

# AFL-CIO

AMERICA'S UNIONS

## LCC Webinar: COVID-19 Legal Issues

# PRESENTERS:

Craig Becker, AFL-CIO General Counsel

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Vicki Shabo, Senior Fellow for Paid Leave Policy and Strategy, New America

Daniel B. Kohrman, Senior Attorney, AARP Foundation Litigation

Rebecca Reindel, Health and Safety Director, AFL-CIO

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Paige McKissock, Segal Roitman

David Jury, United Steelworkers

Alex Roe, Communications Workers of America

Kathy Bakich, Segal Co.

Bob Kurnick, Sherman Dunn

Richard Griffin, Bredhoff and Kaiser (former General Counsel, NLRB)

Monica Guizar, SEIU

Bill Samuel, Legislative Director, AFL-CIO

Peggy Shorey, State & Local Legislation Director, AFL-CIO

# EMPLOYMENT LAW ISSUES

## UNEMPLOYMENT INSURANCE

**Caitlin Connolly**

and

**Michele Evermore**

National Employment Law Project

# EMPLOYMENT LAW ISSUES

## PAID SICK AND FAMILY LEAVE

**Vicki Shabo**  
Senior Fellow  
Paid Leave Policy and  
Strategy, New America

# Families First Coronavirus Response Act: Emergency Paid Leave Provisions

## What's provided?

- 10 paid sick days for full-time workers (usual hours worked for part-time)
  - Reimbursed at 100% pay, up to \$511/day
    - Quarantine
    - COVID symptoms
    - Seek COVID diagnosis
  - Reimbursed at 2/3 pay, up to \$200/day
    - Care for another individual in quarantine or because of illness
    - Child's school or child care closure or unavailable child care provider
    - Other similar circumstances as defined by HHS and DOL
- 12 weeks extended school closure paid leave for parents (first two weeks can be unpaid, or dovetailed with paid sick days) – Reimbursed at 2/3 pay, up to \$200/day
  - *This remaining provision is substantially pared back from the original version of the bill passed on Saturday morning, which covered personal and family illness, too.*

# Families First Coronavirus Response Act: Emergency Paid Leave Provisions

- **Covered employers**
  - Public agencies (federal, state, local)
  - Private employers with FEWER than 500 employees – pay out of pocket, get credit or refund through reconciling payroll taxes owed
- **Exceptions**
  - **Process unclear:** Sec. of Labor can exempt employers with 50 or fewer employees from school closure under both sections if viability of business as ongoing concern is compromised.
  - Employers or DOL can exempt health providers and emergency responders
- **Multiemployer Funds:** Employers who contribute to multiemployer fund will contribute required payments to that fund, and employees can receive benefits through that fund
- **Effective date:** 15 days or sooner (April 2nd)
- **Sunset:** December 31, 2020

# Additional Possible Protections – State and Local Laws

- **State paid family and medical leave laws** for personal or family illness
  - California
  - New Jersey
  - New York
  - Rhode Island
  - Washington
- **State and local paid sick days laws** (days for personal illness, treatment, family care)
  - Some of which have public health emergency language (e.g., Arizona, New Jersey, Oregon, Rhode Island, Washington, Vermont and Seattle, NYC, San Diego, Tacoma, Mont. Co (Md.), Pittsburgh, Minneapolis, Cook Co. (Ill.), Westchester Co. (NY))
  - [Details: www.nationalpartnership.org/psdstatutes](http://www.nationalpartnership.org/psdstatutes)

# EMPLOYMENT LAW ISSUES

## Occupational Safety and Health Administration (OSHA)

**Rebecca Reindel**  
Health and Safety Director  
AFL-CIO

# EMPLOYMENT LAW ISSUES

## Age Discrimination in Employment Act (ADEA)

**Daniel B. Kohrman**  
Senior Attorney  
AARP Foundation Litigation

# LCC Coronavirus Webinar – Age Discrimination issues: thoughts at the outset of the pandemic

## Age and COVID-19:

- >higher est. % of persons 50-80+ needing hospitalization, ICU admission, or who die;  
[p://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications/older-adults.html](https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications/older-adults.html)
- >higher % with underlying conditions, e.g., heart disease, diabetes, lung disease  
[www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html](https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html)

## Age and COVID-19 directives:

- >3-8: W. House overrules recommendation for elderly not to fly (Time)
- >3-15: CA Gov. Newsom calls for home isolation for all 65+ (LA Times)
- >3-16: White House urges all older Americans to stay home (AP)

# LCC Coronavirus Webinar – Age Discrimination issues: thoughts at the outset of the pandemic

Two federal statutes prohibit forms of age bias:

A. The Age Discrimination in Employment Act (ADEA)

- > 29 U.S.C. Sections 621-34.
- > Regulations at 29 C.F.R., Parts 1625-27.

B. The Age Discrimination Act of 1975

- > 42 U.S.C. Sections 6101-07
- > Regulations issued by various individual federal agencies.  
See, e.g., 45 C.F.R., Part 91 (HHS).

# LCC Coronavirus Webinar – Age Discrimination issues: thoughts at the outset of the pandemic

## A. The ADEA

### 1. Coverage, generally.

- > As the name implies, it applies *only* to employment and efforts to obtain employment.
- > It applies to private employers with 20 or more employees.
- > It applies to all federal, state, and local government employers, regardless of size.

### 2. Coverage, remedies.

- > The Act permits most applicants or employees to obtain *lost wages* - whether past or future.
- > Yet, 11th Amendment “sovereign immunity” lets *state employers* avoid a duty to pay lost wages.
- > The Act permits applicants or employees to obtain reinstatement or instatement (rare) and other forms of injunctive and declaratory relief.
- > The Act does NOT permit recovery of *compensatory damages* (i.e., for emotional harm) or *punitive damages*. However, in cases of “willful” discrimination, double lost wages may be awarded

# LCC Coronavirus Webinar – Age Discrimination issues: thoughts at the outset of the pandemic

## 3. Possible COVID-19 scenarios.

> ***All employees over age 65, regardless of COVID-19 symptoms, must shelter at home.***

Discriminatory? Yes. But what is the *harm*?

- Are age 65+ (or 60+ or 70+) allowed to work remotely? or afforded paid leave? time accrued toward higher pension benefits? required to exhaust sick leave?

- If no harm, no claim. If concrete harm occurs, a possible claim. *Thus far, I have seen no such cases.*

> ***All employees with certain medical conditions, or “conditions that make them vulnerable to COVID-19” must shelter in place.***

- Discriminatory? Yes. Under a *disparate impact theory*, as such rules have a significant disproportionate adverse impact on workers 40+ (or 50+ or 60+, etc.). But again, *is there any harm*?

- Even if so, no liability if employer shows the factor “other than age” w/ adverse age impact was “reasonable.”

- FOAs likely to be found “reasonable” in this pandemic.

# LCC Coronavirus Webinar – Age Discrimination issues: thoughts at the outset of the pandemic

## B. The ADA of 1975

### 1. Coverage, generally.

- >All programs and activities operated by entities receiving federal financial assistance.
- >Like Title VI of the CRA of 1964 (race, etc.), Section 504 of the Rehabilitation Act of 1973 (disability), and Title IX of the Education Amendments of 1972 (sex, in education).

### 2. Coverage, remedies.

- >*No monetary relief* of any kind.
- >Injunctive or declaratory relief; attorney's fees.
- >*Limited remedies is one reason the law has almost never been used.*

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## 3. Exceptions – *other reason Act has almost never been used.*

- > Sec. 6103(b)(1)(A): “action *reasonably takes into account age* as a factor *necessary to the normal operation* or the *achievement of any statutory objective* of such program or activity”
- > Sec. 6103(b)(1)(B): “the differentiation made by such action is based upon *reasonable actors other than age*”
- > Sec. 6103(b)(2): “shall not apply to any program or activity established under authority of any law which (A) provides *any benefits of assistance to persons based on the age* of such persons; or (B) *establishes criteria for participation in age-related terms* or *describes intended beneficiaries or target groups in such terms.*”

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## 4. Possible COVID-19 scenarios.

> ***Directive: no persons 65 or over may enter a university campus due to high-risk of serious illness if have/get C-19.*** (All higher ed covered.)

- Discriminatory? Yes.

- But are persons affected *participating in programs/activities*?

E.g., visitors to university art gallery? Participants in alumni continuing ed programs? *Probably so.*

Visitors to campus grounds? *Probably not.*

- ***Do exceptions apply?***

# LCC Coronavirus Webinar – Age Discrimination issues: thoughts at the outset of the pandemic

## Final thought about: Analogous State and Local laws

>e.g., CA, NYC

>Many treat age as *on a par with race, sex, etc.* Thus,

- *Disparate treatment more likely illegal.* E.g., easier to prove causation. Age (like race, etc.) must be “motivating factor” not a “but-for” cause.

- *Disparate impacts more likely to be illegal.* E.g., employers must justify them as a matter of “business necessity” rather than as a “RFOA.”

# EMPLOYMENT LAW ISSUES

## ADA AND COVID-19 IN THE WORKPLACE

**Brian East**  
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Disability Rights Texas  
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# Employer Coverage

- ADA—private employers with 15 or more employees, non-federal governmental employees, many unions, employment agencies
- Sec. 501—federal-sector employees
- Sec. 503—contractors or subs with contracts worth > \$10,000
- Sec. 504—recipients of federal financial assistance
- State or local laws—varies

# Is COVID-19 a Disability?

- “Actual” disability—probably
- “Regarded as”—probably
- Fear of future—probably not

# Employer Actions

- Closing down
  - Normally not ADA issue
  - Watch out for discrimination in RIFs, transfers, or alternate employment
- Going online
  - Normally not ADA issue
  - Employer may need to accommodate to make tech accessible to employees

# Employer actions—OK screening

- Asking returning travelers about exposure
- Asking why employee was absent
- Requiring infection-control practices
- Requiring use of personal protective equipment (but may need accommodation)
- Encouraging getting any vaccine
- Taking temp or asking about symptoms

# Employer actions—OK screening

- Require medical input certifying fitness for duty on return to work
- Taking temp and screening for symptoms of applicants, if conditional job offer and done for all those entering same job type
- Delay start date of applicant w/ symptoms
- Withdraw offer if applicant has COVID-19 or symptoms, and must start immediately

# Employer actions—improper screening

- Asking asymptomatic employees if they have medical conditions that would make them especially vulnerable
- Compelling employees to take vaccine if they have a medical condition that prevents doing so safely
- Failing to share medical info only with those who have need to know

# Can Employer Fire?

- Probably not on basis of COVID-19 bc. it's likely a disability, plus contract rights, leave policies, or accommodations will likely address safety concerns
- Probably not bc of mistaken belief, if had contrary info
- Maybe not if based on association w/ one who has COVID-19, because contract rights or leave policies will likely address safety concerns

# Reasonable Accommodations— May Be Required Because

- Of COVID-19 diagnosis, it it's an “actual” or “record of” disability
- Employee has another disability that creates heightened risk (if disclosed)
- Because of exacerbation of mental disability (e.g., anxiety disorder)

# Types of Accommodations

- Telework
  - Especially prevalent now
  - Reasonable in many (but not all) cases
  - Make sure tech is accessible to worker
- Leave
  - Probably easy because of virus's short duration
  - Can be unpaid unless contract or company policy provide paid leave
  - Longer leave to avoid exposure?
- Others—mask, respirator, isolation, etc.

# More on Accommodations

- “Undue hardship” is statutory defense
- Confidentiality—employer must keep confidential the info disclosed during accommodation process (need to know)
- Retaliation—Requesting accommodation is protected activity
- Caring for family members—ADA does not require accommodations (e.g., leave) to care for others but employer can’t treat such requests differently from others

# Final Points

- Some EEOC and FEP offices are closed to the public, and are taking charges of discrimination by fax or email only
- Resources—The EEOC has information on, or linked to, the following webpage:  
[https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ad\\_a\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ad_a_rehabilitaion_act_coronavirus.cfm)

# EMPLOYMENT LAW ISSUES

## Health Insurance Portability and Accountability Act (HIPPA)

Paige McKissock  
Segal Roitman

# BARGAINING ISSUES

## Including Union as Employer

David Jury, United Steelworkers  
Alex Roe, Communications Workers of America

# Triage of the Labor Agreement

*Review with the Union representative:*

- Sick Leave and Other Paid Leave Provisions
- Vacation Policies
- Seniority and Layoff
- Sickness and Accident Benefits
- Management Rights and the Right to Establish Reasonable Rules (remember *MV Transportation*)
- Health and Safety Language and Contractual Rights to Refuse Work

# The Duty to Meet and Confer

Does the Section 8(d) obligation to “meet at reasonable times and confer in good faith” allow a party to insist upon meeting in person?

- *Face to face bargaining is required. Fountain Lodge*, 269 NLRB 674, 674 (1984); *Redway Carriers, Inc.*, 274 NLRB 1359, 1377 (1985) (“face-to-face negotiations between the bargaining principals is an elementary and essential condition of bona fide bargaining”)
- Employers cannot insist on bargaining by mail or by telephone. *Success Village Apartments*, 347 NLRB 1065, 1080 (2006); *Beverly Farm Foundation, Inc.*, 323 NLRB 787 (1997); *Fountain Lodge*, 269 NLRB 674, 674 (1984)

# The Duty to Meet and Confer

- Regarding videoconferencing, a **2003 Advice Memorandum, *United Restoration*, 36-CA-9318 (Oct. 30, 2003)**, concluded that:

Videoconferencing is an inadequate substitute for face-to-face meetings and recommended issuance of complaint against an employer insisting upon such bargaining. Similarly, a 2019 ALJD concluded an offer to bargain via videoconference was insufficient to satisfy its obligation to bargain, at least in the context of the employer's overall dilatory tactics. *Rhino N.W., LLC*, 2019 WL 5565134 (Oct. 28, 2019). The ALJD was not appealed.

# The Duty to Meet and Confer

Can a party insist upon meeting only by conference call or video conference?

- “[T]he procedure of collective bargaining requires that the employer make his representatives available for conferences at reasonable times and places and in such a manner that personal negotiations are practicable.” *Lorillard, P., Co., Inc.*, 16 NLRB 684, 696 (1939). “The Board does not take a per se approach to deciding where bargaining should take place and instead considers all the relevant circumstances bearing on the issue.” *Somerville Mills*, 308 NLRB 425, 426 (1992) (rejecting ALJ view that law requires presumption that parties are to meet at or near the place where unit employees work). The “determining factors” identified in *Somerville Mills* are “whether the proposed bargaining location is unreasonable, burdensome, or designed to frustrate bargaining, and whether the proponent has been intransigent and in bad faith.” 308 NLRB at 426.

# Unilateral Change During Bargaining

From the ALJ's opinion in *Hartford Head Start Agency, Inc. & Local 517m, Serv. Employees Int'l Union*, 354 NLRB 164 (2009):

Two exceptions to the rule prohibiting unilateral changes during bargaining:

1. When a union engages in bargaining delay tactics and
2. “[W]hen economic exigencies compel prompt action.”

Citing *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991).

Economic exigencies are “extraordinary events which are an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.” *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995).

# Unilateral Change During Bargaining

“Absent a dire financial emergency, economic events such as ... operation at a competitive disadvantage ... do not justify unilateral action.” *RBE Electronics*, 320 NLRB 80, 81 (1995). Additionally, an employer can “satisfy its statutory obligation by providing . . . adequate notice and an opportunity to bargain over the changes it proposes to respond to the exigency and by bargaining to impasse over the particular matter. In such time sensitive circumstances, however, bargaining, to be in good faith, need not be protracted.” *Id.* at 82. See also *Naperville Ready Mix, Inc.*, 329 NLRB 174, 182-184 (1999).

“In defining the less compelling type of economic exigency, the Board in *RBE Electronics* made clear that the exception will be limited only to those exigencies in which time is of the essence and which demand prompt action. The Board will require an employer to show a need that the particular action proposed be implemented promptly. Consistent with the requirement that an employer prove that its proposed changes were “compelled,” the employer must also show the exigency was caused by external events, was beyond its control, or was not reasonably foreseeable. *Hartford Head Start*, 354 NLRB at 187–88 (2009).

# Effects Bargaining/Unilateral Change

1. Proactively request bargaining over proposed changes, effects of any new legislation or other government edicts
2. Avoid creating precedent by implying waiver
3. If the employer claims legal requirements or exigency, ask for detailed support

# Effects Bargaining/Unilateral Change

- *Virginia Mason Hosp.*, 358 NLRB 531, 535 (2012)

Hospital's requirement that unvaccinated nurses wear facemasks in work areas or take antiviral medication was not 8(a)(5) violation due to the management rights clause, which "allow[ed] the Hospital to unilaterally 'direct the nurses' and 'to determine the materials and equipment to be used; [and] to implement improved operational methods and procedures.'" This case applied the clear and unmistakable waiver standard.

# Effects Bargaining/Unilateral Change

- *MV Transportation, Inc.*, 368 NLRB No. 66 (Sep. 10, 2019)

“The Board will examine the plain language of a collective bargaining agreement to determine whether action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally.”

If the agreement does not “cover” the change, “and that act has materially, substantially and significantly changed a term and condition of employment” that is a mandatory subject of bargaining, the employer violates the NLRA unless it can establish the union clearly and unmistakably waived its right to bargain or the employer was otherwise privileged to take action (such as compelling economic considerations).

# Internal Union Issues

*Follow Guidance Above, i.e. Review:*

- Sick Leave and Other Paid Leave Provisions
- Vacation Policies
- Seniority and Layoff
- Sickness and Accident Benefits
- Management Rights and the Right to Establish Reasonable Rules (remember *MV Transportation*)
- Health and Safety Language and Contractual Rights to Refuse Work

## *Working from Home:*

- This may establish precedent as to whether working from home creates undue hardship on the employer as a reasonable accommodation
- Future denial of telework can create disparate treatment allegations
- The home can be the workplace under applicable laws, e.g., worker's comp, OSHA

## *Working from Home:*

- FLSA issues—tracking hours worked
- Data security
- Internal policies regarding use of employer devices for personal business can become complicated if the employee is providing some of the equipment

# BENEFIT ISSUES

## Coronavirus Benefits Issues

**Kathy Bakich**

The Segal Company

# Action to Date

- The first coronavirus response law (PL 116-123) provided \$8 billion for health and international programs and made \$7 billion in small business loans available
- The second law, HR 6201, signed March 18, 2020, provide paid leave, tax credits, expanded unemployment and nutrition assistance, and free testing
- A third law could include income support, surprise medical billing, COBRA premium assistance and other measures

# Covering Testing

- State insurance departments have directed carriers to cover tests and other services at 100% with no cost sharing
- States have also direct PBMs to provide flexibility with refills and other pharmacy issues
- State laws would not apply to self-insured plans, therefore third-party administrators have been asking self-insured plans to opt-in (or opt-out) of coverage rules similar to those in state insurance laws
  - Look for deadlines! TPAs and PBMs are telling plans they will take implementation steps unless directed not to

# Families First Coronavirus Response Act

- The Act requires group health plans (and insurers) to cover specific services related to testing for the virus that causes COVID-19
- Applies to all group health plans, including self-insured plans and grandfathered plans under the Affordable Care Act
- Similar requirements would apply to Medicare (including Medicare Advantage plans), the Federal Employees Health Benefits Program, CHIP, Medicaid, TRICARE and other federal health programs
- Effective March 18, 2020 and applies during the currently declared national emergency

# Coverage of Coronavirus Testing

- Group health plans and insurers must provide coverage for, and not charge any cost sharing for, the following services:
  - Diagnostic tests to detect the virus that are approved or authorized by the FDA, including the administration of such tests; and
  - Items and services furnished to individuals during provider office visits (whether in-person or via telehealth), urgent care visits, and emergency room visits that result in an order for, or the administration of, the test described above, but only to the extent such items or services relate to the furnishing or administration of the test or the evaluation of whether the person needs the test
- The prohibition on cost sharing means that these services cannot be subject to a deductible or to copayments or coinsurance
- Plans and insurers are also prohibited from imposing prior authorization or other medical management requirements for these services

# HSA-Qualified High Deductible Health Plans

- On March 11, 2020, the IRS published Notice 2020-15, which provides that a health plan that is otherwise an HDHP will not fail to be considered an HDHP merely because the health plan provides health benefits associated with testing for and treatment of COVID-19 without a deductible, or with a deductible below the minimum deductible (self-only or family) for an HDHP.
- The IRS cited as its rationale the unprecedented public health emergency posed by COVID-19 and the need to eliminate potential administrative and financial barriers to testing for and treatment of COVID-19
  - It also noted that it continues to consider vaccinations preventive care for purposes of determining whether a health plan is an HDHP (though there is no vaccine for COVID-19 yet)
- Notice 2020-15 appears to be written broadly to apply to any benefits associated with for testing for and treatment of COVID-19

<https://www.irs.gov/pub/irs-drop/n-20-15.pdf>

# Telemedicine Coverage

- HHS will not penalize healthcare providers that use telecommunication methods that may not fully comply with HIPAA
  - <https://www.cms.gov/newsroom/fact-sheets/medicare-telemedicine-health-care-provider-fact-sheet>
- This guidance makes it easier for individuals to seek virtual care from their current provider
- Plans can also use a telehealth network – either stand alone or through their TPA – to provide network telehealth services
- Medicare has also expanded telehealth
  - <https://www.segalco.com/consulting-insights/coronavirus-medicare-telehealth>

# GOVERNANCE ISSUES

## And DoL Responses

**Bob Kurnick**

Sherman Dunn

# NLRB RESPONSES

**Dick Griffin**

Bredhoff and Kaiser (former General Counsel, NLRB)

# IMMIGRATION ISSUES

Monica Guizar  
SEIU

# RELEVANT PUBLIC POLICY RESPONSES

## FEDERAL

**Bill Samuel**  
Legislative Director  
AFL-CIO

# RELEVANT PUBLIC POLICY RESPONSES

## STATE AND LOCAL

**Peggy Shorey**  
State & Local Legislation Director  
AFL-CIO

# State & Local Policy Resources

**SCOPE:** State & local legislation, administrative actions, EOs, agency actions, AGs, Secretaries of the State

- 1. Landscape: State & Local Policy Actions in Response to COVID-19**
- 2. Summary: Changes to State Legislative Sessions & Capitol Rules**
- 3. Dedicated resource folder on COVID-19 materials for SF/CLCs**
- 4. State & Local Policy Recommendations**

# State and Local Policy Recommendations

- **Protect workers on the frontlines**
- **Fund the Public Health Crisis**
- **Workers need to stay home if sick, need to quarantine or isolate, and care for loved ones without financial hardship**
- **Limit economic hardship caused by the pandemic - paid sick days, paid leave, UI**
- **Workers should not face retaliation for acting in their and the public interest**
- **Communicate to workers & employers on options and assistance**
- **Ensure free fair and safe Elections, Census**

# Questions?

Please send any questions that you have to the LCC at [lcc@aflcio.org](mailto:lcc@aflcio.org)