

# *COVID-19*

## *Workforce Re-Mix*

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Amie Flowers Carmack

[acarmack@morningstarlawgroup.com](mailto:acarmack@morningstarlawgroup.com)



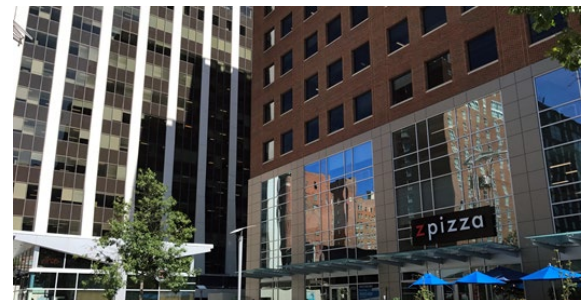
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- **Founded by former big law firm partners**
- **Clients range from start-ups to Fortune 100**
- **Partner-centric service model**
- **Collaborative management and culture**
- **Grown from 10 to 28 attorneys in 8 years**



# Morningstar Law Group Practice Areas

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# *DISCLAIMER*

- **The information contained herein is for training purposes only.**
- **It is not intended to be full legal advice on any issue, but rather to identify issues requiring legal analysis.**
- **In the event of a real situation involving a legal issue, we would need to evaluate all of the facts in light of the existing law in order to provide full legal advice.**

# *COVID-19 Workforce Re-Mix*

- Identify Liabilities
- WFH Best Practices
- Reopening
- Operating Protocols
- Accommodations
- Time off
- Q & A

# COVID-19-Related Liabilities

## Primary COVID-related legal risks to employers =

- Negligence claims (NC: getting past workers comp)
- Violations of existing employment laws (e.g., OSHA, ADA, FMLA, FFCRA, state/local sick leave)

## North Carolina: workers compensation = exclusive remedy for work injuries, w/ exceptions

- **Exception:** employee is able to prove that the Company “intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct” the employee may sue and recover damages from the Company. This is called a “Woodson Claim.”
- **Exception:** Employees can also sue their co-workers for negligence where they can prove that the co-worker injured the worker by willful, wanton and reckless negligence (e.g., by intentionally failing to carry out a duty with manifest indifference to the consequences to others). This is called a “Pleasant Claim.”

# *COVID-19-Related Liabilities: Negligence*

## **Standards for Negligence Liability (the exceptions to worker's compensation bar)**

- Company, managers, coworkers
- Duty to make **reasonable efforts to comply with existing regulations and up to date guidance** from applicable regulatory authorities (reasonable person standard), e.g., :
  - OSHA
  - CDC
  - State government agencies, e.g. NCDHHS
  - Local government agencies, e.g. Exec Orders - Governors, County Commissioners, Mayors

## **Requires regular monitoring of guidance because **COVID-19 is a dynamic situation****

- This is a totally new scenario – none of us have ever done this before (agencies, employers, lawyers, health care providers, schools, daycares, etc.)
- Novel virus - the science is still evolving - how it is transmitted, behaves, immunity, etc.

# COVID-19-Related Liabilities: OSHA

**OSHA:** Applies to occupational exposure to COVID-19 & cleaning/disinfection chemicals

## **Existing OSHA Standards:**

- **PPE** as applicable (e.g., healthcare)
- **OSHA Hazard Communication Standard:** hazardous chemicals for cleaning & Disinfection
- OSHA has designated COVID-19 as a **recordable illness** if infected at work (employers with 10 or more employees)
- **Penalties:** citations, civil fines and penalties, sometimes debarment from government contracting, and in egregious cases criminal charges for the Company and executives.
- **28 OSHA-approved State Plans – some have standards for infectious diseases (e.g., CA)**

**General Duty Clause:** furnish "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm."

- **OSHA's Control & Prevention Guidance:** <https://www.osha.gov/SLTC/covid-19/controlprevention.html>



# COVID-19-Related Liabilities: OSHA

OSHA's General Guidance for All Workers and Employers <https://www.osha.gov/SLTC/covid-19/controlprevention.html>:

- Wash hands, soap and water, at least 20 seconds. When soap and running water are unavailable, use an alcohol-based hand rub with at least 60% alcohol. Always wash hands that are visibly soiled.
- Avoid touching your eyes, nose, or mouth with unwashed hands.
- Practice good respiratory etiquette, including covering coughs and sneezes.
- Avoid close contact with people who are sick.
- Stay home if sick.
- Recognize personal risk factors. According to CDC, certain people, including older adults and those with underlying conditions such as heart or lung disease or diabetes, are at higher risk for developing more serious complications from COVID-19.

OSHA and the U.S. Department of Health and Human Services (HHS) provide joint guidance for all employers on [preparing workplaces for COVID-19](#) ([Spanish](#)).

Also refers to CDC's Interim Guidance for Businesses and Employers (discussed in a later slide)

# *COVID-19-Related Liabilities: OSHA*

**OSHA provides additional specific interim guidance based on worker exposure**

<https://www.osha.gov/SLTC/covid-19/controlprevention.html>:

**Lower exposure** = job does not require contact with known cases or close contact (within 6') of gen public

- Follow OSHA and CDC general guidance
- Awareness of evolving community transmission & guidance, requiring additional precautions
- Identify and isolate suspected cases
- Environmental cleaning and decontamination after exposure
- Worker Training on sources of exposure, reporting and isolating cases
- Identify workers with increases susceptibility for infection or complications & consider adjusting their work schedules, responsibilities or locations to minimize exposure
- PPE based on hazard assessment

**Specific worker groups and their employers** (e.g., business travelers, dentistry, environmental (i.e., janitorial), healthcare, in-home services, manufacturing, retail, etc.)

# *COVID-19-Related Liabilities: CDC*

## **Role of Business and Employers in responding to COVID-19:**

- Phase in operations and take precautions based on level of community spread, revise as necessary
- Follow State and Local Guidance; CDC Mitigation Strategies: <https://www.cdc.gov/coronavirus/2019-ncov/downloads/php/CDC-Activities-Initiatives-for-COVID-19-Response.pdf>; WH Guidelines: <https://www.whitehouse.gov/openingamerica/> ; OSHA Guidance: <https://www.osha.gov/Publications/OSHA3990.pdf>

All employers should implement and update as necessary **a plan** that:

- Is specific to your workplace,
- identifies all areas and job tasks with potential exposures to COVID-19, and
- includes control measures to eliminate or reduce such exposures.
- Talk with your employees about planned changes and seek their input. Additionally, collaborate with employees and unions to effectively communicate important COVID-19 information.

# *COVID-19-Related Liabilities: CDC*

**CDC Guidance for Businesses:** <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

**Recommendations include (but are not limited to):**

- hazard assessment of the workplace, incl functions, existing policies and practices
- Improve the building ventilation system if needed
- flexible sick leave policies, no doctors note
- Protections for those at higher risk, flexible work options to minimize risk
- Communicate, Educate employees on reducing risk of transmission
- daily health checks in person or virtual
- policies and practices for social distancing in the workplace
- cloth face coverings in the workplace, if appropriate
- Sick employees to notify supervisor, stay home, follow CDC recommended steps
- employees with sick family member to notify supervisor, follow CDC recommendations
- Quarantine standards (time and symptom based strategy recommended over test based)
- Other Actions to take if an employee is suspected or confirmed to have COVID-19

# COVID-19-Related Liabilities: NC State/Local

**NC Phase 2 Order:** North Carolina has moved into [Safer At Home Phase 2](#) of lifting COVID-19 restrictions, as outlined in [Executive Order 141](#)

**NCDHHS Guidance for Businesses:** <https://covid19.ncdhhs.gov/guidance#businesses>

- Refers to NCDHHS Interim Guidance for Businesses, dated May 22, 2020: <https://files.nc.gov/covid/documents/guidance/Interim-Guidance-for-Businesses-and-Organizations-Phase-2.pdf>, and has links to additional resources
- Includes specific recommendations for
  - Social Distancing and Minimizing Exposure
  - Cloth Face Coverings
  - Cleaning and Hygiene
  - Monitoring for Symptoms
  - Protecting Vulnerable Populations
  - Combating Misinformation
  - Water and Ventilation Systems

# *COVID19-Related Liabilities: Recommendations*

- **Written policies/protocols:** Telework policy, Operations Plan, Flexible arrangements, etc.
- Conservative approach balanced with business needs – sprint, marathon
- **Communicate, communicate, communicate** (Rule of 7)
- Be aware and sensitive to employees' fears, head them off if you can (information is power)
- Be as flexible and accommodating as you reasonably can, while maintaining consistency
- **Maintain awareness of employment laws** – OSHA, FMLA, FFCRA, ADA, T7 (religion, etc.)
- Protect health information: keep only what you need, disclose names only on need to know or consent
- **Scheduled routine review of guidance and assessment of protocols – at least weekly**

# COVID-19: WFH Best Practices

## **“Telework” Policy – highly recommend a temporary or standing written policy**

- Eligibility criteria and process for selection/requesting- Telework is not a right
- Compensation, work schedule and work expectations
  - Same schedule, expectations unless otherwise agreed
  - Communication and collaboration
  - Dependent care
  - Requests for time off or change in schedule
- Telework Work Location
  - Taxes and local regulations (e.g., zoning) – employee should get professional advice
- Telework Workspace
  - Safety, security
- Equipment, tools, supplies, expenses
- Compliance with Company Policies

# COVID-19: Reopening / Continuing Operations

## “COVID Operations Plan” – highly recommend a written plan for reopening or continuing operations

- Transparent Communication – more information is better, what you know and don't know yet
  - Reduce fear: steps taken and planned to reduce risk of transmission
  - Speak in terms of reducing risk of transmission, not making the workplace “safe”
  - Refer to government resources, provide links – expectation that employees review & comply
  - Describe specific protocols
  - Require employees to sign and return – acknowledge and agree to comply
- Most businesses are restoring operations in phases - risk, employee concerns and production needs
- Furloughed Employees “reactivated” / Laid Off Employees “re-hired”
  - provide written offer with condition of compliance with protocols & any new policies/procedures
  - Great time to change schedules, status, titles, exempt/non-exempt status, etc.



# COVID-19: Operating Protocols

- **Written Protocols:** Tailor to your organization's operations, facility layout, risk profile
- **Describe protocols in phases, include:**
  - Postings
  - Health screening (incl temp), symptom and exposure reporting, Quarantine requirements
  - Routine cleaning & disinfection, protocols for exposure
  - Respiratory Hygiene – washing hands, covering coughs, etc.
  - Face coverings recommended or required
  - Physical distancing, in-office traffic patterns if needed
  - Education and compliance with regulatory guidance
  - Designated positions, rotating schedules for in-person office work vs remote work,
  - Opp to request accommodations for disability, high risk (sincerely held religious beliefs?)
  - Meetings and other in-person collaborations, Travel
- **Be very clear about what's required vs recommended & be prepared to enforce**

# COVID-19: Accommodations

## **Disabilities:**

- Some employees with disabilities will not be able to perform their essential functions
- COVID-19 can cause new disabilities or exacerbate existing disabilities
- Disabilities that may be caused/exacerbated by COVID and other current crises
  - Stress-impacted conditions (**Anxiety**, Migraines, Depression, Heart, Thyroid, etc.)
  - Respiratory conditions
  - EEOC: pregnancy may require accommodation like any other disability
- may not involuntarily exclude disabled employees from the workplace, even with good intentions

**Religion:** Because COVID-19 has been designated as a “Direct Threat” by the EEOC, employers can give priority to transmission reducing protocols over accommodation of religious beliefs

- Employees may be required to wear face coverings (but allow to take PTO or unpaid leave instead)
- Exposed employee who remains well can be time-based quarantined (no right to work due to religious belief that precludes testing)

**Decide on a case-by-case basis, but be consistent**

# COVID-19: Accommodations

**High Risk Individuals:** (defined by CDC, EEOC, state/local agency guidance/orders)

- CDC defines as people **65 years or older**, people with **serious underlying medical conditions**, e.g., immunocompromised, chronic lung disease, moderate-to-severe asthma, serious heart conditions, severe obesity, diabetes, chronic kidney disease w/ dialysis, or liver disease.
  - Regulatory guidance recommends accommodating to reduce risk
- **EEOC:** employers may provide flexibility to workers 65+, even though favors over workers under 65
- **ADA** requires accommodation of employee's disability if required to perform essential functions
- **EEOC:** employees are not entitled to accommodation to avoid exposing a high risk family member

## **Caregivers**

- **EEOC:** employers may provide flexibility to employees who act as caregivers to school-aged children
- Caution: do not treat female caregivers differently from male caregivers

# COVID-19: Time Off

## **FFCRA: UNDER 500 Employees**

### **Emergency Paid Sick Leave**

- up to 80 hours paid leave for qualifying reasons
  - Employee has COVID symptoms and seeking diagnosis
  - Self quarantine (of employee or person s/he cares for) on advice of health care provider (HCP),
  - gov't mandated quarantine (of employee or person s/he cares for)
  - Employee's Child needs care because daycare/school is closed
- full pay for employee's qualifying reason, 2/3 pay to care for child or other covered family member

### **Expanded FMLA** – expands FMLA to employers with fewer than 50 employees / 75 miles

- up to 10 additional weeks of paid leave (@ 2/3 pay) to care for child whose school is closed
- Minus FMLA leave already taken by the employee for the FMLA year

### **FMLA: 50 Employees within 75 mile radius**

- 12 / 26 weeks unpaid per normal, recommend not requiring certification by HCP for qualifying reason

# COVID-19: Time Off

## **ADA:**

- Reasonable period of unpaid leave (undue burden) as accommodation of an ADA-covered disability that renders employee unable to perform essential functions

## **State/Local Sick Leave Laws (none in NC)**

## **Company Policies (PTO, Sick, etc.):**

- allow liberal use for sick leave as operations allow
- Employer can require PTO and change PTO, with notice

# COVID-19: Undue Burden

## What if these requirements/recommendations are an undue burden?

- Transmission reducing protocols
  - Negligence = all employers, plus involved decision-makers, managers, co-workers
  - OSHA = all employers (standards, general duty clause)
  - High Risk Accommodations = all employers
  - Disability Accommodations = 25 or more
- Paid Time off = FFCRA = 500 or fewer (limited exception employers of fewer than 50 employees “when the imposition of such requirements would jeopardize the viability of the business as a going concern”)
- Unpaid Time off
  - FMLA 50 or more within 75 mile radius
  - ADA = 25 or more
- Avoiding Discrimination against protected classes: T7 and NC discrimination laws – 15 or more

# Q & A

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Amie Flowers Carmack | Partner

919-590-0394

[acarmack@morningstarlawgroup.com](mailto:acarmack@morningstarlawgroup.com)