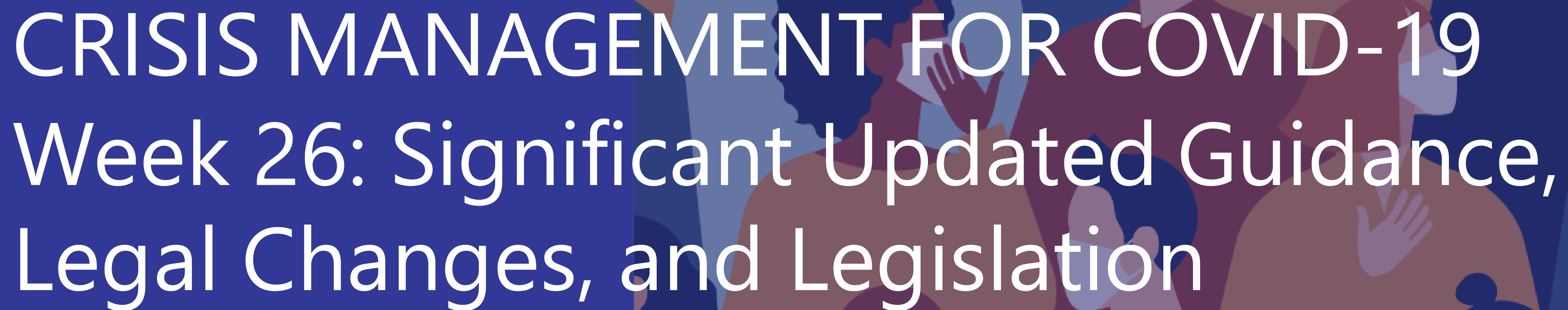

CRISIS MANAGEMENT FOR COVID-19 Week 26: Significant Updated Guidance, Legal Changes, and Legislation

Presented by:
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INTRODUCTIONS

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WHAT WE'LL COVER

1. Voting Information
2. EEOC Update
3. Additional Legal and Regulatory Updates

COMING SOON…

1

Voting Information

Do you want to encourage your employees to vote and make their voices heard?

Provide the resources and the support for employees to exercise their rights!

Time to Vote is "a nonpartisan movement, led by the business community, to contribute to the culture shift needed to increase voter participation in our country's elections."

(https://www.maketimetovote.org/)

- Close for business on Election Day
- Pledge for Election Day to be a day without meetings

1

Voting Information

Other steps to encourage/resources:

- Copy of company voting policy
- Links to:
    - Check registration/register (https://vrsws.sos.ky.gov/ovrweb/govoteky)
    - Request absentee ballot (https://vrsws.sos.ky.gov/abrweb/)
    - Timeline
    - KY Voter Information Portal (https://vrsws.sos.ky.gov/ovrweb/govoteky)
    - VOTE 411 (https://www.vote411.org/kentucky)

Questions & Answers

2

EEOC Update

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2 EEOC Update

*An Entirely New Series of **[18 answers to critical Employer Questions Announced](#)** (9/8/2020)*

Disability-Related Inquiries and Testing

A.6. May an employer administer a COVID-19 virus test when evaluating an employee's initial or continued presence in the workplace? (4/23/20; updated 9/8/20 to address stakeholder updates to CDC guidance)

Yes. ***During Pandemic***, employers may screen and test employees entering the workplace for COVID-19 due to the potential that ***by employers consistent with current CDC guidance will meet ADA's "business necessity" standard***.

The EEOC places a burden upon Employers to ensure that the tests are considered "accurate and reliable," suggesting frequent review of FDA and CDC, and "false positivity rates"

A.8. May employers ask all employees physically entering the workplace if they have been diagnosed with or tested for COVID-19? (adapted from 3/27/20 Q. 1)

Yes. Employers may ask all employees who will be physically entering the workplace if they have COVID-19 or symptoms associated with COVID-19, and ask if they have been tested for COVID-19.

An employer may exclude those with COVID-19, (or with symptoms), from the physical workplace because they pose a direct threat to the health or safety of others. Screening cannot apply to routine teleworking

An Entirely New Series of EEOC Guidelines were issued this past week (9/8/2020)

Disability-Related Inquiries and Testing -- Continued

A.9. May a manager single out one employee regarding COVID-19 for screening, testing, or temperature? (adapted from 3/27/20 Q. 3)

Depends. Only if the employer has a reasonable belief based on objective evidence that this person might have the disease. Critical to document, such as "symptoms," or following CDC Guidelines.

A.10. Can COVID-19 screening expand to an employee's family members? (adapted from 3/27/20 Q. 4)

No. The Genetic Information Nondiscrimination Act (GINA) prohibits medical questions about family members. However, GINA does not prohibit inquiry of employees as to any contact with anyone diagnosed with or symptoms of COVID-19. ***Inquiry must focus on contact, not familial inquiry***.

A.11. What can an employer do if an employee refuses to permit the employer to take his temperature or refuses to answer questions about COVID-19? (adapted from 3/27/20 Q. 2)

During the Pandemic, the ADA allows an employer to bar an employee from physical presence in the workplace if he refuses to have his temperature taken or refuses to answer questions about whether he has COVID-19, has symptoms associated with COVID-19, or has been tested for COVID-19.

2 EEOC Update

An Entirely New Series of EEOC Guidelines were issued this past week (9/8/2020)

Disability-Related Inquiries and Testing -- Continued

A.12. During COVID-19, may an employer request information from employees who work on-site, whether regularly or occasionally, who report feeling ill or who call in sick? (adapted from Pandemic Preparedness Q. 6)

During the Pandemic, employers may ask on-site employees who report feeling ill or who call in sick, questions about their symptoms as part of workplace screening for COVID-19.

A.13. May an employer ask an employee why they have been absent from work? (adapted from Pandemic Preparedness Q. 15)

Yes. This is not, and never has been, a disability-related inquiry. An employer is always entitled to inquire.

A.14. When an employee returns from travel during a pandemic, must an employer wait until the employee develops COVID-19 symptoms to inquire of where they traveled? (adapted from Pandemic Preparedness Q. 8)

No. Questions about where a person traveled would not be disability-related inquiries. ***If the CDC or state or local public health officials recommend that people who visit specified locations remain at home for a certain period of time, an employer may ask whether employees are returning from these locations, even if the travel was personal***.

2 EEOC Update

An Entirely New Series of EEOC Guidelines were issued this past week (9/8/2020)

Confidentiality of Medical Information

B.5. If a manager learns that an employee has COVID-19, or has symptoms, how does the manager report without violating ADA Confidentiality requirements? (adapted from 3/27/20 Q. 5)

COVID-19 symptoms or diagnosis is medical information that must be maintained confidentially. However, the ADA does not preclude an employer's representative interviewing the employee to identify potential contacts, to notify those who may have come into contact, ***without revealing the employee's identity***.

Use generic descriptors, like "someone at this location" or "someone on the fourth floor" has COVID-19

The EEOC highly recommends that employers determine, prior to any incident, who needs to know the identity of the employee, why a specific official needs this information, and limit who accesses information.

B.6. An employee knows that an on-site coworker has COVID-19 symptoms. Does ADA confidentiality prevent the first employee from disclosing the coworker's symptoms to a supervisor? (adapted from 3/27/20 Q. 6)

No. ADA confidentiality does not prevent this employee from communicating to his supervisor about a coworker's symptoms. After learning about this situation, the supervisor should contact appropriate management officials to report this information and discuss next steps.

2 EEOC Update

An Entirely New Series of EEOC Guidelines were issued this past week (9/8/2020)

Confidentiality of Medical Information -- Continued

B.7. An employer knows that an employee is teleworking because he is in COVID-19 self-quarantine. Can the employer disclose that this employee is teleworking without saying why? (9/8/20; adapted from 3/27/20 Q. 7)

Yes. If staff need to know how to contact the employee, and that the employee is working even if not present in the workplace, then advising of teleworking without saying why is permissible.

Also, if the employee was on leave because he has COVID-19, or symptoms, or any other medical condition, then an employer cannot disclose the reason for the leave, just the fact that he is on leave.

B.8. Many employees, including managers, are teleworking as a result of COVID-19. How are they supposed to keep employees' medical information confidential while working remotely? (adapted from 3/27/20 Q. 9)

Under the ADA, all medical information must be kept confidential and separately from regular personnel

If a manager receives medical information while teleworking, and is able to follow an employer's existing confidentiality protocols while working remotely, the supervisor has to do so. To the extent that is not feasible, the supervisor still must safeguard to the greatest extent possible until it can be properly stored.

Similarly, documentation must not be stored electronically where others would have access.

2 EEOC Update

An Entirely New Series of EEOC Guidelines were issued this past week (9/8/2020)

Reasonable Accommodation

D.8. May an employer invite employees now to ask for reasonable accommodations they may need in the future when they are permitted to return to the workplace? (4/17/20; updated 9/8/20 to address stakeholder questions)

Yes. Employees with disabilities may request accommodations in advance that they believe they may need when the workplace re-opens. If advance requests are received, employers may begin the "interactive process." If an employee requests later, the employer must still consider the request at that time.

D.14. When employees are required to telework because of COVID-19, is the employer required to provide a teleworking employee with the same reasonable accommodations for disability under the ADA or the Rehabilitation Act that it provides to this individual in the workplace? (9/8/20; adapted from 3/27/20 Q. 20)

Employer and employee should discuss what and why, and whether different accommodations suffice

Also, the undue hardship may be different when teleworking. A reasonable accommodation might be an undue hardship. For example, the fact that telework may be temporary may render certain accommodations either not feasible. There may also be constraints on the normal availability of items.

Employers and employees should be creative and flexible about what can be done

2 EEOC Update

An Entirely New Series of EEOC Guidelines were issued this past week (9/8/2020)

Reasonable Accommodation – Continued

D.15. When an employer reopens the workplace and recalls employees, does the employer automatically have to grant telework as a reasonable accommodation to every employee with a disability who requests to continue this arrangement as an ADA/Rehabilitation Act accommodation? (adapted from 3/27/20 Q. 21)

No. The employer is entitled to the disability-related limitation that necessitates an accommodation. If there is no disability-related limitation that requires teleworking, then the employer does not have to provide telework as an accommodation. ***Or, if there is a disability-related limitation but the employer can effectively address the need with another form of reasonable accommodation at the workplace, then the employer can choose that alternative to telework***.

To the extent that an employer is permitting telework to employees because of COVID-19 and is choosing to excuse an employee from performing one or more essential functions, then a request—after the workplace reopens—to continue telework as a reasonable accommodation does not have to be granted ***if it requires continuing to excuse the employee from performing an essential function.***

The fact that an employer temporarily excused performance of essential functions due to COVID-19, does not mean that the job's essential functions are eliminated, or that telework is a feasible accommodation

An Entirely New Series of EEOC Guidelines were issued this past week (9/8/2020)

Reasonable Accommodation -- Continued

D.16. Prior COVID-19, an employee with a disability had requested telework, which was denied due to the inability to perform essential functions remotely. In the past, the employee continued to come to the workplace. However, after COVID-19 temporary telework ends, the employee renews her request for telework as a reasonable accommodation. Can the employer again refuse the request? (adapted from 3/27/20 Q. 22)

Assuming all the requirements for such a reasonable accommodation are satisfied, the temporary telework experience could be relevant to considering the renewed request.

D.17. Does COVID-19 result in excusable delays during the interactive process? (adapted from 3/27/20 Q. 19)

Yes. COVID-19 may result in delay in discussing requests and in providing accommodation where warranted.

D.18. Federal agencies are required to have timelines in their written reasonable accommodation procedures governing how quickly they will process requests and provide reasonable accommodations. What happens if COVID-19 prevents an agency from meeting this timeline? (adapted from 3/27/20 Q. 19)

Situations created by the current COVID-19 crisis may constitute an "extenuating circumstance"—something beyond a Federal agency's control—that may justify exceeding the normal timeline for such procedures.

2 EEOC Update

An Entirely New Series of EEOC Guidelines were issued this past week (9/8/2020)

Furloughs and Layoffs

F.2. What are additional EEO considerations in planning furloughs or layoffs? (adapted from 3/27/20 Q. 13)

Can't make selection based upon race, color, religion, national origin, sex, age, disability, GINA, or retaliation.

Age

H.2. If an employer is choosing to offer flexibilities to other workers, may older comparable workers be treated less favorably based on age? (adapted from 3/27/20 Q. 12)

No. If an employer is allowing other comparable workers to telework, it should make sure it is not treating older workers less favorably based on their age.

Questions & Answers

3

Additional Legal & Regulatory Updates

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3 DOL Issues New Guidance

On September 11, 2020, DOL Responds to August 3, 2020 Southern District of New York Order (took effect 9/16/20)

Struck down FFCRA DOL Guidance, finding (1) unlawful that employees are ineligible if there is no work available; (2) "Health Care Provider" was too broad; (3) rejecting the requirement of employer agreement to intermittent leave; and (4) rejecting FFCRA leave requirement

In response, DOL Wage & Hour Division modified its regulations:

1. Employees may take FFCRA leave only if work would otherwise be available to them.
2. Employees must have employer approval to take FFCRA leave intermittently.
3. "Healthcare providers" are only employees who meet the definition of that term under FMLA regulations or who provide diagnostic, preventative, treatment, or other services necessary to patients, and the absence of which would adversely impact patient care.
4. Employees must provide required FFCRA leave documentation to their employers ASAP (correcting an inconsistency regarding when employees may be required to provide notice of a need to take EFMLA leave to their employers).

3 DOL Joint Employer Rule Definition Challenged

DOL's Regulation narrowing Joint Employer under FLSA has been rejected by Southern District of New York Federal Court

DOL identified that a putative joint employer: "(i) hires or fires the employee; (ii) supervises and controls the employee's work schedule or conditions of employment to a substantial degree; (iii) determines the employee's rate and method of payment; and (iv) maintains the employee's employment records." "[T]he appropriate weight to give each factor will vary depending on . . . how that factor . . . suggest[s] control in [a given] case."

On September 8, the SDNY Court vacated a portion of the DOL's regulations narrowing the scope of "joint employer" status under the FLSA, related to "vertical" relationships (leaving "horizontal").

- A "horizontal" joint employer exists "where the employee has employment relationships with 2 or more employers and they are sufficiently associated … with respect to the employee"
- A "vertical" joint employment exists where the employee has an employment relationship with one employer (typically a staffing agency, subcontractor, labor provider) and the economic realities show that he is economically dependent on, and thus employed by, another entity involved.

This decision currently impacts the SDNY Federal District; will definitely be appealed to Second Circuit

3

NLRB Publishes Advice

The National Labor Relations Board has issued Three new Advice Letters related to Political Activism and COVID-19

Political activism: What is and isn't protected?

Facts: A union employee was discharged allegedly because he was also a legislator "working on police transparency and accountability legislation" He was a union rep for "uniformed police officers"

Advice: Political activity is protected only "if it relates in some demonstrable way to employee concerns over wages, hours, or working conditions" not simply "political activity"

Duty to bargain over COVID-19 emergency measures

Does an employer have to engage with the union before taking COVID-19 emergency measures?

Facts: Employers took emergency measures to comply with COVID-related requirements *sans* Union.

Advice (2 different cases): Employer "should be permitted to [initially] act unilaterally during the pandemic so long as … reasonably related to [COVID-19]." "Within a reasonable time thereafter," employer should bargain with the Union. Difficult union positions can be over-ridden by the need to comply with CDC and other Pandemic requirements (PPE, protection, safety and security)

3 CDC Guidance and Updates

CDC continues to issue new and revised updates on guidance previously issued

- 9/18/20: CDC issued a major determination that COVID-19 is airborne; cautions about poor ventilation. This will cause substantial new "policies" in accordance
- 9/18/20: CDC reversed course on its late August, 2020 directive, declaring, again, that individuals within 6 feet of an infected person for at least 15 minutes should get tested
- There are literally ***hundreds*** of updates (between 10-15 per day), and it is quickly becoming information overload…. Too many to list during this webinar!
    - If you need more information on particular subjects, go to:

https://www.cdc.gov/coronavirus/2019-ncov/whats-new-all.html

3 Kentucky Updates

Kentucky Supreme Court hears Oral Arguments

On Thursday, September 17, 2020, the Kentucky Supreme Court held Oral Argument on the Constitutionality of Beshear's Executive Orders

- The Justices appeared focused on specific factors regarding the 800 pages of Executive Orders:
    1. Procedural issues (i.e., whether an Emergency Declaration was properly declared)
    2. Whether Beshear's actions were actually "necessary and adequately tailored"
    3. Whether Regulatory Policies regarding public input were violated
    4. Whether Beshear's Orders are reviewed for Constitutionality "in the present" or "at the time of implementation"
- The issue relates to whether the Governor can dictate all facets because it is an "emergency"
- The Supreme Court could issue an Opinion any day – although they typically take several months to hash out typical Opinions

3 Kentucky Updates

Kentucky has promised new "updates" to COVID-19 pages and more timely changes

Over the past two weeks, Kentucky has assured that they are working on updating the informational pages for businesses (which was pointedly addressed during Oral Argument)

- Kycovid19 webpage is being updated with new total tested, positivity rate, and recoveries #s

COVID-19 Current Incidence Rate in Kentucky

Date of Report: 9/20/2020 (3:46 PM)

Average Daily Cases per 100K population
(based on previous seven days)

On Track (< 1 per 100K)
Community Spread (> 1 - 10 per 100K)
Accelerated (> 10 - 25 per 100K)
Critical (25+ per 100K)

- Kentucky's map updated with proper percentages instead of overall numbers of incidents
- Travel Advisories issued for those states "more than 10% positivity": MS (only 4%), SC (only 9%), ID, AL, KS, and SD; but omits FL, NE, MO, and IA …

3 Kentucky Updates

New Executive Orders and Updated Guidance

- 9/15: Modification for restaurants/bars (last call @ 11:00 p.m.)
- 9/15: Public Facing Businesses no longer include youth sports (follow "Healthy at Sports Guidance for 6-12; KHSAA Healthy at Sports Guidance for K-8)
- On September 14, new Executive Order entered regarding K-12 COVBID-19 reporting mandate
  - Provides for uniformity in reporting, via proper secure portal (addressing our concerns)
  - Guidance for school reopening so long as positivity rate is less than 6%
- New K-12 and College Pages geared toward proper reporting (addressing our concerns)
- The "Healthy at Work" Page has been updated with the following "minimum requirements":
  - Enforce Social Distancing; Universal face coverings; hand sanitizer; Proper Sanitation; and Daily Temperature/Health Screening
  - However, there is no "mandate" changing prior Executive Orders … the page is not law!

Questions & Answers

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