctdol.state.ct.us/UI-OnLine/partials.htm (last visited Aug. 9, 2020).
[114] *Questions and Answers about Unemployment during COVID-19*, CTLawHelp.Org, (May 5, 2020), https://ctlawhelp.org/en/unemployment-questions-during-covid.
[115] *Unemployment Insurance*, *supra* note 119, at 12.
[116] *Unemployment Insurance Frequently Asked Questions, supra* note 108.
[117] *Id.*
[118] *Id.*
[119] *Id.*

C. THE CARES ACT

The Coronavirus Aid, Relief, and Economic Security (CARES) Act, was enacted March 27, 2020 and provides assistance for workers, families and small businesses.[120] The act is federally funded and includes the Pandemic Unemployment Assistance (PUA) program, Pandemic Emergency Unemployment Compensation (PUEC), and Federal Pandemic Unemployment Compensation (FPUC).

1. The Pandemic Unemployment Assistance Program

The PUA extends unemployment benefits to self-employed workers, 1099-employees, and "gig" workers (*e.g*. independent contractors) affected by the COVID-19 pandemic.[121] The PUA program provides up to thirty-nine weeks of benefits to qualifying individuals who are unemployed or underemployed due to the COVID-19 pandemic, granting a minimum of $198 and a maximum of $649 per week.[122] The program's benefit payments are retroactive to January 27, 2020,[123] and will cease on December 26, 2020.[124] Those who do not qualify for regular unemployment or PEUC, or those who have exhausted their rights to such programs, may be eligible for PUA.[125] To receive PUA benefits, an individual must be otherwise available and able to work but be unemployed, unavailable, or unable to work due to COVID-19-related circumstances.[126] The compensation received is taxable.[127]

The Pandemic Emergency Unemployment Compensation

Individuals who are not covered by normal unemployment coverage may also qualify for PEUC.[128] PEUC provides thirteen weeks of emergency unemployment compensation to those who are either ineligible for or exhausted their existing unemployment compensation.[129] The program took effect on April 4, 2020, and will cease on December

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[120] 116 P.L. 136, 2020 Enacted H.R. 748, 116 Enacted H.R. 748, 134 Stat. 281, 116 P.L. 136, 2020 Enacted H.R. 748, 116 Enacted H.R. 748, 134 Stat. 281; *The CARES Act Works for All Americans*, U.S. Dept. of Treas. https://home.treasury.gov/policy-issues/cares (last visited Aug. 9, 2020).
[121] *COVID-19 FAQs for Participants and Beneficiaries*, U.S. Dept of Labor, https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/covid-19.pdf (last visited Jul. 17, 2020); *Pandemic Unemployment Assistance*, CT Dept. of Labor (Jun. 17, 2020), http://www.ctdol.state.ct.us/pua.pdf.
[122] *COVID-19 FAQs for Participants and Beneficiaries, supra* note 121.
[123] *U.S Department of Labor Publishes Guidance on Pandemic Unemployment Assistance,* U.S. Dept of Labor, (Apr. 5, 2020), https://www.dol.gov/newsroom/releases/eta/eta20200405.
[124] *Id*.
[125] *Id*.
[126] *Id*.
[127] *Id*.
[128] *Pandemic Emergency Unemployment Compensation*, CT Dept. of Labor, (May 26, 2020), https://www.ctdol.state.ct.us/PEUC.pdf.
[129] *Id*.

26, 2020.[130] To qualify, an individual must be available and able to work.[131] The Department of Labor Commissioner has temporarily waived the requirement that the applicant be actively searching for work.[132] Like PUA, the benefits are taxable.[133]

The Federal Pandemic Unemployment Compensation

FPUC provides an additional $600 in unemployment compensation for those who are currently receiving unemployment benefits.[134] The program began on April 4, 2020 and ceased July 25, 2020.[135] The extra compensation is retroactive to March 29, 2020, and is subject to taxation.[136]

[130] *Id.*
[131] *Id.*
[132] *Pandemic Emergency Unemployment Compensation*, *supra* note 128.
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*

IV. TELEWORK

Introduction

Remote work is one way to comply with the CDC's physical distancing guidelines in the workplace. Employers and employees who telework (a/k/a "working remotely") are facing a host of novel exigencies. As a threshold matter, many employees are wondering if they have a right to work from home and, if not, whether they should request to do so. In contrast, employers may question the productivity of employees when teleworking as compared to physically coming to the worksite. Both employers and employees should carefully examine telework policies. Issues surrounding privacy, wages, and hours are just a few of the issues inherent to remote work and, depending on how these matters are addressed, the impact on the employment relationship may be significant.

A. OVERVIEW

There is no legal right to work from home in the United States. If someone qualifies as having a disability under the Americans with Disabilities Act (ADA), that individual has the right to request a reasonable accommodation, which may include teleworking.[137] Whether teleworking is a reasonable accommodation depends upon the duties of the worker's position and whether the essential functions of the job can be effectively accomplished when working remotely.[138] Greater detail of the interplay between the ADA and teleworking, particularly in the context of COVID-19, is discussed in Section IX: Discrimination in the Workplace.

1. Requesting Telework

An employee should consider two primary factors before requesting to work remotely: (1), whether the job's requirements can be performed effectively from a remote location; and (2), whether the job site's arrangement heightens the workers' risk of contracting the COVID-19 virus such that telework is the only safe alternative to continue the employer's business.[139] If the nature of the work cannot be effectively accomplished from a remote location, then employers do not have to permit employees to work from home.[140] For example, service employees, such as waiters, janitors, and mechanics, cannot perform the functions inherent to their jobs by working from home. The "General Duty" clause of OSHA requires an employer to "furnish to each of its employees … a place of employment … free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees…"[141] Moreover, if an employer violates this General Duty clause by not providing a safe workplace, an

[137] *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, supra* note 1.
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] 29 U.S.C. 654 § 5(a)(1) (2018).

employee is not required to go to the worksite.[142] If the employer is not providing a safe jobsite as directed by guidelines of public health authorities and the employee can attend to his work obligations from another location, the employee should approach his employer about possible telework opportunities. If the employer refuses to allow telework and does not improve the safety of the worksite, the employee may to refuse to attend the worksite and contact OSHA for guidance. OSHA's regulations and the formal complaint process are discussed further in Section VI: Workplace Safety.

Mandating Telework

An employer may encourage or require employees to telework as an infection-control or prevention strategy. An employer should make this decision based on timely information from public health authorities regarding the public health emergency.[143] Many employers facing a difficult choice between maintaining their business or switching to telework have created or expanded work-from-home programs. Even if employees who are not experiencing COVID-19 symptoms prefer to work onsite, employers may mandate telework for all or some such employees.[144]

Employee-Refusal to Telework

On the other hand, an employee does not have the right to refuse to go to work unless doing so would put them in imminent danger under OSHA guidelines or there are stay at home orders from federal or state authorities.[145]

B. BEST PRACTICES FOR EMPLOYERS AND EMPLOYEES WHEN TELEWORKING

1. Creating a Telework Program

Telework programs are enacted solely by, and at the discretion of, the employer.[146] If employees are teleworking in the absence of a program instituted by the employer, a policy should be put into effect immediately. The policy should address:

- Which employees are allowed to telework;
- Expected hours while teleworking;
- Productivity expectations;

[142] 29 U.S.C. 654 § 5(a)(1) (2018); Richard E. Fairfax, *Standard Interpretations*, OSHA, (Dec. 18, 2003), https://www.osha.gov/laws-regs/standardinterpretations/2003-12-18-1.
[143] *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, supra* note 1.
[144] *COVID-19 and the Fair Labor Standards Act Questions and Answers*, U.S Dept. of Labor, https://www.dol.gov/agencies/whd/flsa/pandemic#q8, (last visited Jul. 22, 2020).
[145] 29 U.S.C. 654 § 5(a)(2) (2018) "Each employee shall comply with occupational safety and health standards promulgated under this Act. (b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct."
[146] *Id.*

- Employees' consent to being remotely monitored by the employer; and,
- Protocols concerning confidentiality.

Employers should clearly communicate the policy is subject to revision or rescission as the employer sees fit, that its implementation is a direct result of the COVID-19 pandemic, and that employees should not expect the teleworking arrangement to be permanent.

These policies must be applied consistently and fairly across employees who telework. A business has the right to furlough employees while permitting others to telework. Employers must, however, have a legitimate business reason when doing so and may not administer the policy in a discriminatory fashion.[147]

Privacy Concerns

Employees should be prepared to be monitored while working at home. Under Connecticut law, an employer may monitor employee work activity provided the employees give their consent to being monitored.[148] Connecticut's Labor Commissioner imposes a minimum penalty of $500 on businesses for every violation of this statute.[149] This law permitting employee-monitoring while teleworking applies only to activity which takes place on an "employer's premise."[150] While Connecticut case law is scant on the issue, the question of what constitutes an "employer's premise" has been faced by other courts before, often in the context of worker's compensation. The Oregon Court of Appeals has stated that while working from home an employee's home becomes their "employer's premises."[151] The Pennsylvania Commonwealth Court classifies a home office as "secondary work premises."[152] The Fifth Circuit, however, has stated that an employee working from home is not on an employer's premises but rather on "work premises."[153] Connecticut law also prohibits surveillance of employees "in areas designed for the health or personal comfort of the employees."[154] However, the boundaries between "employer premises" and "areas designed for health or personal comfort" is unclear; however, a Connecticut court did hold that a vehicle provided to an employee but owned by the employer and used during the course of employment cannot be considered an area for personal health or comfort.[155] A computer provided by an employer and used in the course of employment may be held to the same standard, though the court may distinguish between the two due to the computer being in the employee's home, a space inherently for health and personal comfort. It also remains

[147] Rita Zeidner, *Coronavirus Makes Work from Home the New Normal*, SHRM (Mar. 21, 2020), https://www.shrm.org/hr-today/news/all-things-work/pages/remote-work-has-become-the-new-normal.aspx.
[148] Conn. Gen. Stat. § 31-48d (2019).
[149] *Id.*
[150] *Id.*
[151] *Sandberg v. JC Penney Co. Inc.*, 260 P.3d 495, 499 (Or. Ct. App. 2011).
[152] Verizon Pennsylvania, Inc. v. W.C.A.B. (Alston), 900 A.2d 440, 445 (Pa. Commw. Ct. 2006).
[153] *Halferty v. Pulse Drug Co., Inc.*, 864 F.2d 1185, 1191 (5th Cir. 1989).
[154] Conn. Get. Stat. § 31-48b (2019).
[155] *Vitka v. City of Bridgeport*, 2007 WL 4801298 at *5 (Conn. Super. 2007).

unclear whether employers' virtual private networks (VPN)[156] are considered their "premises." If employees consent to monitoring as a condition of their employment, they should anticipate that their activity while working on the employer's VPN will be monitored while teleworking and prepare accordingly.

Additionally, both businesses and employees should be aware of the risk of losing sensitive data due to security issues. The federal government has published a brief document analyzing some of the most popular video conferencing applications which[157] examines features of each application, such as how secure the application is with respect to user data and privacy, whether the application uses encryption to protect transferred information, and whether the data is sold to third parties.[158] While many applications have security protocols, none are perfect and employees should still be cognizant of this fact when working remotely.

Expenses, Wages, and Hours

Employers are not exempt from the FLSA if their employees are teleworking.[159] Work hours must be logged, with exempt employees earning normal wages regardless of hours worked, and nonexempt employees earning their typical wages and overtime.[160] As with all at-will employment, an employee's hours and wages are subject to change at any time. Note that furloughs, layoffs, pay-cuts, and reductions in work may still occur after employees begin working remotely. Narrow exceptions exist for employees who already are bound by contract to telework or for those workers for which telework is a reasonable accommodation under the ADA.[161] Employers may not require employees who are covered by the FLSA to pay or reimburse the employer for such items that are business expenses of the employer if doing so reduces the employee's earnings below the required minimum wage or overtime compensation.[162]

[156] A virtual private network, commonly known as "VPN," is a secure means through which devices access employers' business infrastructure.
[157] *Selecting and Safely Using Collaboration Services for Telework*, U.S. Natl. Security Agency, (Jun. 2, 2020), https://media.defense.gov/2020/Jun/03/2002310067/-1/-1/0/CSI-SELECTING-AND-USING-COLLABORATION-SERVICES-SECURELY-LONG-20200602.PDF.
[158] *Id.*
[159] *COVID-19 and the Fair Labor Standards Act Questions and Answers*, *supra* note 144.
[160] *Id.*
[161] *Id.*
[162] *Id.*; To determine whether you or your employer falls within the FLSA *see Fact Sheet #14: Coverage under the FLSA*, Dept. of Labor, https://www.dol.gov/agencies/whd/fact-sheets/14-flsa-coverage (Last visited Aug. 17, 2020).

V. WITHDRAWING UNEXECUTED EMPLOYMENT CONTRACTS

Introduction

The COVID-19 pandemic has resulted in massive number of layoffs and the downsizing of companies across the nation. As a result, many offers of employment have been rescinded and the enforceability of many restrictive covenants and non-compete agreements has been challenged. This section discusses the legal issues surrounding job offers and restrictive covenants in Connecticut, and whether the COVID-19 pandemic is likely to have an impact on such policies. Both employers and employees have rights and protections regarding legal agreements that are important to understand during this unprecedented time.

A. RETRACTING A JOB OFFER

1. Can employers ordinarily rescind my job offer? If so, why?

To the surprise of many prospective employees, an offer of employment is not a contract. The offer letter itself is only an informal offer of employment. Even if the offer letter is accepted, it is not a legally binding implied contract.

In Connecticut, most jobs are categorized as employment at-will.[163] "At-will" means there is no definite term of employment. Thus, an employer may discharge an employee at any time without cited cause.[164] There are three exceptions to the at-will policy that are recognized in Connecticut: (1) terminations in violation of public policy, (2) terminations in violation of the implied covenant of good faith and fair dealing, and (3) terminations in violation of an implied contract.[165] It is also important to note that an employer may not discharge an employee for any reasons prohibited by Connecticut's anti-discrimination statutes. Please see Section IX: Discrimination for additional details regarding unlawful termination.

As an offer of employment is not an implied contract, the prospective employee is an at-will employee unless there the contract expressly states otherwise. The general consensus is that suffering alleged to be caused by the withdrawal of an at-will employment offer is reasonably foreseeable, and therefore not worthy of restitution.[166] For example, if an employee resigns from a current job to take the at-will employment offer, but the offer is rescinded, that individual is not entitled damages.[167]

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[163] *Employment-at-will Doctrine, Legal Information I*, Cornell, https://www.law.cornell.edu/wex/employment-at-will_doctrine (last visited Jul. 2, 2020); *Connecticut Termination (with Discharge): What you need to know*, BLR, https://www.blr.com/HR-Employment/Performance-Termination/Termination-with-Discharge-in-Connecticut (last visited Jul. 3, 2020).
[164] *Cruz v. Visual Perceptions, LLC.*, 84 A.3d 828 (Conn. 2014).
[165] *Id.*
[166] *Petitte v. DSL.net, Inc.*, 102 Conn. App. 363, 925 (2007).
[167] *Kaithamattam v. Walnut Hill, Inc.*, 54 Conn. L. Rptr. 890, 896 (Conn. Super. Ct. Oct. 19, 2012).

2. Are employers permitted to rescind offers of employment because of the impact of the COVID-19 pandemic?

Due to most jobs being "at-will" employment, the COVID-19 pandemic does not have a significant impact on withdrawals of offers. Therefore, employers are within their rights to rescind job offers, provided the offer in question was not a legally binding contract. While it has yet to be seen how the at-will employment analysis applies to COVID-19-related matters, it is expected that, similar to ordinary times, rescinding an offer letter is allowed.

First, unless the offer explicitly stated it is not an at-will employment relationship, the letter may be rescinded without cause by the employer.

Second, as long as the decision was not based on protected attributes of an individual, such as sex, race, age, disability, or other discriminatory bases, an employer may rescind the offer letter.

Thus, it is likely that, in Connecticut, if the offer was not accepted and the decision to rescind was not rooted in unlawful bases, then the offer letter may be properly rescinded. If an employee feels their situation meets the needs and requirements of a case and they may be owed retribution, it is strongly advised that they seek guidance from an experienced attorney.

3. As an employer, how can I protect myself if I need to rescind an offer of employment in light of unexpected circumstances?

Offers of employment should adhere to the requirements discussed below. Courts will look to the language of the offer letter's terms when determining whether expectations were clearly communicated to affected parties. The following are common terms courts will examine when determining whether an employment offer was properly withdrawn:

- A summary of the terms of employment including, but not limited to, rate of pay, standard hours, and wage payment schedules;
- Express communication of the at-will nature of the intended employment;
- Whether the offer letter is guaranteed for a given period of time. [168]

[168] *Cruz*, *supra* note 164.

4. What legal options are available if my offer of employment was rescinded because of COVID-19's impact on the economy?

While it is typically legal for an employer to rescind a job offer due to the at-will nature of employment in Connecticut, if your situation meets either of the following two exceptions, it may be possible to for a plaintiff to receive an award of damages: (1) retracting such offer was unlawful due to discrimination; and, (2) the offer can be seen as unequivocal and improperly accepted. If an employee can show he suffered harm as a direct result of an offer's rescission, promissory estoppel may apply.[169]

To establish promissory estoppel, a plaintiff must establish: (1) the existence of a clear and definite promise between the parties; (2) the promise was made with the expectation that the employee would rely upon it; (3) the plaintiff reasonably relied on the promise; and, (4) the plaintiff incurred a detriment in said reliance. Proving promissory estoppel is one of the most common channels to protect yourself from damage caused by a withdrawal of an offer of employment.

B. RESTRICTIVE COVENANTS AND NON-COMPETE AGREEMENTS

1. How are non-compete agreements ordinarily enforced?

Non-compete agreements, as a restrictive covenant, limit the rights of an employee when working for a different employer in the future. The purpose of non-compete agreements are to protect goodwill, product information, sales strategy, and client lists belonging to a past employer.

For a non-compete agreement to be enforceable in Connecticut, it must be reasonable as to the "(1) duration, (2) geography, (3) fairness of the protection accorded to the employer, (4) extent of the restraint on the employee's opportunity to pursue his or her occupation, and (5) the extent of the interference with the public's interests."[170]

Courts additionally consider three contextual components when determining whether a restrictive covenant is enforceable: (1) the parties have a mutual understanding of the terms of the agreement; (2) the skills and job description of the employee warrant a non-compete protection to protect the goodwill and secrets of the company; and (3) the non-compete clauses and other restrictive covenants protect legitimate business interests.[171] Thus, courts employ this comprehensive analysis when determining the enforceability of restrictive covenants, often on a case-by-case basis.

2. Will restrictive covenants be enforced during the COVID-19 pandemic?

The COVID-19 pandemic has resulted in extremely high rates of unemployment as the nation's economy continues to struggle. With respect to the unenforceability of non-compete agreements in such an atypically harsh economic and employment landscape,

[169] *Stewart v. Cendant Mobility Servs. Corp.,* 837 A.2d 736, 742 (Conn. 2003).
[170] *Scott v General Iron & Welding Co., Inc.,* 171 Conn. 132, 137 (1976); *Robert S. Weiss & Assoc.'s, Inc. v. Wiederlight,* 208 Conn. 525 (1988).
[171] *Scott v General Iron & Welding Co., Inc.,* 171 Conn. 132, 137 (1976).

there is uncertainty surrounding the degree to which these agreements' terms will be enforced.

In Connecticut, restrictive covenants are governed by case law and are typically subject to the analysis discussed above. During the pandemic, it is likely that restrictive covenants will receive less blanket enforcement, rather, the enforceability of non-compete agreements will be decided on a case-by case basis.

3. Has the COVID-19 pandemic affected employees' rights regarding restrictive covenants?

Employees should keep two primary considerations in mind when presented with a request to enter into a non-compete agreement, and even after they have committed to the terms of a restrictive covenant:

- First, the employee must enter into a non-compete agreement voluntarily. Because of the variability in duration and scope, respective power dynamics, and the interests of both parties, before entering into a non-compete agreement it is recommended to consult an experienced employment attorney.

- Second, if a restrictive covenant is already in place and an employee wishes to challenge its enforceability during the pandemic, courts are likely to analyze enforceability on a case-by-case basis in the same manner courts did prior to COVID-19's impact.

Employees should examine the analysis outlined at the beginning of this section if they are concerned the terms of their agreements do not align with what is presented. If an employee suspects or is concerned that an agreement fails to meet the standards articulated by Connecticut courts, it is important to seek counsel from an experienced employment attorney before committing to any next steps or even continuing the employment relationship, as continuing the relationship can be construed as an employee's acceptance of the terms of the agreement in question.[172]

In the past, there was a division between state courts with respect to the type of analysis to apply when examining the reasonableness of non-compete agreements. Recently, a "reasonableness" test has emerged and gained significant traction. Many courts now examine the purpose of the agreement, in addition to the nature and quantity of information contained in these agreements, as well as other considerations.[173] Additionally, Connecticut's State Legislature is currently working to enact a law that

[172] *Roessler v. Burwell*, 176 A. 126, 127 (Conn. 1934).

[173] *Differences in the Enforcement of Non-Disclosure and Non-Compete Covenants,* MayaMurphy Law (July 27, 2013), https://www.mayalaw.com/2013/07/27/differences-in-the-enforcement-of-non-disclosure-and-non-compete-covenants/.

places restrictions on non-compete agreements. The restriction will prohibit employers from requiring certain employees to sign unfair covenants not to compete.[174]

> Under the bill, non-compete clauses are prohibited for any employees who do not earn more than twice the state's minimum wage. In addition to the wage threshold, the bill requires that in order to be legal a non-compete clause must: [1] not restrict the employee's competitive activities for more than one year after the employee's termination; [2] be necessary to protect the employer's legitimate business interest; [3] be reasonably limited in time, geographic scope, and employment restrictions as necessary to protect the business interest; and [4] otherwise be consistent with state law and public policy.[175]

Given this current emerging trend of attacking non-compete agreements, it is possible that during the pandemic the number and frequency of challenges to these agreements will increase. To ensure employees' rights are given due deference, it is advisable to consult an employment law attorney to discuss the enforceability of any restrictive covenants and non-compete agreements already in effect.

4. As an employer, how can I ensure restrictive covenants will be enforced during the COVID-19 pandemic?

Employers would be well-served to carefully consider the legitimate and realistic harm an employee poses to the company, and to best identify which restrictive covenants' enforceability are most worth pursuing in court.[176] The covenant must be reasonable in terms of geography and time and meet all requirements discussed. Recall that continuation of the employment relationship can be construed as tacit acceptance of restrictive covenants by at-will employees.[177] Additionally, it is important to note that if employers do not consistently enforce restrictive covenants, courts are less likely to enforce them on that employer's behalf. Thus, employers who are unsure as to whether their restrictive covenants meet the requirements established by Connecticut case law should seek the advice of experienced counsel.

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[174] *See* H.B. 6913, Reg. Sess. (Conn. 2019).
[175] *Id.*
[176] Erik Weibust, Jeremy Cohen, Marcus Mintz, & Jasmine Stanzick, *Tips for Handling Non-Compete Agreements During Times of Unemployment*, ABA (April 30, 2020), https://www.americanbar.org/groups/litigation/committees/business-torts-unfair-competition/practice/2020/non-compete-agreements-high-unemployment-covid-19/.
[177] *Roessler, supra* note 172.

VI. WORKPLACE SAFETY

Introduction

Workplace safety is governed by a federal governing body as well as by state governments. On the federal level, the Occupational Safety and Health Act of 1970 (OSHA) provides regulations for workplace safety and its regulations remain in effect during the COVID-19 pandemic. The Act's General Duty Clause, Section 5(a)(1), requires employers to provide a workplace "free from recognized hazards likely to cause death and serious physical harm."[178] To address concerns unique to the circumstances surrounding the COVID-19 outbreak, OSHA issued non-binding guidelines to further assist in providing a safe and healthy workplace.[179] Despite the guidance provided by OSHA, implementing COVID-19 safety protocols require a good deal of advance planning and diligence by employers, while taking into account employees' rights to work in a safe environment. In addition to federal OSHA regulations, many states' governors have issued Executive Orders and many states' public health departments have set forth guidelines addressing workplace safety.

A. FOR EMPLOYERS

1. OSHA's "Zones of Risk" and Respective Safety Protocols

OSHA has categorized employers into one of four "zones of risk." The "zone" in which a workplace is classified dictates the respective recommendations to which those employers are subject to ensure safety in the workplace.[180] Employers operating in each zone should be aware of the safety protocols which apply to them. Those operating in higher-risk categories should take precautions commensurate with their category of risk. Below we discuss the obligations of employers to ensure the safety of employees in conjunction with the legal rights of employers and employees that provide for protections in the workplace.

2. OSHA Regulations and Recommendations to Protect Employees from COVID-19 in the Workplace

An employer may require physical distancing between employees and implement other safety precautions. Common prophylactic measures include:

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[178] *Guidance on Preparing Workplaces for COVID-19*, OSHA, https://www.osha.gov/Publications/OSHA3990.pdf (last visited Jun. 15, 2020);
[179] *Id.*
[180] *Worker Exposure Risk to COVID-19*, OSHA (April 23,2020), https://www.osha.gov/Publications/OSHA3993.pdf.

- Social distancing (i.e. staying at least six feet apart from others);
- Providing and encouraging the use of sanitizing and hygienic resources (e.g. facial tissues, contact-free entry and egress, hands-free trash receptacles, contact-free ability to open and close doors, hand soap, paper towels, access to 60% alcohol-based hand sanitizers and EPA-approved disinfectants);[181]
- Requiring regular and proper hand washing (washing for at least 20 seconds) or the use of effective hand sanitizing solutions;[182] and,
- Posting conspicuous signs throughout the workplace reminding employees to follow safety protocols.[183]

A complete list of recommended workplace protocols and safety measures is contained in the guidelines found on the agency's website.[184]

Administering Examinations and Testing Employees for COVID-19

Employers' actions should be guided by a comprehensive risk assessment of workplace transmission and balanced with the feasibility of protecting workers' safety and privacy while remaining financially viable. Employers may simply request employees to inform supervisors if they test positive for COVID-19, experience COVID-19 symptoms, or if they possess affirmative knowledge of their own exposure to COVID-19 outside of the workplace.[185] If employees exhibit COVID-19 symptoms or test positive for the virus, however, employers face critical decisions and, before acting, a number of factors must be considered.

To combat the public health emergency created by COVID-19, the DOL affords employers discretion to "examine" employees entering the workplace to ascertain whether they have contracted the virus. For example, employers are allowed to take employees' temperatures before they are allowed to enter the workplace.[186] Prior to the pandemic, such examinations violated employees' rights, so the DOL restricts employers' authority

[181] *Guidance on Returning to Work*, OSHA, https://www.osha.gov/Publications/OSHA4045.pdf (last visited Jul. 12, 2020).
[182] *Id.*
[183] *Id.*
[184] Guidance on Preparing Workplaces for COVID-19, OSHA https://www.osha.gov/Publications/OSHA3990.pdf (last visited Aug. 9, 2020).
[185] *Information for Employers During COVID-19,* Justia, https://www.justia.com/covid-19/information-for-employers-during-covid-19/ (last visited Jul. 11, 2020).
[186] *Id.*

to administer such examinations to when it necessary to the viability of the business and aimed to prevent direct health threats to employees.[187]

Employers may also subject employees to testing for COVID-19. Tests must be limited to detecting only COVID-19, or else the test is unlawful. Employers who choose to test employees for COVID-19 should nonetheless give serious consideration to obtaining employees' prior written consent to submit to such examinations. When administering examinations, employers must act within the bounds of the law by:[188]

- Conducting tests on a nondiscriminatory basis;
- Maintaining the confidentiality of results in employee medical records;
- Accommodating qualifying employees by utilizing different forms of testing; and,
- Being consistent when addressing refusals to submit to testing.

The Americans with Disabilities Act (ADA) permits an employer to lawfully instruct an employee exhibiting COVID-19 symptoms to leave work.[189] If an employee has tested positive for COVID-19, it is imperative to act quickly to prevent further spread of the virus throughout the workplace. Employers should execute a plan articulating a procedure employees should expect to follow if they test positive for COVID-19.[190] Please see Section I: Protecting Privacy and Safety in the Workplace regarding quarantine instructions.

The Law on Facemasks

The Centers for Disease Control and Prevention (CDC) is the only federal body to issue guidance on face coverings. Accordingly, it is paramount that employers running an open business or who are deciding whether to re-open their business, frequently review the frequently updated guidelines issued by the CDC.[191]

Employers may require employees to wear a face mask to protect the safety of their peers. Any employee who refuses to comply may be lawfully terminated with limited exceptions.[192] Such exceptions include medical or religious reasons. Additionally, it is

[187] Allen Smith, *EEOC: Employers Can Screen for COVID-19,* SHRM (April 23, 2020), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-employers-can-screen-for-covid-19.aspx.
[188] *Id.*
[189] *Employee Exposure to COVID-19,* Justia, https://www.justia.com/covid-19/information-for-employers-during-covid-19/workplace-safety-during-covid-19/ (last visited Jun. 28, 2020).
[190] *Id.*
[191] *Considerations for Wearing Face Cloth Coverings*, Centers for Disease Control and Prevention (Jun. 28, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html.
[192] *Refusing to Wear a Mask at Work Could Get You Fired*, Bloomberg Law (May 20, 2020), https://news.bloomberglaw.com/daily-labor-report/refusing-to-wear-a-mask-at-work-could-get-you-fired.

unlawful for the employer to require facemasks and coverings on a discriminatory basis.[193] Enforcing employment policies designed to protect employees' safety while working is a right afforded to employers. Thus, even if an employee refuses to wear a mask as an expression of freedom of speech afforded by the First Amendment of the United States Constitution, employers may enforce their protective and precautionary policies aimed at ensuring public health and workplace safety.[194]

An employer may also require an employee *not* to wear a mask as part of workplace policy, even if it is an employee's preference to wear a face covering during the pandemic. Once again, however, exceptions arise if an employee is at greater risk for contracting COVID-19, has underlying health conditions that may be exacerbated if COVID-19 is contracted, other medical conditions requiring a face covering, or where covering one's face violates the tenets of one's religion.[195] Disallowing employees to wear a facemask may be subject to investigation by OSHA if employees believe it to create an unsafe work environment, as discussed below.

B. FOR EMPLOYEES

1. Employee Rights When an Employer Fails to Follow Federal, State, or Local COVID-19 Safety Protocols

Where federal, state, or local safety protocols are issued (like the guidelines issued by the Centers for Disease Control and Prevention) and an employer fails to adhere to such protocols, an employee may seek the enforcement of these protocols through various channels. It is recommended that the employee:

1. Inform the employer of the guidelines and request proper safety protocols be followed;[196]
2. Document all ways in which your workplace is unsafe;[197] or,
3. File a complaint that includes documented evidence of employer violations with the Connecticut State Department of Consumer Protection (review of these complaints may take up to a week[198,199]).*

[*Please note: The Investigations Division of the Connecticut State Department of Consumer Protection will ascertain whether a resolution seems attainable between the

[193] *Refusing to Wear a Mask at Work Could Get You Fired, supra* note 192.
[194] *Id.*
[195] *Employee Exposure to COVID-19, supra* note 189.
[196] *Id.*
[197] *Id.*
[198] *Complaint Forms & Procedures*, Dept. of Consumer Protection, https://portal.ct.gov/DCP/Complaint-Center/Complaint-Forms-and-Procedures (Last Visited July 1, 2020).
[199] Visit https://elicense.ct.gov/Activities/Complaint.aspx to file a complaint.

parties, and if so, it will initiate next steps. However, if the agency determines a resolution is not feasible or the employer does not respond to the complaint, the employee may commence an action against the employer in court.]

Employees may anonymously file complaints; however, anonymous complaints limit the ability of the Connecticut Department of Consumer Protection to conduct a thorough investigation which may result in a delay or inability to notify the complainant of status updates.[200] If an employer engages in retaliatory action against an employee who files a complaint, that employee is entitled to legal recourse.

Alternatives to filing a complaint with the appropriate governing body include:

- The right to refuse to go to work.
    - OSHA identifies criteria that, if not followed by an employer, affords the employee a legal right to refuse to go to work if that refusal is made in good faith. So, if an insubordinate employer refuses to implement safety protocols in the workplace and there is insufficient time to file a proper complaint without further endangering oneself, that employee may refuse to work until his complaint is filed and acted upon by the appropriate state agency;[201] or,
- The right to unemployment benefits.
    - If an employee establishes that his choice to leave work was necessary to protect his safety and that decision resulted in subsequent termination from work, then the employee is likely eligible to receive unemployment benefits as an alternative to remaining in an unsafe work environment.[202]

[200] *Complaint Forms & Procedures*, *supra* note 198.
[201] *Id.*
[202] *Id.*

VII. EMPLOYMENT INSURANCE AND BENEFITS

Introduction

Employee benefits may include health insurance, life insurance, retirement plans, and short or long-term disability coverage. Maintaining access to such benefits, especially health care and insurance coverage, is a key focus of employees during the COVID-19 pandemic. Employers are not obligated by federal law to provide certain benefits to employees. Thus, those benefits provided by employers may be reduced or terminated. However, employers must provide advanced notice of such changes. If employers choose to provide benefits, they are not permitted to deny or allocate benefits on a discriminatory or otherwise illegal basis. Employees should check with their plan-related documents and contact their plans' administrators to elicit additional information and to assist them in understanding their plans' specific policies and provisions that address any reductions or terminations. If employees lose health coverage previously provided through their employment, COBRA may serve as a viable alternative, as well as other avenues discussed. Where employees voluntarily sever the employment relationship, they may retain eligibility to receive unemployment benefits if they have successfully documented that they have left their place of work with just cause. In general, benefits impacted by a paid or unpaid leave are typically addressed by legislation and if the complex interplay between the myriad emergency acts creates confusion of lack of clarity, it is advisable to consult an experienced employment attorney.

A. TERMINATION OR REDUCTION OF EMPLOYMENT HEALTH BENEFITS

1. Overview

Many workers rely on their jobs for more than just a paycheck. For millions of working Americans and their families, employment is also a source of life enhancing benefits such as health insurance (like medical, dental, and vision), short and long-term disability, financial plans (like profit sharing and employee stock ownership plans), access to life insurance, and retirement (defined benefit) plans. While these benefits are important, they are not required "compensation" employers must provide under the law. Generally, employers may add or remove benefits and adjust the respective amount or value of these benefits. However, when doing so, employers must be cognizant of restrictions applicable in certain circumstances and the special provisions that apply to health insurance. Below, we discuss the variety of employment classifications inherent to the pandemic and how they impact the most important benefit upon which employees rely: health insurance.

Health Benefits – Generally

Employers are not required by law to offer health benefits, including medical insurance.[203] When such benefits are provided, however, employers cannot unfairly deny or allocate benefits. Depending on the coverage and plan, employers typically cannot deny benefits without due notice, implement changes to the plan midyear, determine eligibility based on an individual's state of health, or terminate coverage that is required under a collective bargaining agreement.[204]

Health Benefits While Furloughed

If the employee is required to work a set number of hours to be eligible for benefits but the furlough will prevent them from meeting such requirements, then there are two options for employers who aim to keep their employees covered under the plan. First, an employer may choose to not treat the furlough as a COBRA qualified event, but instead categorize the employees as active employees. This matter should be discussed with the insurer to ensure their cooperation. Second, an employer may treat the furlough as a COBRA qualifying event and offer COBRA coverage.[205] See below for further details regarding COBRA continuation coverage qualified events.

Health Benefits While on Unpaid Leave from Work

Employees should begin any inquiry regarding health coverage while on unpaid leave by reviewing the Summary Plan Description provided by their employer.[206] Typically, plan documents will address the part of the period during which employees on leave will remain covered under the employer's health benefit plan. In general, even if the physical place of employment closes, the employee remains covered under the existing health plan if the following criteria is met: the employer still exists, the employee is continuously employed, the employer continues to sponsor a health plan, and the employee continues to meet the eligibility for the plan.[207]

Health Benefits While on Paid Leave from Work

Employees who elected to participate in their employer's group health coverage prior to the COVID-19 outbreak are entitled to coverage while on family and medical leave, just as if they were not on sick leave.[208] Under both the Families First Coronavirus Response Act (FFCRA) and Family Medical Leave Act of 1993 (FMLA) employees are entitled to

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[203] *COVID-19 FAQs for Participants and Beneficiaries, supra* note 121; *See generally* 85 Fed. Reg. 26351 (May 4, 2020).
[204] *Id.*
[205] 29 U.S.C. 1163(2) (2018).
[206] *COVID-19 FAQs for Participants and Beneficiaries, supra* note 121.
[207] *Id.*
[208] *Unemployment Insurance Filing Questions*, CT Dept. of Labor (May 19, 2020), https://www.ctdol.state.ct.us/uiworkersfilingquestions.pdf.

uninterrupted health insurance coverage irrespective of whether they take paid sick leave during the pandemic.[209]

2. What resources are available to employees whose health insurance benefits were reduced or terminated by their employer?

Receipt of Unemployment Benefits

If employers reduce or terminate employees' benefits such that remaining in their employ is not economically feasible for workers, those employees may have good reason to leave the employment of their own volition while not precluding them from remaining eligible to receive unemployment benefits. To ensure eligibility is not jeopardized, the employee should immediately notify the employer of their situation and the reasons that require the requested leave (preferably in writing). If there are multiple employees who find themselves facing a similar situation, from a strategic standpoint it may be advantageous to inform the employer as a group to uncover the widespread impact the termination or reduction in benefits is causing. Once employees communicate the hardship they are facing as a result of the employer's action and no additional reasonable means of dispute resolution seems realistic, it is possible for employees to terminate the employment relationship voluntarily and not jeopardize their eligibility to receive unemployment benefits.[210]

COBRA

In addition to the possible receipt of unemployment benefits, another way to maintain health insurance coverage is through the Consolidated Omnibus Budget Reconciliation Act, better known as "COBRA."

If health care benefits are fully terminated, employees are likely eligible for continued coverage under COBRA. This legislation allows workers and their families to continue receiving employer-sponsored health insurance for a limited amount of time after a loss of coverage due to a qualifying event.[211] Qualifying circumstances may include voluntary or involuntary job loss, reduction in hours worked, transition between jobs, death of the covered employee, divorce from the covered employee, and others. COBRA typically applies to private-sector employers with 20 or more employees.[212] The DOL has provided for COVID-19-related extension of COBRA deadlines to accommodate the public health emergency facing the nation.[213] Options under COBRA include special enrollment in

[209] *Families First Coronavirus Response Act: Questions and Answers*, *supra* note 40.
[210] *COVID-19 FAQs for Participants and Beneficiaries,* U.S. Dept. of Labor, *supra* note 121.
[211] *FAQs About COBRA Model Notices*, U.S. Dept. of Labor, (May 1, 2020) https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/cobra-model-notices.pdf.
[212] *COVID-19 FAQs for Participants and Beneficiaries,* U.S. Dept. of Labor, *supra* note 121.
[213] *Id.*

another group health plan, COBRA continued coverage, special enrollment in individual markets insurance coverage, and health coverage through a government program.[214]

3. Who qualifies for coverage under COBRA?

COBRA covers group health plans for both part-time and full-time private sector employers with at least 20 employees, as well as health plans provided to state or local government employees.[215]

To be eligible for COBRA, one must have been enrolled in their employer's health care plan while they were actively working.[216] COBRA continuation coverage is available upon a qualifying event that, as a result, ends the employee's coverage of health care notwithstanding COBRA continued coverage.[217] Individuals may elect to be covered by COBRA's continuation coverage if they meet the following criteria: the previously covered employee's group health plan is be covered by COBRA; a qualifying event has occurred; and the individual is a qualified beneficiary.[218]

Qualifying events are events that cause an individual to lose health care coverage. Such an event may include termination of a covered employee's employment for any reason other than gross misconduct or reduction in the hours of their employment.[219]

Qualified beneficiaries include employees covered by their employer's sponsored health care; the employee's spouse or former spouse; or the employee's dependent child, including any child born or adopted by the covered employee.[220] A spouse or dependent is also qualified for continued coverage if the covered employee becomes entitled to Medicare; they become legally separated from the covered employee; or if the covered employee dies.[221] A child may be eligible for continued coverage under the Affordable Care Act until they are twenty-six even if the plan rules that the child has lost dependent status.[222]

COBRA does not apply to plans sponsored by the federal government or churches and certain church-related organizations.[223]

Originally, the notice deadlines for continuation coverage were as follows: the employer is required to notify the health plan administrator of an employee's termination within thirty days; the health plan administrator is then required to notify the employee of their

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[214] *Families First Coronavirus Response Act: Questions and Answers*, *supra* note 40.
[215] *FAQs on COBRA Continuation Health Coverage for Workers*, at 2, U.S. Dept. of Labor, https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/cobra-continuation-health-coverage-consumer.pdf (last visited Jul. 16, 2020).
[216] *Id.* at 3.
[217] *Id*.
[218] *Id.* at 2.
[219] *Id.*at 3.
[220] *Id*.
[221] *Id*.
[222] *Id*.
[223] *Id.* at 1.

COBRA rights within fourteen days; and the employee has sixty days to elect COBRA continuation coverage.[224]

Given the COVID-19 pandemic, however, employers who do not meet the above deadlines have been granted temporary relief for notice deadlines.[225] From March 1, 2020 until sixty days after the announced end of the COVID-19 pandemic[226], all group health plans, disability, and other welfare plans are to disregard original deadlines. As a result, if a deadline existed under the COBRA election notice and would have ended on or after March 15, 2020, then the new deadline is fifteen days following the end of the Outbreak Period. If a person begins a sixty-day notice window period of time during the Outbreak Period to take a specific action described in the COBRA election notice, then that sixty-day period is extended until sixty days after the announced end of the Outbreak Period.[227]

4. Alternatives to COBRA

Under COBRA, the share that an employee pays may be more than what they had previously been contributing but will likely be less than the price of a private individual health insurance coverage.[228] That said, there may be more affordable options. Such affordable coverage or more generous coverage options include enrolling in a spouse's plan, enrolling in Health Insurance Marketplace, or Medicaid.[229]

If an employee's spouse or dependents lose coverage under a group health care plan, special enrollment in the Health Insurance Portability and Accountability Act (HIPAA) may afford them replacement coverage. Alternatively, these individuals may apply for special enrollment in their spouse's or parent's employer health benefit plan.[230] To specially enroll an individual must have previously received coverage through another plan, from which they have since lost coverage.[231] The individual must have had an alternative coverage plan as the reason for originally declining coverage from the plan they hope to be specially enrolled in.[232] Special enrollment must occur thirty days of losing coverage.[233]

On the other hand, an employee can use the Health Insurance Marketplace, as operated by the federal government, for "one-stop shopping" to find and compare private health

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[224] *An Employer's Guide to Group Health Continuation Coverage Under COBRA,* U.S. Dept. of Labor (September 2018), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/an-employers-guide-to-group-health-continuation-coverage-under-cobra.pdf.
[225] 85 Fed. Reg. 26352 (May 4, 2020).
[226] The "Outbreak Period" is March 1, 2020 until 60 days after the formal end of the COVID-19 pandemic as announced by the federal government.
[227] Fed. Reg. *supra* note 225.
[228] *FAQs on COBRA Continuation Health Coverage for Workers, supra* note 215.
[229] *Id.*
[230] *Id.*
[231] *Id.* at 2.
[232] *Id.*
[233] *Id.*

insurance options. Individuals can apply for Marketplace at HealthCare.gov and must select a plan within sixty days after losing coverage.[234] In the meantime, they may elect COBRA continuation coverage to ensure they have health coverage until their Marketplace plan begins.

B. COVID-19'S IMPACT ON RETIREMENT BENEFITS

The Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 is legislation passed with the intention of helping employers and employees contend with the wide-scale unemployment and economic fallouts in the country. In the act, several sections provide instruction and assistance for retirement plans. Section 2202 allows for special distribution, new rollover requirements, and expansion of permissible loans taken from retirement plans.[235] It waives the 10% early withdrawal penalty typically paired with early distributions of qualifying retirement plans for distributions of 100,000 or less to (1) individuals diagnosed with COVID-19; (2) those who have a dependent diagnosed with COVID-19; or (3) those experiencing financial burdens as a result of a furlough, termination, reduction in work hours, inability to work so that they may care for a dependent, or an employee who is no longer employed as a result of the closing of a business.[236] The distribution will not be subject to withholding.[237] Employees are required to certify the reason for the distribution but plan administrators are not obligated to verify the certified reason.[238]

Once the COVID-19-related distribution is received, individuals may recontribute the funds without having them be recognized as an income but rather as a rollover back into the retirement plan or IRA.[239] Section 2202 additionally increases the maximum loan amount and delays repayment obligations by a year.[240] The CARES act has amended the Employee Retirement Income Security Act of 1974 (ERISA) to grant the Department of Labor significant leeway in delaying filings as well as postponing dates in which notices or filings were originally required to be completed by.[241] In cases involving bankruptcy of the employer, retired employees, their spouse, and their dependent children may be qualified beneficiaries of COBRA.[242]

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[234] *Enroll in or Change Plans,* HealthCare.gov, https://www.healthcare.gov/coverage-outside-open-enrollment/special-enrollment-period/ (Last visited July 21, 2020).
[235] Mitch Thompson, et al., *The CARES Act of 2020: Key COVID-19 Relief Provisions Impacting Your Employer-Sponsored Benefit Plans (US),* Employment Law Worldview, (March 27, 2020), https://www.employmentlawworldview.com/the-cares-act-of-2020-key-covid-19-relief-provisions-impacting-your-employer-sponsored-benefit-plans-us/.
[236] *Id.*
[237] *Id.*
[238] *Id.*
[239] *Id.*
[240] *Id.*
[241] *Id.*
[242] *FAQs on COBRA Continuation Health Coverage for Workers, supra* note 215.

Retirement plans across the country are encountering similar hardships to those whose invest in them during this challenging economic time. It is crucial to consider all aspects of your financial situation strategically before making decisions regarding such important plans.

VIII. EMPLOYMENT RELATIONSHIP CONCERNS

Introduction

The COVID-19 pandemic has brought about many concerns for all. For employers this includes safety in the workplace, as previously discussed, and much more. Notwithstanding physical and hygienic measures to protect employees from contracting COVID-19, employers are encouraged to protect the mental health of their employees as well as keep all employees and themselves fully informed on the progression of the pandemic. Additionally, employers are likely worried of areas of liability that may arise out of the pandemic either through worker's compensation claims or claims of wrongful termination as a result of layoffs and terminations following pandemic-related difficulties. This section addresses such common concerns and lists precautions employers may take to protect themselves from liability as best as they can.

A. PROTECTING ALL ASPECTS OF EMPLOYEES' HEALTH DURING THE PANDEMIC

Within the current public health emergency there exists a pervasive, underlying fear of the unknown. To combat the emotional and mental health risks posed by COVID-19, the CDC released recommendations for how employers can best serve the overall well-being of employees. When overlooked, symptoms of stress, anxiety, fear, helplessness, and depression can become overwhelming, if not paralyzing. Employers would be best served by remembering it is not just the physical aspects of health that should be addressed to keep workers safe and well.[243]

1. The Impact of Higher Levels of Stress and Anxiety

In addition to the hygienic safety measures discussed in previous sections, employers would benefit from alleviating stress and anxiety as much as possible for employees. These concerns are best addressed by increased frequency of communication with employees to mitigate the sense of uncertainty, at least with respect to their jobs. Such communications allow employers to stay up to date on the health status of employees, gauge how employees appear to be coping with the pandemic, and boost employee morale.

It is critical to recognize troubling signs of stress and understand how to manage it. The CDC provided guidance on how to accomplish this.[244] Common symptoms of stress include:

- Irritability, anger, denial, uncertainty, anxiousness;
- Lack of motivation;
- Depression or pervasive feelings of sadness;

[243] *Coping with Stress for Workers,* CDC (May 5, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/mental-health-non-healthcare.html.
[244] *Id.*

- Trouble sleeping;
- Difficulty concentrating; and,
- Feeling tired and/or overwhelmed.[245]

It behooves employers to recognize and allay the following work-related factors associated with higher stress levels during the pandemic:

- Anxiety about the risk of exposure to the virus while at work;
- Concern for family, loved ones and one's own personal needs;
- Managing a workload with a greater number of responsibilities than prior to the pandemic;
- Sufficient access to tools and equipment required to complete the duties of one's job;
- Adapting to a new workspace and/or schedule;
- Challenges of adapting to new platforms of communication;
- Experiencing guilt or unsureness about whether one's work is "enough" in the context of the pandemic; and,
- Uncertainty surrounding the employment, and the future, generally.[246]

Any effort by employers to alleviate these concerns is a step forward towards a less stressful and, consequently more productive, work environment.

Additional tips to build a resilient workplace and empower workers to improve their stress-management techniques include:

- Frequent communication with coworkers and employees, while encouraging them to speak openly about concerns and stressors;
- Identify that which you cannot control and finds ways to innovate and employ previously unused tools and resources to harness additional influence over some of these matters; and,
- Develop and adhere to a new daily routine.[247]

Staying Informed

Employers should make their best effort to ensure timely awareness of the changing circumstances of the pandemic and its contemporaneous impact on so many aspects of life. It is paramount employers are aware of and stay up to date with the CDC's COVID-

[245] *Coping with Stress for Workers, supra* note 243.
[246] *Id.*
[247] *Id.*

19 response webpage,[248] and regularly follow other trusted, regulated sources of information.

B. TERMINATION OF THE EMPLOYMENT RELATIONSHIP

1. Can an employer terminate employees for financial reasons during the COVID-19 pandemic?

Generally, employers are free to terminate employees as a result of financial difficulties. Due to the economic fallout caused by the pandemic, many companies are struggling financially. Employers are forced to make difficult decisions to best protect their businesses and employees. If financial exigencies require employers to minimize their workforce, they are generally indemnified against claims for wrongful termination, absent discrimination or any other unlawful reason for reducing the number of employees.

2. On what grounds can an employer be liable for wrongful termination?

Employers may incur liability for wrongful termination if the termination was based on discriminatory conduct, or if the terminated employee suffered harassment, or if the reason for the termination was retaliatory. Employers shall not discharge or discriminate against an employee because the employee has filed a complaint with OSHA regarding the unsafe health practices of their employer.[249]

Even when a business is physically closed but continues to operate via telework, those employers continue to have a duty to protect employees from adverse treatment based on protected characteristics identified by federal, state, and local laws. Please see Section IX: Discrimination for an in-depth discussion of what constitutes discriminatory behavior.

3. What precautions can an employer take to protect themselves from a wrongful termination claim during the COVID-19 pandemic?

As discussed, employment in Connecticut is generally at-will, so an employer can end an employment relationship for any reason (that is not illegal or in violation of an employment contract).[250] To ensure employers operate in accordance with the law, while protecting themselves from wrongful termination claims, they should follow three primary guidelines:

- First, consult an experienced attorney to be sure all employment contracts directing employees to company policies and requirements are unambiguous. Maya Murphy can help with all contract needs. In the case of any legal

[248] The CDC COVID-19 Response webpage can be found at: https://www.cdc.gov/coronavirus/2019-ncov/index.html.
[249] Conn. Gen. Stat. § 31-40d (2019).
[250] *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385 (Conn. 1980); *Battista v. United Illuminating Co.*, 523 A.2d 1356 (Conn. App. 1987).

complaint, if a contract is ambiguous, courts seeking to determine wrongful termination look to the environment surrounding the employee and the actions of the employer;[251]

- Second, follow OSHA guidelines to ensure a safe working environment that protects employees from contracting COVID-19. By implementing as many of the discussed safety protocols as possible, the employer will have made a good faith effort to protect employees from contracting COVID-19 as required by OSHA; and,

- Third, do not remain open in violation of government directive. If an employee files a legal complaint for wrongful termination, or other causes of actions, while a business is illegally open, the employer may be liable for damages that could have been easily avoided. Employers that remain open despite regulations or directives to the contrary risk exposure to liability.

251 *Cruz v. Visual Perceptions, LLC*, 84 A.3d 828 (Conn. 2014).

IX. DISCRIMINATION IN THE WORKPLACE

Introduction

The unique circumstances presented by the COVID-19 pandemic warrant a comprehensive review of the rights, means of recourse, and resources available to individuals who believe they are the subject of discriminatory action, as well as an overview of the challenges and concerns faced by both employers and employees. The impact of the pandemic on employment has prompted the enactment of special state and federal legislation designed to target discriminatory action and ensure the rights of workers are not violated.

Discrimination is the mistreatment of individuals based on race, color, ethnicity, religious creed, gender, sexual orientation, gender identity, disability, pregnancy, age, or national origin and is illegal under federal law as well as many state and local laws. This list is not exhaustive; a person may experience discrimination based on more than just one factor. Discrimination exists in myriad forms and is experienced by individuals in a variety of ways. Accordingly, during the current public health crisis, there are several important federal and state statutes and legislative bodies of which employees and employers should be aware and which are discussed in this section.

At the federal level, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act of 1967, and the Pregnancy Discrimination Act combat discrimination and are germane to common concerns circulating throughout the COVID-19 climate. Legislative bodies, such as the Equal Employment Opportunity Commission, enforce and promulgate federal laws prohibiting discrimination in the employment environment. In Connecticut, the Fair Employment Practices Act defines discrimination and is enforced by regulatory bodies such as the Connecticut Commission on Human Rights and Opportunities.

A. REGULATORY BODIES AND FEDERAL LEGISLATION

1. Equal Employment Opportunity Commission Enforced Statutes

U.S. Equal Employment Opportunity Commission (EEOC)

The EEOC views COVID-19 as a "direct threat" to health and safety and has issued pandemic-related regulations accordingly.[252] The EEOC enforces Title VII of the 1964 Civil Rights Act (which encompasses the Pregnancy Discrimination Act), the Equal Pay Act of 1963, the Age Discrimination in Employment Act, Title I of the Americans With Disabilities Act, Sections 501 and 505 of the Rehabilitation Act, and the Genetic

[252] *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, EEOC (Mar. 21, 2020), https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act.

Information Nondiscrimination Act.[253] These laws prohibit discrimination against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (forty or older), disability, or genetic information.[254] It is also illegal for employers to discriminate against employees for complaining about discrimination, filing a complaint of discrimination, or participating in an employment discrimination investigation or lawsuit.[255] Most employers with at least fifteen employees fall under the purview of the EEOC, as do many labor unions and employment agencies.[256] The aforementioned laws apply to many types of interpersonal interactions inherent to employment relationships, including job interviews, hiring employees, firing employees, promoting employees, harassment, employment-related training, and wage and benefit determinations.[257]

Timeline

Normally, an employee has 180 calendar days to file an employment discrimination complaint with the EEOC.[258] Federal employees have forty-five days to bring the same kind of charge.[259] State or local agencies enforcing laws prohibiting discrimination allow a 300-day time period to file a complaint.[260] Such timelines have changed due to COVID-19 and, while no strict guidelines now exist, principles of equitable tolling must be applied.[261] The reasons for such tolling must be recorded and will be fully examined should the case be later appealed.[262] The location of the alleged discriminatory act and the type of discrimination determine the precise time period during which a charge may be filed with the EEOC.[263] Anyone wishing to initiate an action may file a claim at an EEOC field office, through the mail, or online via the EEOC.[264] Complaints filed with the CHRO can often be filed by the EEOC simultaneously: the CHRO pursues the matter at the state level while the EEOC oversees the matter at the federal level, as will be discussed in further detail below.[265]

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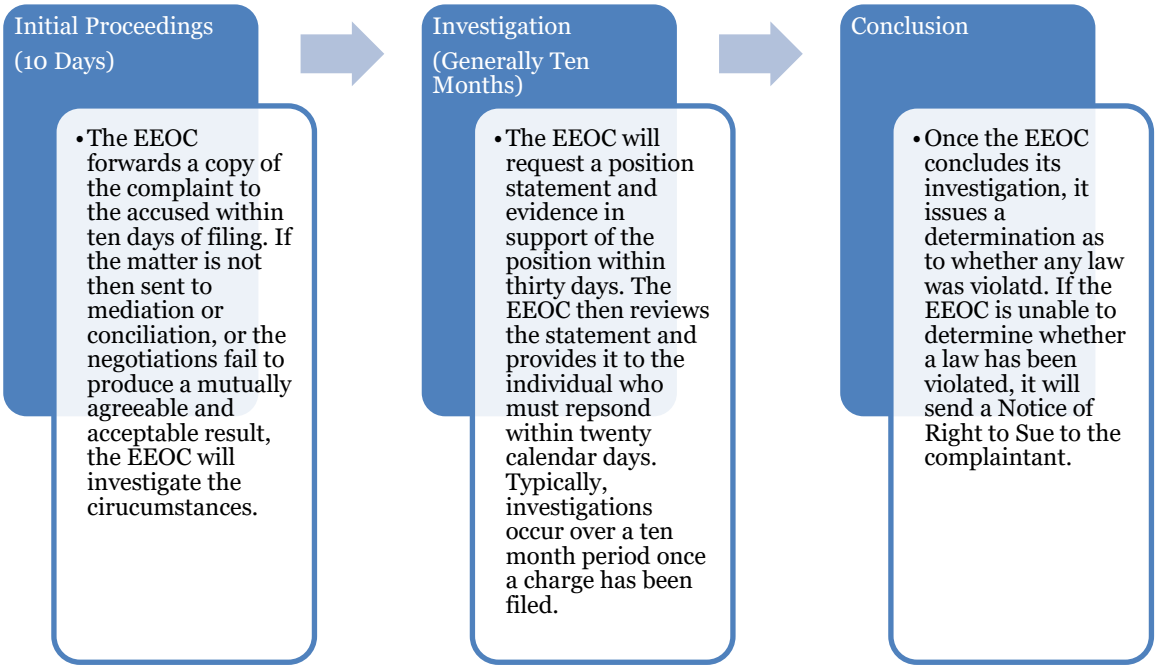
[253] *Laws Enforced by the EEOC*, EEOC, https://www.eeoc.gov/statutes/laws-enforced-eeoc (last visited Jul. 24, 2020).
[254] *Discrimination by Type*, EEOC, https://www.eeoc.gov/discrimination-type (last visited Jul. 24, 2020).
[255] *Overview*, EEOC, https://www.eeoc.gov/overview (last visited Jul. 20, 2020).
[256] *Id.*
[257] *Id.*
[258] *Time Limits for Filing a Charge*, EEOC (April 6, 2020) https://www.eeoc.gov/time-limits-filing-charge.
[259] *Id.*
[260] *Id.*
[261] *Processing Information for All Parties in Federal EEO Processing under 29 CFR Part 1614*, EEOC, https://www.eeoc.gov/processing-information-all-parties-federal-eeo-processing-under-29-cfr-part-1614 (last visited Jul. 20, 2020).
[262] *Id.*
[263] *Id.*
[264] *How to File a Charge of Employment Discrimination*, EEOC, https://www.eeoc.gov/how-file-charge-employment-discrimination (last visited Jul 22, 2020). To file a charge, visit https://publicportal.eeoc.gov/Portal/Login.aspx
[265] *Id.*



The EEOC follows the above general timeline in conducting investigations and handling filings. [266]

If the alleged discrimination violates the ADA or Title VII of the Civil Rights Act, the plaintiff must receive a Notice of Right to Sue before commencing a claim in federal court.[267] Generally, the EEOC issues a Notice of Right to Sue within 180 days from when a charge under Title VII or the ADA is filed, although on occasion less time is required for the EEOC to resolve the charge.[268] Even when the EEOC is unable to determine whether a cause of action exists despite completing its investigation, a Notice of Right to Sue will be issued to permit the claimant to commence a lawsuit.

If the EEOC's investigation reveals it is likely that illegal conduct occurred, the commission will encourage voluntary settlement between the parties through the process of mediation.[269] If settlement attempts prove unsuccessful, the matter is referred to the EEOC's legal staff, who will decide whether to pursue the case.[270] If the legal department

[266] *What you can Expect After you File a Charge*, EEOC, https://www.eeoc.gov/what-you-can-expect-after-you-file-charge (last visited Jul. 23, 2020); *EEOC Announces Pilot Programs to Increase Voluntary Resolutions*, EEOC (Jul. 7, 2020), https://www.eeoc.gov/newsroom/eeoc-announces-pilot-programs-increase-voluntary-resolutions; *Questions and Answers for Charging Parties on EEOCs New Position Statement Procedures*, EEOC, *https://www.eeoc.gov/questions-and-answers-charging-parties-eeocs-new-position-statement-procedures* (last visited Jul. 24, 2020).
[267] *Questions and Answers for Charging Parties on EEOCs New Position Statement Procedures, supra* note 266.
[268] *Id.*
[269] *Id.*
[270] *Id.*

chooses not to pursue the case, the claimant will receive a Notice of Right to Sue.[271] Once the Notice is received by the charging party, the lawsuit must be commenced within 90 days of its receipt.[272] It is important to note that, amidst the COVID-19 pandemic, the Department of Justice announced Right-to-Sue Notices are temporarily suspended as of March 16, 2020, unless requested by the charging party for claims of employment discrimination based on Title VII of the Civil Rights Act, the ADA and the Genetic Information Nondiscrimination Act.[273]

Remedies

When an employer has engaged in discriminatory action, appropriate remedies may include an award of attorney's fees, in addition to compensatory and punitive damages.[274] Injunctive relief may also be awarded to the prevailing party of an employment discrimination matter.[275] Limitations on the amount of an award for monetary damages received by a plaintiff are capped as follows:

- For employers with 15-100 employees, damages may not exceed $50,000;
- For employers with 101-200 employees, the limit is $100,000;
- For employers with 201-500 employees, the limit is $200,000; and,
- For employers with more than 500 employees, the limit for damages is $300,000.[276]

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 is a federal law that prohibits employment discrimination based on certain specified characteristics: race, color, national origin, sex, and religion.[277] Two limited exceptions arise when such a characteristic constitutes a "bona fide occupational qualification reasonably necessary to the operation of that

[271] *Questions and Answers for Charging Parties on EEOCs New Position Statement Procedures, supra* note 266.
[272] *DEPARTMENT OF JUSTICE TEMPORARILY HALTS THE ISSUANCE OF RIGHT-TO-SUE NOTICES AMIDST COVID-19 PANDEMIC*, U.S. Dept. of Justice (March 16, 2020), https://www.justice.gov/crt/case-document/file/1272126/download.
[273] *Id.* at 1.
[274] *Remedies for Employment Discrimination,* EEOC, https://www.eeoc.gov/remedies-employment-discrimination (last visited Jul. 23, 2020).
[275] *Id.*
[276] *Id.*
[277] 42 U.S.C. § 2000e-2(b) (2018).

particular business" or when a religious school hires only members of a particular faith.[278] Title VII applies to public and private employers with over fifteen employees.[279]

Protected Traits

National Origin

No race or national origin may be discriminated against during COVID-19. Asians and Asian-Americans may be the most targeted due to the origins of the virus.[280] Harassment can come from many places, including through electronic communication.[281] This does not lessen employer liability however, and businesses must protect their employees' rights.

Sex

Employees must not be discriminated against on the basis of sex. For example, female employees cannot receive preferential treatment in scheduling or work-from-home opportunities due to assumptions about childcare based on gender. Recently the Supreme Court has added gender identity and sexual orientation to characteristics protected by Title VII.[282]

Title VII also includes sexual harassment claims. The two types of sexual harassment cognizable under Title VII include quid pro quo harassment and hostile work environment harassment. Quid pro quo harassment is when submission to such harassment is made either explicitly or implicitly a term or condition of an individual's employment or submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.[283] Hostile work environment harassment is when the harassment has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.[284] The two types of sexual harassment are not exclusive and often overlap. The crux of a harassment case is whether the harassment altered the terms and conditions of the employment in violation of Title VII.[285] Employees do not need to be in physical proximity to one another to engage in sexual harassment. Inappropriate communications and advances can still occur, even while working remotely. It is

[278] 42 U.S.C. § 2000e-2(e) (2018).
[279] 42 U.S.C. § 2000e(b) (2018).
[280] *See, Message From EEOC Chair Janet Dhillon on National Origin and Race Discrimination During the COVID-19 Outbreak*, EEOC, https://www.eeoc.gov/wysk/message-eeoc-chair-janet-dhillon-national-origin-and-race-discrimination-during-covid-19 (last visited Jul. 25, 2020).
[281] *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, supra* note 1.
[282] *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020).
[283] 29 C.F.R. § 1604.11 (2020).
[284] *Id.*
[285] *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752 (1998).

important that employers fully investigate and work to prevent sexual harassment from occurring.

Religion

Employees may not be discriminated against or harassed on the basis of religion or religious creed. Employers must grant reasonable accommodations for personal protective equipment or screening processes if they are requested due to religion.[286] Harassment may exist wherever an employee of a protected class is unfairly targeted. For example, a religious employee coerced into altering or abandoning a religious practice due to his employer is the victim of quid pro quo harassment. Similar to the ADA's reasonable accommodation requirement for people with disabilities (discussed below), Title VII creates an affirmative obligation to provide a reasonable accommodation for any sincerely held religious belief provided to do so would not create an undue hardship on the business.[287] The undue hardship exception for Title VII religious accommodations is less demanding than the ADA's definition, with Title VII defining undue as any action that requires more than de minimis cost or burden while the ADA defines undue hardship as requiring significant difficulty or expense.[288]

The Pregnancy Discrimination Act

The Pregnancy Discrimination Act (PDA) is an amendment to Title VII of the Civil Rights Act of 1964 that prohibits employment discrimination based on "pregnancy, childbirth, or related medical conditions."[289] Pregnant employees may not be terminated or furloughed due to their pregnancy. Even if an employer excludes a pregnant employee for what the employer believes to be their safety, the employee may bring an action for discrimination.[290] If a pregnant employee who can complete the essential functions of their job at home requests to work at home during COVID-19, the request most likely will be granted (provided it causes no undue hardship to the employer).[291]

[286] *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, *supra* note 1.
[287] 42 U.S.C. § 2000e(j) (2018).
[288] *Questions and Answers: Religious Discrimination in the Workplace*, EEOC, https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace#fn1 (last visited Aug. 9, 2020).
[289] 41 C.F.R. § 60-20.5 (2020).
[290] *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, *supra* note 1.
[291] *Id.*

Theories of Liability

Disparate Treatment

Disparate treatment takes place when an employer treats an employee or applicant differently based on a protected characteristic. Often there is no proverbial smoking gun and discriminatory actions are cloaked under the guise of fair dealing. To prove disparate treatment, courts apply the McDonnell-Douglas burden-shifting framework.[292] This framework requires plaintiffs to establish:

1. They were within the protected class;
2. They were qualified for the employment position from which they were wrongfully discharged;
3. They were subject to an adverse employment action; and,
4. The adverse action occurred under circumstances giving rise to an inference of discrimination.[293]

An adverse action is a material change to the compensation, terms, conditions, or privileges of employment.[294] Once established, the burden shifts to the employer to establish a non-discriminatory business reason for why the employee was the target of the adverse action.[295] If the employer is successful in showing a non-discriminatory basis for the action, the plaintiff then has the opportunity to establish said reason is merely pretext.[296] Disparate treatment liability, by its nature, requires a showing of an affirmative intent to discriminate.

Disparate Impact

Disparate impact liability requires only a showing that a certain employment practice has a disparate impact on the basis of a protected characteristic.[297] Once shown, the burden is on the employer to demonstrate that the practice is necessary for the business and no alternative practice can be implemented that would not have a disparate impact.[298] Proceeding under a disparate impact theory of liability does not require the use of the McDonnell-Douglas burden shifting framework, but disparate impact and disparate treatment liability claims may be pursued simultaneously.

[292] *Davey v. Jones*, 371 Fed. Appx. 146, 148 (2d Cir. 2010).
[293] *Id.*; *See also*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) holding modified by *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).
[294] *Atkins v. Rochester City Sch. Dist.*, 764 Fed. Appx. 117, 119 (2d Cir. 2019).
[295] *Davey*, 371 Fed. Appx. at 148.
[296] *Id.*
[297] 42 U.S.C. § 2000e-2(k) (2018).
[298] *Id.*

Retaliation

Employees who face an adverse action after opposing a discriminatory practice are also protected under Title VII.[299] Employees cannot be punished if they "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing . . ." against a discriminatory employment practice.[300] The lessened causation used in mixed motive cases is not applicable to retaliation claims under Title VII.[301] Plaintiffs must prove that the adverse action would not have taken place without the discriminatory intent.[302] Federal employees or applicants who face retaliation do not have to show but for causation, only that the retaliation occurred and was intentional.[303] In Connecticut, plaintiffs may still establish a prima facie case of retaliation without demonstrating but-for causation.[304]

Cat's Paw

An employer may be liable even where retaliatory action is taken without any discriminatory animus on the part of the agent taking the action. If the employer engages in retaliation against an employee that is, unbeknownst to the employer, motivated by the animus of another employee, the employer may be liable under the cat's paw theory of liability.[305] The second circuit has applied this theory of liability to Title VII cases.[306] Cat's paw liability requires that:

- The plaintiff's co-worker makes statements maligning the plaintiff, for discriminatory reasons and with the intent to cause the plaintiff's firing;
- The co-worker's discriminatory acts proximately cause the plaintiff to be fired; and,
- The employer acts negligently by allowing the co-worker's acts to achieve their desired effect though they know (or reasonably should know) of the discriminatory motivation.[307]

Defenses

Decision Maker in the Same Protected Class

If a plaintiff is bringing suit alleging discrimination, the suit becomes more difficult if the actor who instituted the adverse employment action belongs to the same protected class.

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[299] 42 U.S.C. § 2000e-3(a) (2018).
[300] *Id.*
[301] *Nassar*, 570 U.S. at 360.
[302] *Id.*
[303] *Nita H., Petitioner, v. Sally Jewell, Sec'y, Dep't of the Interior (Nat'l Park Serv.), Agency.*, EEOC DOC 0320110050, 2014 WL 3788011 at *10.
[304] *Zann Kwan v. Andalex Group LLC*, 737 F.3d 834, 845 (2d Cir. 2013).
[305] *Staub v. Proctor Hosp.*, 562 U.S. 411, 418-419 (2011).
[306] *Vasquez v. Empress Ambulance Serv., Inc.*, 835 F.3d 267, 272-273 (2d Cir. 2016).
[307] *Id.* quoting *Velazquez-Perez v. Developers Diversified Realty Corp.*, 753 F.3d 265, 274 (1st Cir. 2014).

It does not, however, defeat the claim because a court may not "presume as a matter of law that human beings of one definable group will not discriminate against other members of their group."[308]

Same Actor Inference

If the employee bringing the suit was hired by the same actor that took the adverse employment action the case may be weakened. The Second Circuit has explained, "when the person who made the decision to fire was the same person who made the decision to hire, it is difficult to impute to her an invidious motivation that would be inconsistent with the decision to hire."[309]

Good Faith Reliance on EEOC

An employer may limit liability under Title VII if they can demonstrate that the adverse employment action taken was "in good faith, in conformity with, and in reliance on any written interpretation or opinion" of the EEOC.[310]

After Acquired Evidence

Evidence discovered of an employee's wrongdoing after the employer has taken an adverse employment action does not absolve an employer from liability, though it does factor into the relief granted by the court.[311] The Supreme Court has held that in these matters "neither reinstatement nor front pay is an appropriate remedy."[312]

Mixed Motive

In a mixed motive case the employee does not need to show that the adverse action would not have taken place but-for the discriminatory intent.[313] It suffices to show that discrimination was one of a multitude of motivating factors.[314] Where a defendant employer can show that the adverse action would have occurred regardless of the impermissible motivating factor, the court may grant injunctive and declaratory relief as well as attorney's fees, but may not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment.[315] Unlike disparate treatment cases, plaintiffs do not have the burden of proving an employers proffered reason for the adverse action was pretextual.[316]

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[308] *Castaneda v. Partida*, 430 U.S. 482, 499 (1977).
[309] *Grady v. Affiliated Cent., Inc.*, 130 F.3d 553, 560 (2d Cir. 1997).
[310] 42 U.S.C. § 2000e-12 (2018).
[311] *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 361 (1995).
[312] *Id.*
[313] *Univ. of Texas Sw. Med. Ctr. v. Nassa*r, 570 U.S. 338, 343 (2013); 42 USC 2000e-2(m) (2018).
[314] *Id.*
[315] 42 U.S.C. § 2000e-5(g)(2)(B) (2018).
[316] *Holcomb v. Iona Coll.*, 521 F.3d 130, 141-142 (2d Cir. 2008).

Remedies

Remedies available for individuals suing their employer for discrimination under Title VII include back pay, front pay, injunctive and equitable relief, compensatory damages, punitive damages, and attorney's fees.[317]

The Equal Pay Act (EPA)

The EPA was passed as an amendment to the FLSA.[318] Unlike Title VII, which also prohibits sex-based discrimination, under the EPA an individual does not have to exhaust all available administrative remedies before bringing the suit to court.[319] The suit must be brought within two years of the discriminatory action or three years if the discrimination was willful.[320]

Theories of Liability

The Equal Pay Act of 1963 prohibits paying people of a particular gender differently than a person of another gender solely on that basis. A plaintiff must show that an employer does not equally compensate people of different sexes whose jobs are equal in skill, effort, and responsibility and are performed in similar working conditions.[321] Retaliation is also prohibited under the EPA.[322]

Defenses

The pay need not be equal where there is a non-discriminatory seniority system, a merit-based advancement or compensation system, a system which measures earnings by quantity or quality of production, or where pay differential is based on any other factor than sex.[323]

Remedies

An individual bringing an EPA case may recover for lost wages, attorney's fees, and liquidated damages.[324] Individuals who faced retaliation may also be eligible for equitable relief such as reinstatement or promotion.[325] The EEOC is able to obtain injunctive relief in EPA cases, but an individual bringing a private suit is not.[326]

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[317] 42 U.S.C. § 1981, 2000e (2018).
[318] 29 U.S.C. § 206 (2018); *The Equal Pay Act of 1963,* EEOC, https://www.eeoc.gov/statutes/equal-pay-act-1963 (last visited Jul. 23, 2020).
[319] *Filing a Lawsuit in Federal Court*, EEOC, https://www.eeoc.gov/federal-sector/filing-lawsuit-federal-court (last visited Jul. 24, 2020).
[320] *Id.*
[321] 29 U.S.C. § 206 (2018).
[322] 29 U.S.C. § 215 (2018).
[323] 29 U.S.C. § 206 (2018).
[324] 29 U.S.C. § 216 (2018).
[325] 29 U.S.C. §§ 215(a)(3), 216 (2018).
[326] 29 U.S.C. § 217 (2018).

Title I of the Americans with Disabilities Act (ADA)

Title I of the ADA prohibits employers from discriminating against qualified individuals on the basis of a disability in regard to hiring, advancement, or discharge of employees.[327] The purpose of this civil rights legislation is to ensure people with disabilities have equal rights and opportunities to those who do not.[328] The ADA applies to employers with fifteen or more employees, including state and local governments.[329] It also applies to employment agencies and labor organizations.[330] The ADA offers similar protections to individuals with disabilities as those provided to individuals who face discrimination on the basis of race, color, sex, national origin, age, and religion by Title VII of the Civil Rights Act.[331] For the purposes of the ADA, a disability is defined as:

- A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- A record of such an impairment; or,
- Being regarded as having such an impairment. Meaning, an individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both "transitory and minor."[332]

The "substantially limits" language is a relative concept and is explained by the ADA as an impairment which "substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population."[333] The first prong discussing substantial limitations is not meant to be subject to stringent analysis.[334] A significant question due to the novelty of the virus is whether a COVID-19 diagnosis constitutes a disability under the parlance of the ADA. The EEOC has not yet offered a definitive answer.[335] However, it is likely an individual will not be considered to have a disability under the third prong "impairment" element of the ADA's above-definition, even if the individual is believed by others to have COVID-19. The rationale is that the condition must persist beyond six-months, or else it is considered "transitory and minor."[336] Nonetheless, "[t]he effects of an impairment lasting or expected to last fewer than six months can be substantially limiting" within the meaning of the first two categories of the ADA.[337]

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[327] 42 U.S.C. § 12112(a) (2018).
[328] *What is the Americans with Disabilities Act?*, The ADA National Network, https://adata.org/learn-about-ada (last visited Aug. 17, 2020).
[329] 42 U.S.C. §§ 12111, 12202 (2018).
[330] 42 U.S.C. § 12111(2) (2018).
[331] *Id.*
[332] 29 C.F.R. § 1630.2. (2020).
[333] 29 C.F.R. § 1630.2(j)(1)(ii) (2020).
[334] 29 C.F.R. § 1630.2(j)(1) (2020).
[335] *Transcript of March 27, 2020, Outreach Webinar*, EEOC, https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar (last visited Aug. 17, 2020).
[336] 42 U.S.C. § 12102 (2018).
[337] 29 C.F.R. § 1630.2(j)(1)(ix) (2020).

Reasonable Accommodations

If an employee has a disability within the meaning of the ADA, employers are required to provide reasonable accommodations except where doing so would create an undue burden on the employer.[338] A reasonable accommodation is any modification or adjustment to a job or the work environment that will enable an applicant or employee with a disability to participate in the application process or to perform essential job functions.[339] Undue hardship means that the accommodation would result in significant expense or difficulty.[340] To determine whether an accommodation poses an undue hardship, factors such as the financial resources of the facility and covered entity, the nature of the accommodation, and the type of operations undertaken at the facility are examined.[341] Connecticut, likewise, upholds this duty of reasonable accommodation in the workplace.[342]

Theories of Liability

A plaintiff bringing suit under the ADA may base the claim on disparate treatment, disparate impact, harassment, failure to accommodate, or retaliation.[343] Connecticut adopted federal ADA provisions by codifying it in its General Statutes, thereby extending the Act's protection to the State's citizens though its own laws.[344] The United States Court of Appeals for the Second Circuit gave credence to enforcement of the ADA's provisions by setting a "but for" causal standard of proof, borne by a plaintiff, rather than the more stringent "sole cause" standard.[345] Thus, to prevail on an employment discrimination claim, the Court held that a plaintiff need only establish that, "but for" the disability, no employment discrimination would have occurred (rather than proving the plaintiff's disability was the *sole* cause of the adverse impact).[346]

Defenses

Business Necessity

If a business can show that an individual with a disability is unable to perform the job with or without reasonable accommodation, then the business may have a complete defense to the employment action.[347] The same is true with an undue hardship defense.

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[338] 42 U.S.C. § 12112(b)(5) (2018); *What is the Americans with Disabilities Act*, *supra* note 328.
[339] 42 U.S.C. § 12111 (9) (2018).
[340] 42 U.S.C. § 12111(10) (2018).
[341] *Id*.
[342] *Saksena v. Dept. of Revenue Services*, Commission on Human Rights & Opportunities, Opinion No. 9940089 (August 9, 2001).
[343] 42 U.S.C. §§ 12112, 12203 (2018).
[344] Conn. Gen. Stat. § 46a-58(a).
[345] *Natofsky v. City of New York*, 921 F.3d 337, 340 (2d Cir. 2019), cert. denied, 206 L. Ed. 2d 822 (Apr. 20, 2020).
[346] *Id*.
[347] 42 U.S.C. § 12113 (2018).

Direct Threat

A business may also take remedial action without consequence when the employee poses a direct threat as explained below in the section COVID-19 and the ADA.

Exempted Businesses

Religious entities may give preference to individuals with a certain religion without running afoul of the ADA.[348] Employers of food handlers also are an exception so that food handlers with an infectious disease may be prevented from working in the absence of a reasonable accommodation, thus halting the spread.[349]

Good Faith

If an employer attempts to work with the employee to find a reasonable accommodation, but is unable to, his liability may be reduced or even wholly dismissed.[350]

Mixed Motive

A mixed motive defense is available within the Second Circuit.[351]

Remedies

Remedies for violations of the ADA are generally the same provided for Title VII violations.[352]

The ADA and COVID-19

The ADA remains in effect during any public health crisis and does not interfere with employers' adherence to the CDC's guidelines.[353] While the ADA prohibits an employer from making disability-related inquiries or medical examinations during employment, exceptions are made when the examinations are job related and constitute a business necessity.[354] This requires an employer to have a reasonable belief, based on objective evidence, that an employee's ability to perform essential job functions will be impaired by a medical condition, or an employee will pose a direct threat due to a medical condition[355] The results of this examination must be confidential.[356] COVID-19 has already been

[348] 42 U.S.C. § 12113 (2018).
[349] *Id.*
[350] 42 U.S.C. § 1981a (2018).
[351] *Parker v. Columbia Pictures Industries*, 204 F.3d 326, 336-337 (2d Cir. 2000).
[352] 42 U.S.C. § 1981a. (2018).
[353] *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, *supra* note 1.
[354] *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, *supra* note 252.
[355] *Id.*
[356] *Id.*

labeled a "direct threat" by the EEOC.[357] Asking whether an employee displayed COVID-19 symptoms and taking employees' temperatures are not prohibited under the ADA.[358] An employer may request a doctor's note certifying an employee's fitness to return to work.[359] If an employee requests an accommodation, the employer still has the right to request documentation of the illness. Because medical providers are understandably difficult to reach during public health emergencies, it may be a best practice to be flexible with documentation. An employer is also not required to grant an accommodation to protect a non-employee with a disability.[360] This means that an employee requesting to telework so that he can limit possible contamination of a spouse with a disability is not considered a request for a reasonable accommodation under the ADA.[361]

The COVID-19 pandemic has created hardships for employers which exacerbates some employers' ability to provide reasonable accommodations.[362] The EEOC stated that "it may be significantly more difficult in this pandemic to conduct a needs assessment or to acquire certain items, and delivery may be impacted, particularly for employees who may be telecommuting."[363] Employers should work with employees to negotiate mutually agreeable and cooperative solutions whenever possible. Employers who fail to reasonably accommodate an employee may be liable under a failure to accommodate theory of liability.[364]

The Rehabilitation Act

The Rehabilitation Act protects federal employees from disability-based discrimination.[365] The Act's protections are substantially similar to those provided by the ADA with respect to "employers with federal contracts or subcontracts that exceed $10,000, and by employers that receive federal funds."[366] This includes agencies, departments, and instrumentalities in the federal executive branch, military departments, the U.S. postal service, the Tennessee Valley Authority, the National Oceanic and Atmospheric Administration Commissioned Corps, and the Smithsonian Institution.[367] The Rehabilitation Act uses the same definition as the ADA to identify qualified individual.[368]

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[357] *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, *supra* note 252.
[358] *Id.*
[359] *Id.*
[360] *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, *supra* note 1.
[361] *Id.*
[362] *Id.*
[363] *Id.*
[364] 42 U.S.C. § 12112 (2018).
[365] 29 U.S.C. § 791 (2018).
[366] 29 U.S.C. § 701 et seq. (2018).
[367] *Id.*
[368] 29 U.S.C. § 705 (2018).

Timeline

To bring a timely claim under the Rehabilitation Act, an individual must meet with an EEOC counselor within forty-five days of the alleged discriminatory event.[369] If the matter is not resolved through counseling, the EEOC will issue a notice of the right to file a formal complaint.[370] The individual may lodge a formal complaint with the EEOC within fifteen days of receiving the notice.[371]

Theories of Liability

The liability theories that are available under the ADA for employment discrimination are generally also available to be used in suits brought under the Rehabilitation Act.[372]

Defenses

The defenses available for employers in a case brought under the Rehabilitation Act are the same for those available in a suit brought under the ADA.

Remedies

Remedies available under the Rehabilitation Act are generally the same as those granted under Title VII, including back-pay, front-pay, injunctive relief, equitable relief, compensatory damages, and attorney's fees.[373] An agency is not liable for compensatory damages, however, if it demonstrates good faith efforts were made to accommodate the complainant-employee.[374] Punitive damages are not recoverable against the federal government.[375]

The Age Discrimination in Employment Act of 1967 (ADEA)

The ADEA protects applicants and employees forty years of age and older from employment discrimination.[376] Unlike the EEOC's standard coverage of employers with more than fifteen employees, the Act covers employers, labor organizations, and employment agencies with more than twenty employees.[377] This includes state and local government agencies, but excludes the federal government or corporations wholly owned by the United States.[378] Independent Contractors are also excluded.[379] Unlike the ADA,

[369] 29 C.F.R. § 1614.105 (2020).
[370] 29 C.F.R. § 1614.105 (2020).
[371] 29 C.F.R. § 1614.106 (2020).
[372] 29 U.S.C. § 791 (2018).
[373] 29 U.S.C. § 794a (2018).
[374] 42 U.S.C. § 1981a (2018).
[375] *Id.*
[376] *Age Discrimination,* Dept. of Labor, https://www.dol.gov/general/topic/discrimination/agedisc (last visited Jul. 23, 2020).
[377] 29 U.S.C. §§ 630(c), (d) (2018).
[378] 29 U.S.C. §§ 630(a),(b) (2018).
[379] 29 U.S.C. § 630(f) (2018).

the ADEA does not include a "reasonable accommodation" provision.[380] The ADEA recognizes exemptions for the mandatory retirement at age sixty-five of executives and high policy makers.[381] Favoring an older individual over a younger individual because of age is allowable under the ADEA, even if the younger individual is at least forty years old.[382] Upon separation from a job, an individual to whom the ADEA applies may release the employer from liability by signing a waiver.[383]
The waiver must:

- Be written in a manner that is understandable;
- Reference the ADEA;
- Not include a waiver of future events;
- Provide consideration not already owed to the employee;
- Specifically advise the employee to speak with an attorney before signing;
- Grant a twenty-one day period if a single employee is being terminated, or forty-five days if there are multiple employees; and,
- Grant seven days during which the employee may rescind his acceptance.[384]

Timeline

Receiving a Notice of Right to Sue from the EEOC is not necessarily a prerequisite to commence an action. Suit may be initiated sixty days after filing a charge with the EEOC.[385] If a Notice of Right to Sue is received, the aggrieved party has ninety days to commence an action.[386]

Theories of Liability

The plaintiff must prove that but for the alleged age discrimination, the adverse action would not have occurred.[387] ADEA lawsuits may be based on a theory of disparate treatment, disparate impact,[388] harassment,[389] cat's paw,[390] or retaliation theory of

[380] *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, *supra* note 1.
[381] 29 U.S.C. § 631(c) (2018).
[382] 29 C.F.R. § 1625.2 (2020).
[383] 29 C.F.R. § 1625.22 (2020).
[384] *Id.*
[385] *Filing a Lawsuit,* EEOC, https://www.eeoc.gov/filing-lawsuit (last visited Jul. 23, 2020).
[386] *Id.*
[387] *Gross v. FBL Fin. Services, Inc*., 557 U.S. 167, 174 (2009).
[388] *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 240 (2005).
[389] *Dediol v. Best Chevrolet, Inc.*, 655 F.3d 435, 441-442 (5th Cir. 2011); *Crawford v. Medina Gen. Hosp*., 96 F.3d 830, 834 (6th Cir. 1996).
[390] *Sims v. MVM, Inc.*, 704 F.3d 1327, 1336 (11th Cir. 2013).

liability.[391] In Connecticut, a plaintiff may still use the McDonnell-Douglas burden-shifting framework to show disparate treatment.[392]

Defenses

Bona Fide Occupational Qualification

Like Title VII of the Civil Rights Act, with respect to all protected classes except race, the ADEA[393] provides an affirmative defense to liability where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business.[394] Employers may show that age discrimination was necessary as a bona fide occupational qualification (BFOQ) by proving:

a) that they had reasonable cause to believe that all or substantially all persons over the age qualification would be unable to perform safely the duties of the job, or
b) that it is highly impractical to deal with the older employees on an individualized basis.[395]

Reasons Other Than Age

If age is not the crux of the argument asserted against the employer, the employer may not be responsible for committing age-related discrimination.[396] The employer has the burden of production and persuasion when attempting to assert this defense.[397] The ADEA does not prevent disciplinary action taken for good cause.[398]

Remedies

Those bringing a suit under the ADEA may receive back pay, front pay, equitable and injunctive relief, liquidated damages, and attorney's fees.[399] Unlike a suit brought under Title VII, an ADEA plaintiff cannot recover compensatory or punitive damages.[400] Also unlike Title VII , suits brought under the ADEA have no maximum monetary award for damages.[401]

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[391] 29 U.S.C. § 623(d) (2018).
[392] *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 106 (2d Cir. 2010).
[393] 29 U.S.C. § 621 et seq. (2018); 29 U.S.C. § 623(f)(1) (2018).
[394] *Smith v. City of Jackson*, 544 U.S. 228, 230 (2005).
[395] *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 401 (1985).
[396] 29 U.S.C. § 623(f)(1) (2018).
[397] 29 C.F.R. § 1625.7(d) (2020).
[398] 29 U.S.C. § 623(f)(3) (2018).
[399] 29 U.S.C. §§ 216(b), 626(b) (2018).
[400] *Dean v. Am. Sec. Ins. Co.*, 559 F.2d 1036, 1038-1039, reh'g denied, 564 F.2d 97 (5th Cir. 1977), cert. denied, 434 U.S. 1066 (1978).
[401] 29 U.S.C. § 626(b) (2018).

ADEA and COVID-19

Employees over forty years of age may not be subject to adverse employment actions based on their age and may not be excluded from the workplace solely because they may be at a higher risk of contracting COVID-19 due to their age.[402] Although the ADEA does not have a reasonable accommodation provision, there is no prohibition on employers who wish to provide tailored accommodations to those employees who are sixty-five years of age and older (who the CDC has recognized as a high risk category).[403] Even if such accommodations were granted only to employees above the age of sixty-five, thereby affording more favorable treatment to a certain class of employees as opposed to others, an office would still be in compliance with the ADEA.[404] Purportedly altruistic motives in excluding employees over forty from the workplace will not shield an employer from liability under the ADEA.

Genetic Information Nondiscrimination Act (GINA)

GINA prohibits employers from discriminating, acquiring, or taking adverse employment action based on genetic information.[405] GINA adopts the same definition of covered entities used by Title VII.[406] The genetic information covered by the GINA includes an employee's genetic tests, the genetic tests of biological family members of an employee, and the manifestation of a disease or disorder in family members of such individuals.[407] Manifested conditions, even those that may be impacted by genetics, are not covered by the GINA.[408]

Defenses

Employers may legally collect genetic information from their employees through six mechanisms:

1. The genetic material is acquired inadvertently;
2. The genetic material is acquired as a part of health or genetic services (including a wellness program) that a covered entity provides on a voluntary-participatory basis;
3. In the form of family medical history to comply with the certification requirements of the Family and Medical Leave Act, state or local leave laws, or certain employer leave policies;

[402] *See*, 29 U.S.C. § 626(b) (2018).
[403] *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, *supra* note 1.
[404] *Id*.
[405] 42 U.S.C § 2000ff (2018).
[406] *Id*.
[407] *Id*.
[408] *Jacobs v. Donnelly Commun*., 1:13-CV-980-WSD, 2013 WL 5436682 at 2 (N.D. Ga. Sept. 27, 2013).

4. From sources that are commercially and publicly available, such as newspapers, books, magazines, and even electronic sources;
5. As a part of genetic monitoring that is either required by law or provided on a voluntary basis; and,
6. By employers who conduct DNA testing for law enforcement purposes as a forensic lab, or for human remains identification.[409]

Theories of Liability

GINA includes provisions prohibiting retaliation for opposing an unlawful employment practice listed in GINA, and harassment of employees based on their genetic information.[410] Disparate impact liability is not currently recognized under GINA.[411]

Remedies

Remedies for a violation of GINA include reinstatement, hiring, promotion, back pay, injunctive relief, pecuniary and non-pecuniary damages (including compensatory and punitive damages), and attorneys' fees.[412] Compensatory damages are unavailable when the suit is brought against federal, state or local employers.[413]

GINA and COVID-19

Employers may not keep individuals from reentering the workplace due to higher risk of contracting COVID-19. This does not mean that an employer cannot cooperatively reach a solution that minimizes the risk for an individual with a pre-existing condition. But the employer cannot search out information that relates to genetic information. As GINA covers family medical history, prohibited inquiries include asking whether a family member has or has had COVID-19, or whether an employee is or is close to someone who is at high risk for COVID-19.

[409] *Background Information for EEOC Final Rule on Title II of the Genetic Information Nondiscrimination Act of 2008*, EEOC, https://www.eeoc.gov/laws/guidance/background-information-eeoc-final-rule-title-ii-genetic-information-nondiscrimination (last visited Jul. 22, 2020).
[410] 42 U.S.C. § 2000ff-6 (2018).
[411] 42 U.S.C. § 2000ff-7 (2018).
[412] *Background Information for EEOC Final Rule on Title II of the Genetic Information Nondiscrimination Act of 2008*, *supra* note 409.
[413] *Id.*

2. Non-EEOC Enforced Statutes

The Immigration Reform and Control Act of 1986 (IRCA)

The IRCA prohibits citizenship discrimination, national origin discrimination, unfair documentary practices, and retaliation.[414] IRCA protects United States citizens and nationals, lawful temporary or permanent residents, legal asylees, and legal refugees.[415] The IRCA applies to employers with more than three employees.[416] If an employer has more than fifteen employees a national origin discrimination claim must be brought under Title VII.[417] The IRCA prohibits an employer from demanding specific or different documentation than is required by 8 U.S.C. § 1324a(b).[418]

Timeline

To file a charge, an individual must notify the Special Counsel for Immigration-Related Unfair Employment Practices, an office of the Department of Justice, within 180 days of the discriminatory action.[419] Charges may not be filed with the EEOC on the same basis as the one presented to the Special Counsel.[420] Within ten days of receiving the charge, the office will send out a notice to the charging party and the respondent.[421] The individual is entitled to bring the suit before an administrative law judge if the Office of Special Counsel does not do so within 120 days of receiving the charge.[422] Once the 120 days have elapsed, the individual receives a notice that the Office of Special Counsel is either continuing the investigation or not filing a complaint.[423] In either circumstance an individual may bring the suit on his own behalf.[424]

Theories of Liability

To be liable under the IRCA, an employer must knowingly and intentionally discriminate against an individual due to his national origin, immigration status, appearance, or native language.[425] Retaliation is likewise prohibited.[426]

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[414] 8 U.S.C. § 1324b (2018).
[415] 28 C.F.R. § 44.101 (2020).
[416] 28 C.F.R. § 44.200 (2020).
[417] 28 C.F.R. § 44.200 (2020).
[418] 8 U.S.C. § 1324b. (2018).
[419] 28 C.F.R. § 44.301 (2020).
[420] 28 C.F.R. § 44.300 (2020).
[421] *Id.*
[422] *Id.*
[423] 28 C.F.R. § 44.303 (2020).
[424] *Id.*
[425] 8 U.S.C. § 1324b (2018).
[426] *Id.*

Defenses

Discrimination because of citizenship is allowed if it is otherwise required in order to comply with a law, regulation, or Executive order.[427] It is also allowed if it is required by a federal, state, or local government contract, or the Attorney General determines it is essential for an employer to do business with an agency or department of the federal, state, or local government.[428]

Remedies

Remedies under the IRCA include an order to cease and desist the discriminatory practice, lost wages, back pay, civil monetary penalties, and attorneys' fees.[429]

The IRCA and COVID-19

Like Title VII and Section 1981, the IRCA prohibits discrimination based on race or national origin. The EEOC has warned of increasing discrimination against Asian Americans and those of Asian descent due to the origins of COVID-19.[430] Employers must act diligently to protect employees who may be targeted because of such heritage.

The Uniformed Services Employment and Reemployment Rights Act (USERRA)

The USERRA protects individuals with "membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services" from discrimination. The USERRA covers all United States public and private employers.[431]

Timeline

There is no statute of limitations for claims that accrue under USERRA after October 10, 2008.[432]

[427] 28 C.F.R. § 44.200 (2020).
[428] *Id.*
[429] 8 U.S.C. § 1324b (2018).
[430] *Message From EEOC Chair Janet Dhillon on National Origin and Race Discrimination During the COVID-19 Outbreak, supra* note 280.
[431] 38 U.S.C. § 4303 (2018).
[432] 38 U.S.C. § 4327 (2018).

Theories of Liability

Some courts have interpreted the USERRA to include individual liability.[433] It is not necessary to prove but-for causation in a case brought under USERRA, merely proximate causation.[434] A cat's paw theory of liability is also available.[435]

Defenses

Once an individual shows that anti-military animus was a motivating factor in the employment decision, the employer may rebut by providing proof that it would have taken the action regardless of the individual's military status.[436]

Remedies

Remedies for violations of USERRA include lost wages and benefits, liquidated damages (if the discrimination was willful), and equitable relief.[437] The USERRA is enforced by the Department of Labor Veterans' Employment and Training Service for private employees, the Office of Special Counsel for federal employees, and the Department of Justice for state or local employees. Individuals also have a private right of action to bring claims under USERRA without the need to exhaust administrative remedies.[438]

USERRA and COVID-19

With the National Guard being called on by several states to perform different tasks related to COVID-19 it is important to understand the contours of the USERRA. If a Guard member is called upon under the authority of their state, often referred to as State Active Duty, they are not protected by USERRA.[439] USERRA also does not prevent from furloughs or layoffs that would have occurred regardless of the individuals participation in the armed forces.[440]

Section 1981 of the 1866 Civil Rights Act

Section 1981 of the 1866 Civil Rights Act guarantees the right to make and enforce contracts to all persons within the Jurisdiction of the United States regardless of race.[441] The statute applies to all individuals within the United States but exempts the federal government from liability, leaving Title VII as the sole remedy for federal employees.[442]

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[433] *Bello v. Village of Skokie*, 151 F. Supp. 3d 849, 859 (N.D. Ill. 2015).
[434] *Staub v. Proctor Hosp.*, 562 U.S. 411, 422 (2011).
[435] *Id.*
[436] 38 U.S.C. § 4311 (2018).
[437] 20 C.F.R. § 1002.312-14 (2020).
[438] 20 C.F.R. § 1002.303 (2020).
[439] *Covid-19 Impact Uniformed Services Employment and Reemployment Rights*, U.S. Dept. of Labor https://www.dol.gov/sites/dolgov/files/VETS/files/USERRA-COVID-19-Impact.pdf (last visited Aug. 9, 2020).
[440] *Id.*
[441] 42 U.S.C. § 1981 (2018).
[442] *Brown v. Gen. Services Admin.*, 425 U.S. 820, 826-827 n.8 (1976).

It is unclear whether Section 1981 applies to state or local government employers, as federal circuit courts are split on the matter.[443] The Second Circuit (the federal circuit which encompasses the State of Connecticut) interprets the statute to expose individuals to liability if they engage in discriminatory action in the employment context.[444] The Second Circuit has also held that an at-will employee may sue under Section 1981 if they are terminated on the basis of race.[445] Unlike Title VII, there is no exemption for businesses with less than fifteen employees, [446] nor is it necessary for a claimant to exhaust all available administrative remedies prior to commencing an action.[447]

Timeline

The statute of limitations for Section 1981 actions is four years after the triggering event.[448]

Theories of Liability

The United States Supreme Court has interpreted the statute to encompass claims of disparate treatment in employment, while excluding disparate impact claims.[449] Retaliation claims are cognizable under Section 1981.[450] The Ninth Circuit held that Section 1981 can serve as the basis for harassment claims.[451] When filing a Section 1981 claim, a plaintiff must prove that, but for the discriminatory actions of the employer, the injury could not have been the result, or caused, by other benign behavior.[452]

Defenses

As Section 1981 shares "[m]ost of the core substantive standards that apply to claims of discriminatory conduct in violation of Title VII" the theories of liability are generally the same.[453] A key difference between the two is that Section 1981 requires an showing of intentional discrimination.[454]

[443] *See Buntin v. City of Boston*, 857 F.3d 69 (1st Cir. 2017); *Fed'n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204 (9th Cir. 1996).
[444] *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 75 (2d Cir. 2000).
[445] *Lauture v. Int'l Bus. Machines Corp.*, 216 F.3d 258, 260. (2d Cir. 2000).
[446] 42 U.S.C. § 1981 (2018).
[447] *See Id.*
[448] 28 U.S.C. 1658(a) (2018).
[449] *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 390 (1982).
[450] *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 451 (2008).
[451] *Manatt v. Bank of Am., NA*, 339 F.3d 792, 797 (9th Cir. 2003).
[452] *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020).
[453] *Patterson v. County of Oneida*, N.Y., 375 F.3d 206, 225 (2d Cir. 2004).
[454] *Id.* at 226.

Remedies

Those bringing suit under Section 1981 are entitled to "equitable and legal relief, including compensatory and, under certain circumstances, punitive damages."[455]

Section 1981 and COVID-19

The protections offered under Section 1981 are substantially similar to those offered by Title VII and the IRCA. Employers should take steps to protect and educate employees about discrimination and harassment in the workplace.

B. CONNECTICUT LEGISLATION AND LEGISLATIVE BODIES

1. Executive Order 7JJJ

Governor Ned Lamont has promulgated an executive order which prohibits the discrimination or discharge of employees who file for Workers' Compensation.[456] The order also protects employees who are deliberately misinformed or dissuaded from filing a claim.[457] Employees who have faced demotion, discharge, or who were misinformed or dissuaded from filing a claim may bring a civil suit for back pay and/or reinstatement.[458]

2. The Connecticut Fair Employment Practices Act

The Connecticut Fair Employment Practice Act prohibits discrimination in employment on the basis of race, color, religion, sex, pregnancy, gender identity and expression, genetic information, sexual orientation, marital status, national origin, ancestry, alienage and citizenship, and disability.[459] In Connecticut, a disability may include a present or past history of mental disability, intellectual disability, learning or physical disability, and the perception of having a disability.[460] Employers are additionally prohibited from discharging or discriminating against an employee because he or she has opposed any discriminatory practices, and/or has testified in any related proceedings.[461]

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[455] *Johnson v. Ry. Exp. Agency, Inc*., 421 U.S. 454, 460 (1975).
[456] Conn. Executive Order No. 7JJJ (Jul. 24, 2020).
[457] *Id*.
[458] *Id*.
[459] Conn. Gen. Stat. §§ 46a-51 to 46a-104 (2019).
[460] Conn. Gen. Stat. § 46a-60(a) (2019); *See also Desrosiers* v. *Diageo N. America, Inc*., 105 A.3d 103 (Conn. 2014).
[461] Conn. Gen. Stat. § 46a-60(a)(4) (2019); *See also Patino* v. *Berkin Mfg. Co.* 41 A.3d 1013 (Conn. 2012) (holding that a state statute allows a cause of action for a hostile work environment that discriminates against an employee's sexual orientation).

Covered Employees

The Connecticut Fair Employment Practices Act applies to all employers with three or more employees.[462] Additionally, public contractors are prohibited from discriminatory practices under the statute.[463] Individual defendants cannot be liable for discrimination under this act.[464]

Defenses

An exception to the Act is it is lawful for an employer to discharge an employee based on criteria otherwise prohibited if the discharge is due to a bona fide occupational qualification.[465] Such an exception allows employers to consider certain qualities and attributes when making hiring or discharging decisions. This defense is similar to that of Title VII discussed above. Connecticut law does not recognize a bona fide occupational qualification defense in the case of discrimination based on genetic information.

3. Enforcement of the Connecticut Fair Employment Practices Act

Any person who feels aggrieved by an unlawful discriminatory practice under the Connecticut Fair Employment Practices Act may file a complaint with the Commission on Human Rights and Opportunities. Likewise, if the Commission has reason to believe that an employer has been engaged in a discriminatory practice, the Commission itself may issue a complaint.

Commission on Human Rights and Opportunities (CHRO) – Connecticut

The CHRO's mission is to eliminate discrimination in employment, housing, public accommodations, and credit transactions to establish equal opportunity and justice for all persons.[466] According to the CHRO's Discrimination Brochure, "Connecticut law provides greater protection than federal law. Since our state's definition of 'disability' covers more than the federal definition, an individual may be entitled to protections at the state level that they otherwise may not be."[467] Federal law mandates that the CHRO bear the responsibility of regulating policy and prohibiting behavior addressing discrimination in Connecticut.[468] The Commission oversees discriminatory and unlawful decisions which comprise employment transactions, housing transactions, and

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[462] Conn. Gen. Stat. § 46a-51(10) (2019).

[463] Conn. Gen. Stat. § 4a-60 (2019).

[464] *Perodeau v. City of Hartford*, 792 A.2d 752, 758 (Conn. 2002).

[465] Conn. Gen. Stat. § 46-60(a)(1) (2019)(allows for a "bona fide occupational qualification or need"); Conn. Gen. Stat. § 46a-60(a) (2019)(race, color, religion, age, sex, marital status, national origin, ancestry, mental or physical disability); Conn. Gen. Stat. § 46a-81c (2019)(sexual orientation).

[466] *Our Purpose*, Commission on Human Rights and Opportunities (April 29, 2011), https://www.ct.gov/chro/cwp/view.asp?a=2523&Q=315854.

[467] *Discrimination Brochure*, CHRO, https://www.ct.gov/chro/lib/chro/Disability_Discrimination_Brochure.pdf, p. 1 (last visited Jun. 28, 2020).

[468] Conn. Gen. Stat. § 46a-56 (2019).

transactions of goods or services, based on age, ancestry, color, learning disability, marital status, mental retardation, national origin, physical disability, mental disability, race, religious creed, sex, gender identity or expression, or sexual orientation.[469]

How to File a Discrimination Complaint through CHRO:

To file a discrimination complaint with the CHRO:

1. Contact an intake officer at one of the CHRO regional offices to discuss the overall process and any concerns;
2. Determine the appropriate regional office serving the town in which the alleged discriminatory action took place; and,
3. File a sworn, written complaint within 180 days after the person filing became aware of the alleged discriminatory act.

All claimants are protected by the Whistleblower Protection Statute.[470] If the commission believes an employer is engaging in discriminatory practices, the commission may file its own complaint.[471] Such complaints must be filed within 180 days.[472]
Within sixty days after the respondent's answer, the complaint will either be processed further or dismissed in its entirety by the Executive Director. Claims are dismissed when:

- They are frivolous on the surface or fail to state a claim upon which relief may be granted;
- The respondent is exempt from the act; or,
- There is no reasonable possibility that further investigation would uncover a reasonable cause or lawful explanation.[473]

If a case is retained after a case assessment review, then there shall be a mediation conference no later than sixty days after the case retainment is confirmed.[474] If the complaint is still not resolved after the mediation conference, then the complainant, respondent, or Commission may request early legal intervention.

The investigator of the case must determine whether there exists a reasonable cause to believe that the discriminatory practice or action has occurred within 190 days following the initial review of the case by the Executive Director.[475] If there is believed to be

[469] *Our Purpose, supra* note 466.
[470] Conn. Gen. Stat. §46-61dd (2019).
[471] *Id.*
[472] *Id.;* Conn. Gen. Stat. § 46(a)-82 (2019).
[473] Conn. Gen. Stat. § 46(a)-82 (2019); Conn. Gen. Stat. §46a-83(c) (2019).
[474] Conn. Gen. Stat. § 46a-83(d) (2019).
[475] *Id.*; Conn. Gen. Stat. § 46a-83 (2019).

reasonable cause, then the investigator has fifty days to attempt to resolve such discriminatory practice through conference, conciliation, and/or persuasion.[476]

If the investigator is unable to eliminate the discriminatory practice, then they must certify the case to the Executive Director and Attorney General. At that time, a human rights referee will be appointed to conduct settlement negotiations for the case. The hearing conference for the human rights referee must take place within forty-five days after the complaint certification.[477]

Remedies

If it is determined that the employer has violated the statute, a cease and desist order is issued. The employee that had been discharged may be reinstated as well as receive back pay for the two years prior to filing the complaint.[478] Orders may be appealed.[479]

COVID-19's Impact

In light of the pandemic, all in-person meetings and hearings are cancelled and will be scheduled to take place via phone or video conferencing, if possible. Irrespective of whether an individual believes he or she was discriminated against because of the pandemic, or due to reasons unrelated to COVID-19, the process to file a complaint remains the same.

Private Enforcement

If a complainant alleging unlawful discrimination practice in the workplace is awaiting a pending complaint for more than 180 days after the complaint was filed, they may request a release from the Commission in order to proceed with civil action.[480]

C. THE RIGHTS OF EMPLOYEES WHO BELIEVE THEY HAVE BEEN THE TARGET OF DISCRIMINATION IN THE WORKPLACE

Discrimination exists in many forms, including derogatory comments, slurs, stereotyping, and adverse employment actions like poor performance reviews, demotion, or termination. If you have reason to believe you are being discriminated against because of a protected characteristic like your race, ethnicity, or national origin, an employment attorney can discuss available options with you.

[476] Conn. Gen. Stat. § 46a-83 (2019).
[477] Conn. Gen. Stat. § 46a-84 (2019).
[478] Conn. Gen. Stat. § 46a-86 (2019).
[479] *Id.*; Conn. Gen. Stat. § 46a-94a (2019).
[480] Conn. Gen. Stat. § 46(a)-101(b) (2019).

As there are a multitude of considerations beyond what is discussed in this outline, a consultation with a lawyer is recommended before navigating the complexities of employment law while discerning employers' and employees' rights as they exist in the COVID-19 environment. Only an experienced employment attorney can address your unique concerns and circumstances.

If you have any questions about Employment Law in Connecticut or New York, contact Managing Partner Joseph Maya at JMaya@mayalaw.com.

If you have any questions regarding this material or any employment matter, please contact Joseph Maya and the experienced employment law attorneys at Maya Murphy, P.C. at (203) 221-3100.