

Executive Summary

HR Policy Association represents the Chief Human Resource Officers of over 390 of the largest companies doing business in the United States. The attached memorandum from the Association's Future Workplace Policy Council summarizes for our member companies the federal, state, and local labor and employment laws and regulations in play as they work to return their workers to the workplace in the midst of the continuing COVID-19 pandemic. Below are the key laws covered in the memorandum and the relevant issues each presents in the current environment.

Occupational Safety and Health Act

- Extent of employer liability/responsibilities under the general duty clause, which requires employers to provide a safe workplace for employees free from hazards such as COVID-19
- The extent to which face coverings and other protective equipment must be provided to employees, and how such equipment will be financed
- The extent to which pre-entry to the workplace screening and testing will be required, how the equipment for such will be acquired, and how it will be financed

National Labor Relations Act

- Protection accorded concerted action/strike activity related to workplace safety issues
- Feasibility of holding safe and equitable representation elections

Fair Labor Standards Act & State Compensation Laws

- Whether time spent undergoing pre or post-workplace entry COVID-19 screening is compensable under the FLSA and associated state laws
- Whether waiting time while sanitation procedures occur in the workplace, and other infection control protocols are completed, is compensable for non-exempt employees under the FLSA and associated state laws
- Whether employee self-conducted, at-home COVID-19 screening will trigger the "continuous workday" rule under the FLSA, requiring employers to compensate employees for their time beginning with the at-home screenings through the end of their workdays
- Whether bonus payments and related pay incentives (e.g. hazard pay) is to be included in non-exempt employees' regular rate of pay for overtime pay purposes

Workers' Compensation

- Increasing action on the state level through which employees who contract COVID-19 will be presumed to have medical and disability paid under workers' compensation, without possibility or practicality of federal intervention

Age Discrimination in Employment Act

- Increased liability for employers who seek to prevent older employees from re-entering the workplace out of concerns for their own safety and the safety of other employees

Americans with Disabilities Act

- Potential liability in conducting COVID-19 screenings
- Cost and feasibility of increased reasonable accommodations related to infection control protocols
- Liability for excluding employees from the workplace whose disabilities put them at a higher risk for severe illness from COVID-19
- Keeping identity of an infected employee confidential while ensuring the safety of the workplace and other employees
- Extent of an employer's duty to engage in interactive discussion with employees who develop a disability as a result of COVID-19 infection or who otherwise are currently disabled, and may be particularly vulnerable to COVID-19, and also provide reasonable accommodations for their continuation to work or their return to work

Title VII

- Increased protection against harassment of people of Asian descent due to the COVID-19 pandemic
- Religious accommodations for employees related to personal protective equipment such as facial coverings and gloves

Federal Family and Medical Leave Act

- Reluctance of or difficulty for employees to return to the workplace, especially due to childcare and elder care responsibilities related to COVID-19 issues
- Uncertainty over whether COVID-19 entitles an employee to FMLA leave
- Potential for liability under anti-discrimination and anti-retaliation provisions of the Act

Privacy Laws (such as the Health Insurance Portability and Accountability Act, Genetic Information Nondiscrimination Act, and Illinois Biometric Privacy Act)

- Keeping employees' and employees' family and relatives' health information confidential while also maintaining workplace safety
- Whether employers must gain consent from their employees to conduct COVID-19 screenings that otherwise might be required or recommended by the CDC or OSHA
- Protecting against elevated cyber threats such as social engineering in light of increased remote and flexible working

Employee Retirement Income Security Act

- Expansion of COBRA health plan continuation coverage and associated notice requirements due to increased job loss and hours reduction associated with the COVID-19 pandemic
- Exposure to class action lawsuits due to improper wording of COBRA notices

State and Local Scheduling Laws

- Increasing employee absences, hours reductions, and workforce restructuring making it difficult to provide predictable schedules for employees required by several laws