

Welcome to the SIG University Webinar Series:

# New and Recent Considerations for Re-Opening the Workplace

Doug Desmarais, Esq | *Smith & Downey*

*July 16, 2020*



# QUESTIONS?

During the webinar if you have any questions please feel free to...

📱 Text Richard: **(443) 250-8606**

✉ Email Richard: **[richard@silbs.com](mailto:richard@silbs.com)**

💬 Zoom Chat: Enter questions via the "**Chat**" feature in the Zoom meeting

# REMINDERS

Slides and resources will be emailed after the webinar and are available on [silbs.com/sig-university](https://silbs.com/sig-university)

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\*\*All completed surveys will be entered in a raffle to win a \$100 donation to the charity of your choice!\*\*

**Congratulations to last week's winner, Kelly Salkeld from United Urology Group. We are proud to support Zero – The End of Prostate Cancer on your behalf!**





## RECORDINGS

### [How Small to Mid-Size Companies Purchase Health Care Like a Fortune 500](#)

**Presenter:** David Konrad, *Alera Group*

## UPCOMING

### [What Leading Companies Are Doing to Support Employees' Emotional Health & Families](#)

**JULY 23, 11 AM – 12 PM EST**

**Presenter:** Daniel Freedman, *Co-Founder & Co-CEO of BurnAlong*

### [Workplace Wellness Programs and Compliance with DOL & EEOC Rules](#)

**AUGUST 12TH, 12 PM – 1 PM EST**

**Presenter:** Stacy Barrow, Esq., *Marathas, Barrow & Weatherhead*

WEBINARS

The background of the slide features a warm, orange-toned image of two hands holding a tablet. A network of white lines and dots is overlaid on the bottom left of the image, suggesting a digital or data theme.

# **If you are a Mid-Atlantic employer with 50 or more employees, then you are invited to participate in the 2020 Mid-Atlantic Benchmarking Survey**

Our survey provides companies with comparable benchmarking data for:

- Medical Plans
- Dental, Life, and Disability Benefits
- Innovative Benefits & Strategies
- Wellness & Vision
- Other Specialty Benefits

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2020 MID-ATLANTIC  
BENCHMARKING  
SURVEY

## U.S. Supreme Court Upholds Final Rules Allowing Employer-Sponsored Health Plans to Decline to Cover Contraceptives Due to Moral or Religious Objections

## Bostock v. Clayton County Supreme Court Ruling – Time to Review Your Employee Benefit Plans

## COVID-19 and Affordability for Applicable Large Employers



### COVID-19 and Affordability for Applicable Large Employers

ALEs are required to offer minimum value, minimum essential, affordable coverage to all full-time employees. In 2020 that standard is 9.78%, which is lower than the 2019 standard of 9.86%.

Because employers rarely know an employee's household income, ALEs may meet the affordability requirement through one of three safe harbor options –

RECENT  
INSIGHTS

# Returning to Work: Manager Education During a Period of Crisis and Unrest

July 16, 2020

- Doug Desmarais, Esq. – (410) 321-9348
  - [ddesmarais@smithdowney.com](mailto:ddesmarais@smithdowney.com)



SMITH & DOWNEY, P.A.

Note that this presentation is intended as a general discussion of the law and is not intended as legal advice for any particular situation.



# Employee Rights and Employee Responsibilities

- **Employee Rights:**

- An employer must not discriminate against an employee on the basis of any protected class (e.g., race, color, religion, national origin, sex, sexual orientation, gender identity and expression, age, disability, marital status, etc.)
- Similarly protected from discrimination by vendors, clients, etc.

- **Employee Responsibility:**

- Employees must not discriminate against anyone else in the workplace on the basis of any protected class

# What is Harassment?

- Subset of discrimination, and may include any unwelcome conduct that is based on a protected class.
- Unlawful where: (1) enduring the offensive conduct becomes a condition of continued employment; or (2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive
- May include:
  - \* Offensive jokes \* Stereotypes \* Slurs \* Name calling \*
  - Physical assaults \* Threats \* Intimidation \* Ridicule \*
  - Mockery \* Insults \* Put-downs \* Offensive objects/pictures
  - \* Interference with work performance

# Race Harassment

The “Black Lives Matter” movement raises important questions regarding workplace conduct.

- May employees discuss in the workplace their belief that “Black Lives Matter”?
- May employees say in the workplace that they believe that “All Lives Matter”?
- May employees discuss “White Privilege” in the workplace?
- May employees discuss the impact of race upon recent police shootings?
- May employees state that they believe that race was a factor in the death of George Floyd?
- May employees disagree that race was a factor in the death of George Floyd?
- May an employer provide racial sensitivity training that focuses exclusively on the rights of African Americans in the workplace?

# Conduct Outside the Workplace

- Policies regarding anti-harassment, anti-discrimination, etc. apply to conduct outside the workplace, including:
  - Business Trips
  - Office parties
  - Social Media use

# Retaliation

- Harassment includes unlawful retaliation for engaging in protected activity (e.g., communicating with a supervisor about employment discrimination, filing a complaint, testifying in an action)

# COVID-19 REOPENINGS: OSHA

- The General Duty Clause under the OSH Act applies to virtually every workplace.
  - The Clause requires employers to provide a place of employment “free from recognized hazards that are causing or are likely to cause death or serious physical harm to...employees.”
  - The Clause also requires employers to comply with all occupational safety and health standards.
- Employers should be aware of CDC Guidance and, even though not mandatory, it this Guidance should be treated as a requirement.

# Question #1 – Reopening Guidance

## What steps should an employer take to ensure a safe reopening environment?

- Before reopening, employers should:
  - Consider all local guidance and requirements to ensure compliance;
  - Identify areas at most risk of contamination;
  - Create a plan that will reduce the risk of contamination and promote safety;
  - **Communicate all new requirements with employees;**
  - Ensure that ventilation systems are *fully operational* (such as HVAC systems); and
  - Consider whether to conduct employee training on the risks of being back in the workplace.
- Rearranging workspaces and schedules – the CDC recommends:
  - Spacing seats and workstations further apart;
  - Installing shields/other barriers if rearranging is not feasible;
  - Posting signs, visual cues (such as tape on the floor) and other notices reminding employees of social distancing guidelines;
  - Placing employees in better-ventilated workplaces; and
  - Staggering work schedules (one employee group works mornings; the other group works nights).

# Question #1 – Reopening Guidance (cont.)

## What steps should an employer take to ensure a safe reopening environment?

- The CDC recommends to increase air quality by:
  - Increasing the frequency of air supply (use the “fan” feature on the HVAC unit);
  - Opening windows;
  - Using fans to redirect airflow between offices and air filtration systems;
  - Operating exhaust fans in restrooms at full capacity; and
  - Using ultraviolet germicidal irradiation to kill the virus.
- Promote healthy conduct in the workplace:
  - Consider testing employees daily;
  - Take proper sanitary steps, and encourage employees to do the same;
  - Limit occupancy in the office and common areas;
  - Require masks when moving in the workplace;
  - Encourage masks while employees are at their workstation;
  - Prohibit any and all handshaking, hugs, etc.;
  - Prohibit sharing materials/supplies unless necessary and sanitary steps have been taken;
  - Remind employees to properly wash their hands frequently;
  - Encourage employees to eat/meet outside;
  - Incentivize employees to not use public transportation; and
  - Remind all employees that if they are symptomatic or feeling ill, they should remain home and self-isolate until a healthcare provider deems them safe to return to work.



# Question #2 – Testing Employees

## Is an employer able to test employees for high temperatures/symptoms?

- Employers are permitted to conduct temperature/symptom checks of employees.
- If an employer decides to test employees, it should ensure safety measures are taken to prevent the possible spread of the virus, including:
  - Maintaining a distance of 6 feet among employees being tested;
  - Installing barriers to protect the screener's face from the employee being tested; and
  - Ensuring proper personal protective equipment is used at all times.
- Methods of testing:
  - Employers can ask employees to conduct their own temperature checks upon arrival (employers can give employees their own thermometer to lessen contact with others);
  - Perform employer-administered temperature checks (which should include using a new set of disposable gloves for each employee being screened);
  - Conduct a visual inspection of the employee for symptoms in addition to temperature checks (including looking for flushed cheeks or fatigue).

# Question #3 – Testing Positive

## What must an employer do if an employee tests positive, or reports that he/she has tested positive for COVID-19?

- **Immediate steps to take:**
  - Separate positive employee from all others, provide a face mask, and send the employee home.
  - Request positive employees to identify all recent contacts in the workplace, and which common areas they used.
  - Alert the office staff that an *anonymous* employee has recently tested positive for COVID-19.
  - Conduct a thorough disinfection of workplace and remind employees of proper safety procedures.
- **Employers are now required to determine whether a positive employee contracted the virus while at work:**
  - This means conducting an investigation into whether the employee's infection is related to work.
  - A reasonable investigation includes:
    - Asking the employee limited questions about how he/she believes COVID-19 was contracted;
    - Asking about the employee's work and nonwork activities and possible exposure; and
    - Examining the work environment to determine if and how exposure was possible.
  - Beware of boundaries of an employee's personal life.
- **OSHA Steps:**
  - If an employer is covered by OSHA, and an employee's infection is work related, and the infection results in (1) the employee's death, (2) time away from work, (3) restricted work/transfer, (4) medical treatment, or (5) the loss of consciousness, the employer must record the COVID-19 case on the OSHA 300 log.
  -
- **If employees is only symptomatic:**
  - If an employee only shows COVID symptoms, but no positive test, the employee is likely still considered a "known danger" to others, and should be sent home.
  - The ADA's guidance has stated that being COVID-19 positive, or even showing symptoms of it, poses significant risk of substantial harm to the workplace.

# Question #4 – Symptom Tracking

## How can employers track an employee's COVID-19 symptoms while the employee is out on leave?

- Supplying ill employees with a self-certification and medical tracking chart is a good way to help employees track their symptoms to determine when they will be permitted to return to work.
  - NOTE: The CDC has changed its guidelines for returning to work from 7 days after the onset of symptoms to 10 days.
- The self-certification should include an employee attestation that:
  - The employee has not had a fever for at least three days without taking medications to reduce fever (while requesting the date of last fever of 100.4 degrees or higher); the employee's respiratory symptoms have improved for at least three days; and at least ten days have passed since the employee's symptoms first started.
- The medical tracking chart should include:
  - A spreadsheet that allows an employee to document his/her temperature, respiratory symptoms, and other symptoms; and
  - A disclaimer that the medical tracking chart is for the employee's use only and should not be provided to the employer.

# Question #5 – Asymptomatic Employees

**May an employer ask asymptomatic employees to disclose whether they have a medical condition that could make them especially vulnerable to COVID-19 complications?**

- Generally, asking an employee about underlying medical conditions is a disability-related inquiry, which is highly restricted by the ADA.
- Because COVID-19 is a pandemic and is considered severe by health officials, employers have sufficient objection information to reasonably conclude that employees will face a direct threat if they contract COVID-19.
  - As such, an employer may make a disability-related inquiry of asymptomatic employees in order to identify those at higher risk of COVID-19 complications.
- Those at higher risk for severe illness from COVID-19, according to the CDC, are:
  - People 65 years or older;
  - People with chronic lung disease or moderate to severe asthma;
  - People who are immunocompromised; and
  - People with severe obesity, diabetes, chronic kidney disease, and/or liver disease.

# Question #6 – Fear of Infection at Work

## Is an employee able to take FFCRA leave due to a general fear of the risk of being infected by COVID-19?

- The employee is not missing work due to an FFCRA-approved reason, thus, he/she would not generally be entitled to paid sick leave under the Act.
  - Unless a quarantine, isolation order, or shelter-in-place order applies specifically to the employee (such as “all people older than 65 may not leave their house”), the employee would not be permitted to FFCRA leave simply out of fear of coming to work.
- There are a few limited circumstances where leave to avoid contracting COVID-19 might be covered under FMLA:
  - For example, if an employee has an underlying mental health condition (severe anxiety) which triggers an incapacitating fear of COVID-19, it could be considered a serious health condition as defined by the FMLA. (This would also trigger an ADA interactive dialogue.)
- Additionally, if the employee has an underlying chronic condition (diabetes, lung disease, asthma), and a health care provider advises the employee to stay home to avoid triggering the condition, the employee would likely qualify for FFCRA leave.
- Otherwise, staying at home simply to avoid getting sick, even for employees with underlying chronic conditions, does not qualify for leave, or as a serious medical condition under the FMLA.

# Question #7 – Intermittent Leave

**Are employees required to use the sick leave in 8 hour increments or can they use them as needed?**

- **Example**: an employee is in self isolation, and he/she wants to work 4 hours in the morning, can they record his/her morning time as working, and then his/her afternoon time as COVID-19 related leave?
- Employees may **not** take intermittent paid sick leave if the employee is still working at the typical worksite (meaning, not teleworking).
  - Instead, the employee must take paid sick leave in full-day increments, unless (1) the paid sick leave is being taken for care of a child whose school or place of care has closed due to COVID-19 reasons, **and** (2) the employer agrees to such intermittent use.
  - Otherwise, once an employee begins taking paid sick leave, the employee must continue taking paid sick leave in full-day increments until (1) the full available amount of paid sick leave is exhausted; (2) the employee no longer has a qualifying reason for paid sick leave. Any unused sick leave may be saved and used later, until December 31, 2020.
- If teleworking, and the employer permits it, an employee may take intermittent leave for any reason in the FFCRA.
  - The increment of leave must be agreed to be employer/employee.

# Thank You for Attending

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