CORONAVIRUS

- Congress has passed several bills signed by the President to provide relief from the Coronavirus

- Over 30 million have filed for unemployment

- April Gallup monthly poll – coronavirus #1 problem facing the US cited by 45% of respondents – one of the highest percentages Gallup has recorded on an issue
FAMILIES FIRST CORONAVIRUS RESPONSE ACT

- Law includes the Emergency Family and Medical Leave Expansion Act & the Emergency Paid Sick Leave Act

- Both provisions became effective on April 1, 2020 and expire on December 31, 2020 (probably)

- Guidance can be accessed at: https://www.dol.gov/agencies/whd/pandemic/ffcra-questions
EMERGENCY FAMILY AND MEDICAL LEAVE
EMERGENCY PAID SICK LEAVE
Emergency responders according to the DOL regulations (29 CFR 826.30) include:

- Law enforcement officers, correctional institution personnel, firefighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency.
INTERMITTENT LEAVE
INTERMITTENT LEAVE

- If employers allow it, employees who are teleworking due to one of the qualifying reasons, can take paid sick leave intermittently.

- If employees are prevented from teleworking their normal schedule since they are caring for a child, employers can allow them to take expanded family medical leave intermittently.

- The intermittent leave can be taken in any increment to which the employer and employee agree.
COMMON MISTAKES - 1

• “The normal FMLA eligibility requirements apply to extended FMLA, right? So employees are only eligible if they’ve been employed for a year and worked 1,250 hours during that year?”

• False!

• An employee is eligible for extended FMLA if he or she has been employed for at least 30 calendar days.
"No, you can’t take leave under FFCRA because your grandchild’s school is closed. That leave is only available for a “son or daughter.”"
COMMON MISTAKES - 2.

- FFCRA is available for employees who need leave to care for a “son or daughter” due to a school closure or childcare unavailability

- DOL regulations define “son or daughter” as “a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is under 18 years of age; or 18 years of age or older who is incapable of self-care because of a mental or physical disability”
MISTAKE 2. IN LOCO PARENTIS

• What is “in loco parentis?!“
• Not how you feel after dealing with a toddler all day.

• A person with day-to-day responsibilities to care for or financially support a child. Factors in determining status:
  • Age of the child;
  • Degree to which the child is dependent on the person;
  • Amount of financial support, if any, provided; and
  • Extent to which duties commonly associated with parenthood are exercised.
EEOC REFRESHER
THE MORE THINGS CHANGE THE MORE THEY STAY THE SAME

- **EEOC**: Federal Equal Employment Opportunity Commission
  - Enforces workplace anti-discrimination laws

- **Americans with Disabilities Act (ADA)**
  - Disability, employer medical exams and inquiries, reasonable accommodations

- **Title VII**
  - race, religion, sex, pregnancy, national origin, etc

- **Genetic Information Nondiscrimination Act**

- **Age Discrimination in Employment Act (ADEA)**
  - 40 years and older
HOW DO EMPLOYERS HAVE TO ACCOMMODATE CERTAIN EMPLOYEES DURING THE COVID-19 PANDEMIC?

• Q. Is an employee entitled to an accommodation under the ADA in order to avoid exposing a family member who is at a higher risk of severe illness from COVID-19 due to underlying medical condition?

• A. No. The ADA does not require an employer accommodate an employee without a disability based on the disability-related needs of a family member with whom s/he is associated.
RETURN TO WORK ACCOMMODATIONS

Q. How do employers know what steps they can take consistent with the ADA to screen employees for COVID-19 when entering the workplace?

A. The ADA permits employers to make disability-related inquiries and conduct medical exams if job-related and consistent with business necessity.
Q. What does an employee need to do to request a reasonable accommodation because s/he has one of the medical conditions that CDC says may put him/her at higher risk for severe illness from COVID-19?

A. The employee or medical provider must let the employer know that s/he needs a change for a reason related to a medical condition (here, the underlying condition)
RETURN TO WORK ACCOMMODATIONS

· Q. An employer knows that an employee has a medical condition that places the employee at a higher risk for severe illness under the CDC guidelines if they get COVID-19. The employer is concerned that his/her health will be jeopardized upon returning to work but the employee has not requested an accommodation.

· A. If the employee does not request a reasonable accommodation, the ADA does not allow the employer to exclude the employee from the workplace solely because the employee has a disability that the CDC identifies as potentially placing him/her at “higher risk for severe illness” if s/he gets COVID-19. Direct threat under the ADA is a high standard.
RETURN TO WORK ACCOMMODATIONS

• Q. As a best practice, and in advance of having employees return to work, are there ways for an employer to invite employees to request flexibility in work arrangements?

• A. Yes. The ADA allows employers to make information available in advance to all employees about who to contact—if they wish—to request accommodation for a disability that they may need upon return to the workplace, even if no date has been announced for their return.
Q. Individuals age 65 and over are at higher risk for a severe case of COVID-19 and the CDC has encouraged employers to offer maximum flexibilities to this group. Do employees age 65 and over have protections under federal employment discrimination laws?

A. ADEA prohibits employers from involuntarily excluding an employee from work based on his or her being 65 or older, even if the employer acted for benevolent reasons.
A. Unlike the ADA, the ADEA does not include a right to reasonable accommodation for older workers due to age. However, the EEOC states that employers are free to provide flexibility to workers age 65 and older even if it results in younger workers ages 40-64 being treated less favorably based on age in comparison.

** Medical conditions that fall under ADA
GENDER

- Q. If an employer provides telework, modified schedules, or other benefits to employees with school-aged children due to school closures or distance learning during the pandemic, are there sex discrimination considerations?

- A. Employers may provide any flexibilities as long as they are not treating employees differently based on sex or other EEO-protected characteristics.
· Q. Due to the pandemic, may an employer exclude an employee from the workplace involuntarily due to pregnancy?

· A. No. Even if motivated by benevolent concern, an employer is not permitted to single out workers on the basis of pregnancy for adverse employment actions, including involuntarily leave, layoff, or furloughs.
PREGNANCY

• Q. Is there a right to accommodation based on pregnancy during the pandemic?

• A. Two federal laws that may trigger accommodation for employees based on pregnancy.
  • Pregnancy-related medical conditions are protected under the ADA
  • Title VII protects women affected by pregnancy, childbirth, and related medical conditions and they must be treated the same as others who are similar in their ability or inability to work.
ACCOMMODATION PROCESS - COVID

- COVID-19 Accommodation Process
- Complies with ADA accommodation requirements (disability)
- Complies with Title VII accommodation requirements (religion)
- Is non-discriminatory (gender, disability, religion, familial status, association with a disabled person)
- Is applied consistently
DECISIONS

- Option 1: Provide only legally required accommodations (disability and religion + FMLA, FFCRA)
- Option 2: Reasonably accommodate all employees whose request is based on any protected class
  - Above categories
  - Age, pregnancy, familial status, disability association
- Option 3: Reasonably accommodate all employees whose request is related to COVID
  - Above categories
  - General concern/fear about COVID, family members who work in healthcare, etc.
EMPLOYEE REQUEST

- “I’m not comfortable returning to in-person work yet because I am pregnant.”
- “I’m not able to return to work because I am recovering from COVID-19.”
- “I am not able to wear gloves because of a latex allergy.”
- “I am not able to wear a face covering due to my religion.”
- “I have a hearing difficulty, and face masks make it difficult for me to read lips.”
CREATE AN ACCOMMODATION PROCESS

- Forms?
- Emails?
- In-person?
INTERACTIVE ACCOMMODATION PROCESS

- Review nature of request
- Evaluate potential accommodations
- Assess undue hardship
- NOTE: Due to nature of COVID-19, the length of many requests may be indefinite or unknown. That is a relevant factor for both reasonableness and undue hardship.
Remember: ADA reasonable accommodation is required only for an employee’s own medical condition to the extent that

- The medical condition meets the definition of a disability, and
- The accommodation would allow the employee to perform his/her EJF
- Remote work and Leave can be examples of reasonable accommodations
ADA: ASSOCIATION

- Prohibits employment discrimination against a person, whether or not he or she has a disability, because of his or her known relationship or association with a person with a known disability.

- This means that an employer is prohibited from making adverse employment decisions based on unfounded concerns about the known disability of anyone whom the employee has a relationship or association.
What types of employer conduct does the association provision prohibit?

- An employer may not deny an employee any other benefits or privileges of employment that are available to others because of the disability of someone with whom the employee has a relationship or association.

- An employer may not subject someone to harassment (and, shall ensure that other employees do not harass the individual) based on that person’s association with a person with a disability.
ADA ASSOCIATION AND COVID-19

- Requests for Workplace Accommodations
  - NOT required to engage in the ADA reasonable accommodation process outside of requests related to the employee’s own disability

- However:
  - IF you grant accommodation requests from employees for reasons other than the employee’s own disability, must ensure you are doing so on a non-discriminatory basis
SCENARIO 1.

- City I is located in Northern Arkansas, not Walnut Ridge – definitely not, and was able to adjust to remote work for all employees during the first stages of COVID-19.

- Now that City is bringing certain positions/employees back for on-site work.

- Edna Employee lives with her elderly parents, and is frightened that if she comes back to work, she could expose herself- and her parents- to COVID-19.

- Edna Employee requests to continue her remote-work assignment because of her close contact/association with her elderly parents.
SCENARIO 1.

- Is City required to grant Edna’s request?

- If not, what should City consider when evaluating Edna’s request?
  - NOT an ADA Association issue (elderly ≠ disabled)
SCENARIO 2.

- City II is located in Southern Arkansas, not-Stuttgart, and was able to adjust to remote work for all employees during the first stages of COVID-19.

- City II is bringing certain positions/employees back for on-site work.

- Lanny Layman’s spouse has a chronic breathing condition, and is frightened that if he comes back to work, he could expose himself and his spouse to COVID-19.
Lanny Layman requests to continue his remote-work assignment because of his close contact/association with his spouse.

Is City II required to grant Lan-man’s request?

If not, what should City consider when evaluating his request?
SCENARIO 3.

- Wilksy Johnson has an approved one-week paid vacation coming up at the end of July.
- His mother is coming into town for a visit
- His mother has a chronic breathing condition
- Wilksy requests a two-week remote work assignment and/or unpaid leave because he wants to self-quarantine before her visit to limit any potential COVID-19 exposure
SCENARIO 3.

- City recently granted Kara Co-Worker’s request for an unpaid leave to attend a parent-child camp with his child in June, so that Collin could save his PTO for a planned vacation in December.

- Is City required to grant Edgar’s request?

- If not, what should City consider when evaluating Edgar’s request?
ACCOMMODATION REQUESTS AND COVID

• Analysis Steps:
  • Must I consider this request?
    • What should I do to evaluate the request properly?

• May I consider this request?
  • How should I evaluate requests?
SCHOOLS OUT FOR SUMMER; DO I STILL PAY FFCRA LEAVE?

- Expanded FMLA
- Up to 12 weeks (10 paid)
- Common reason:
  - Employee is caring for his or her child whose school, place of care is closed (or child care provider is unavailable) due to a COVID-19 related reason.

- No. Paid sick leave and emergency family and medical leave are not available for this qualifying reason if the school or child care provider is closed for summer vacation, or any other reason that is not related to COVID-19. However, the employee may be able to take leave if his or her child’s care provider during the summer—a camp or other programs in which the employee’s child is enrolled—is closed or unavailable for a COVID-19 related reason.
Section 2302 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) allows the deferral of the employer’s portion of the employment tax deposits and payments through December 31, 2020.

The deferral applies to deposits and payments of the employer’s share beginning on March 27, 2020 and ending December 31, 2020.

The deferred deposits of the employer’s share of social security tax must be deposited by:

- 50% of the deferred amount by December 31, 2021
- The remaining amount of December 31, 2022
• The CARES Act provides unemployment assistance for governments as follows:
  • The federal government will reimburse governments for half of the costs they incur to pay for all unemployment benefits through December 31, 2020 (Section 2103)
  • The federal government will provide funding to provide an additional $600 per week in addition to the weekly unemployment benefit through July 31, 2020 (Section 2104)
  • If individuals remain unemployed after state benefits are no longer available, the federal government will fund up to an additional 13 weeks of unemployment benefits (Section 2107)
EEOC TECHNICAL ASSISTANCE

- The Equal Employment Opportunity Commission has issued technical assistance questions and answers titled What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

- The technical assistance is available at: https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitation_act_coronavirus.cfm
Governments are implementing changes to their vacation policies since employees are restricted from traveling:
- Forgoing use or lose leave
- Extending vacation carryover deadline by 6 month
- Increasing the maximum number of hours that can be carried over
QUESTIONS?

- [https://www.dol.gov/agencies/whd/pandemic/ffcra-questions](https://www.dol.gov/agencies/whd/pandemic/ffcra-questions)