PRESENTED AT

TEXAS CITY ATTORNEY'S ASSOCIATION
Fall Meeting

Virtual Event
October 15, 2020

Human Resources and COVID 19

Matthew C. G. Boyle
BOYLE & LOWRY, L.L.P.
4201 Wingren, Suite 108
Irving, Texas 75062
mboyle@boyle-lowry.com
(972)650-7100

Human Resources and Covid-19

COVID-19 has had an extensive impact on the workplace. Communicable diseases like coronavirus and the respiratory illness it causes, COVID-19, can bring a busy municipal workforce to a standstill. The World Health Organization (WHO) has declared COVID-19 to be an international pandemic. It is important for employers to be aware of these changes and adjust accordingly. COVID-19 has impacted not only the daily life of the workplace but also things like the procedures and policies governing the hiring and firing of employees. A good example of the COVID-19 impact is the challenge to maintain a safe and productive workplace while ensuring compliance with equal opportunity laws and employee privacy. While certain aspects of law have changed to address this pandemic, the core principles of the law have not. As workplace restrictions begin to be lifted and employees return to the physical site of their workplace understanding what the new normal is will be up to their city employers. New safety measures will be required and implementing them could be expensive including providing items like face masks, protective gear, and enough office space to socially distance all employees. A city's desire/ability to allow employees to work from home is another big decision facing employers. Lastly, if and when a COVID-19 vaccine comes available, can and should a city mandate its employees to take it? Today the workplace is facing major changes as a result of the COVID-19 pandemic. In order to adjust to these changes and create a balanced productive "new normal," cities and their employees must be aware of these changes.

I. Employee Wellness

In the climate of fear created by COVID-19, one of the threshold issues that cities must deal with is doing their part to ensure the health of their employees who are coming into work. Employee safety measures range from taking temperatures to requiring COVID testing for all employees. Instituting health screening protocols makes sense, but doing so raises the specter of a number of human resource and legal issues. On the human resources side, the first goal should be to protect the health of the workforce so that the workplace is safe and not a place where the spread of viruses is promulgated. That level of protection will give the city's employees comfort so that they can focus on the task at hand without the unnecessary distraction of worrying about getting infected at work. On the legal front, healthcare inquiries implicate a number of statutes: the Americans with Disabilities Act (ADA) and the Rehabilitation Act (which include the requirement for reasonable accommodation and non-discrimination based on disability, and rules about employer medical examinations and inquiries), Title VII of the Civil Rights Act (which prohibits discrimination based on race, color, national origin, religion, and sex, including pregnancy), the Age Discrimination in Employment Act (ADEA) which prohibits discrimination based on age, 40 or older), and the Genetic Information Nondiscrimination Act (GINA), and the Health Insurance Portability and Accountability Act (HIPAA). Maintaining the appropriate level of privacy for impacted employees must be maintained at all times. Failure to appropriately tend to employee wellness can lead to a significant reduction in the availability of city employees and a corresponding loss in production.

A. Screening

Employees who are not feeling well should be trained and instructed to stay home. Every city should have already adopted a pre-screening requirement that applies to all employees on a daily basis. The screening measure can utilize a number of formats, from good old fashioned paper checklists to a fully digital platform. Employee privacy must be maintained and the responses to these inquiries must be maintained confidentially at all times. Such information should be shared only on a need to know basis. Regardless, the basics of the pre-screening should be focused on the overall health and wellness of the employee, specifically including the elements most commonly associated with COVID-19. Some of the most commonly utilized inquiries include:

1. Has the employee travelled out of the country or to any area with a COVID-19 outbreak?
2. Has the employee been exposed to anyone diagnosed with COVID-19?
3. Has the employee experienced a fever in excess of 100 Fahrenheit in the last two weeks?
4. Does the employee currently have a cough?

Positive responses to any of these should require that the employee be kept out of the workplace and either sent home to quarantine and monitor or be sent to the doctor for evaluation. Given that these questions involve an employee's personal health, care must be taken to ensure the appropriate level of privacy for any completed forms. The importance of keeping ill employees out of the workplace cannot be overstated so these standards should be regularly emphasized across all employee groups. In addition to the above, the Equal Employment Opportunity Commission (EEOC) has stipulated that:

- An employer may screen applicants for symptoms of COVID-19 after making a conditional job offer.
- An employer may delay the start date of an applicant who has COVID-19 or symptoms associated with it.
- An employer may withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it. Based on current CDC guidance, the individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer, the EEOC explained.

B. Workplace safety measures

Cities have to ensure their workplaces are as safe as possible. Employees and customers alike may have fears of returning to business as usual; preparing for and communicating how safety is a top priority will allay fears and increase productivity. Safety measures every city should consider include:

- Implementing employee health screening procedures as noted above.
- Developing an exposure-response plan that addresses:

        - Isolation, containment and contact tracking procedures.
        - Stay-at-home requirements.
        - Exposure communications to affected staff.
    - Providing personal protective equipment (PPE) such as:
        - Masks, gloves, face shields, etc.
        - Personal hand sanitizer.
    - Detailing cleaning procedures and procuring ongoing supplies.
    - Establishing physical distancing measures within the workplace:
        - Staggered shifts and lunch/rest breaks.
        - Rotating weeks in the office and working remotely.
        - Moving workstations to increase separation distance.
        - Implementing one-way traffic patterns throughout workplace.
    - Restricting business travel:
        - Start with essential travel only and define what that is.
        - Follow government guidance to ease restrictions over time.
    - Defining customer and/or visitor contact protocols such as:
        - Directing customer traffic through workplace.
        - Limiting the number of customers in any area at one time.
        - No handshake greetings, remain 3-6 ft. apart.
        - Using video or telephone conferencing instead of in-person client meetings.
        - Providing contactless pickup and delivery of products.
    - Understanding and complying with Occupational Safety and Health Administration (OSHA) record-keeping and reporting obligations:
        - Identify positions, if any, with the potential for occupational exposure to the coronavirus.
        - Review OSHA regulation 29 CFR § 1904 to determine work-relatedness of illnesses.

C. Taking Temperatures

In addition to the written pre-screening noted above, it may also be prudent to consider requiring a temperature check before reporting to work. The significance of a high temperature has been the subject of debate in that it can be an indicator of a wide range of health issues that may be wholly unrelated to COVID-19. The Centers for Disease Control and Prevention (CDC) and state and local health authorities have acknowledged community spread of COVID-19 and have issued related precautions encouraging employers to measure employees' body temperature. The EEOC has previously concluded that measuring an employee's body temperature is a medical examination. In addition, the ADA prohibits medical examinations unless they are job-related and consistent with business necessity. So we must consider the safety, privacy and employee relations concerns in taking temperatures. An employee who has a fever at or above 100.4 degrees Fahrenheit or who is experiencing symptoms of COVID-19 should be sent home to quarantine and/or to visit their doctor. The temperature reading should be kept confidential, and the person administering the temperature check should be trained on the procedure. With proper training, personal protective equipment, a no-touch thermometer and an understanding of confidentiality considerations, a non-medical professional can take

temperatures and help keep the workplace safe. Employers should avoid employees lining up and waiting for their temperature to be taken. Employee's temperatures should be taken as privately as possible and care should be taken to keep the identity of any employees with fevers confidential. In accordance with the FLSA, time spent waiting for the health screenings should be recorded as time worked for non-exempt employees. In addition, the city may take an applicant's temperature as part of a post-offer, pre-employment medical examination.

D. Masks and Protective Clothing

The appropriate level of personal protective equipment ("PPE") should be required of and provided for all employees based on their regular scope of work. In accordance with Governor Abbott's Orders, any person who cannot maintain effective social distancing must don a mask or face covering and that rule should be applied to all city workplaces. Cities can and should enforce this requirement on all of their employees. Public safety employees who are forced to deal with the public should be provided PPE suitable to those tasks. Employees should be trained in the correct protocol for donning PPE to include the full deployment of PPE any time they are responding to a call or situation where PPE is necessary (e.g. responding to a call from an address with a known COVID-19 patient). The city bears the burden to provide the necessary supply of PPE for its employees.

E. What do we do if all of the protective measures fail?

Sometimes, even the most robust measures do not succeed in keeping city employees protected from COVID-19. If a city employee tests positive for COVID-19, then the city must act promptly to isolate that employee by sending them home, and then conducting contact tracing to determine who the employee may have exposed to COVID-19. Similarly, caution must be given to how the city treats employees who have been exposed to COVID-19. The CDC's guidance relative to isolation and quarantine has evolved into the protocol described below. When it comes to informing those co-workers, care must be taken to protect the medical privacy of the sick employee.

1. Exposure, Quarantine, and Isolation

City employees who have been in close contact with a person who has tested positive for COVID-19 must stay home for a period of 14 days after their last contact with the positive case. The current guidance from the CDC defines close contact as:

- Being within 6 feet of someone who has COVID-19 for a total of 15 minutes or more
- Providing care at home to someone who is sick with COVID-19
- Having direct physical contact with the person (hugged or kissed them)
- Having shared eating or drinking utensils
- The positive employee sneezed, coughed, or somehow got respiratory droplets on you

CDC guidance on this issue is further addressed in Appendix A.

2. Notice

If a city employee tests positive for COVID-19, care must be taken to inform those persons who have been exposed as described in the scenarios above. While the name of the infected employee should not be disclosed, each exposed employee should be provided notice. A suggested form of notice is as follows:

NOTICE

We have been notified that one of our employees has been diagnosed with the novel coronavirus, also known as COVID-19. As such, employees working at [location] may have been exposed to this virus. According to the Centers for Disease Control and Prevention (CDC), the virus is thought to spread mainly between people who are in close contact with one another (within about 6 feet) through respiratory droplets produced when an infected person coughs or sneezes. If you experience symptoms of respiratory illness (fever, coughing or shortness of breath), please inform human resources at [contact information] and contact your health care provider. The City of _____ will keep all medical information confidential and will only disclose it on a need-to-know basis. The City of _____ is taking measures to ensure the safety of our employees during this coronavirus outbreak, including:

[Describe the measures taken, such as disinfecting workspaces, offering telework, etc.]

F. COVID-19 Back-to-Work Checklist

Returning employees to the workplace during and after the COVID-19 pandemic won't be as simple as announcing a reopening or return-to-the-workplace date and carrying on business as usual. Not only will many workplaces be altered initially, some changes may be long term, even beyond the imagined "finish line" of a widely available vaccine or treatment. The details of each city's plan to return will look different, but there are several key issues most will need to understand and start preparing for now.

1. Remote work.

Telecommuting has proven to work well during the pandemic for some employers and employees. Using it not only as a short-term emergency tool to survive the next year but also as a permanent work/life balance and cost-saving measure should be considered.

Actions to consider include:

- Continuing to allow remote work where possible to keep employees safe.
- Staggering weeks in office and at home among team members or part-time remote work on alternate weekdays.
- Responding to employee requests to continue to work from home, including long-term arrangements.

- Updating technology to support virtual workers.
- Consider the long-term cost savings or impact of offering permanent remote work.

2. Communications.

Establishing a clear communication plan will allow employees and customers to understand how the organization plans to reopen or re-establish business processes.

Topics to cover may include:

- How staying home if sick and physical distancing policies are being used to protect workers and customers.
- Detail what training on new workplace safety and disinfection protocols have been implemented.
- Have exposure-response communications available for any affected employees and customers.
- Have media communications ready to release on topics such as return-to-work timetables, safety protections in place, and other ways the company is supporting workers and customers. Prepare to respond to the media for workplace exposures.

3. New-hire paperwork.

Employees returning to work who remained on the payroll would generally not need to complete new paperwork. However, for those separated from employment, such as laid-off workers, it may be best to follow normal hiring procedures.

- Determine employment application and benefits enrollment requirements for re-hired workers.
- Decide whether full or adjusted orientation procedures will be utilized.
- Submit new-hire reports for new and rehired workers.
- Notify state unemployment agencies of recalled workers, whether rehired or not.
- Address I-9 issues as noted above.

4. Policy changes.

It is no longer business as usual, and employers will likely need to update or create policies to reflect the new normal. Some examples include:

- Paid-leave policies adjusted to reflect regulatory requirements and actual business needs.
- Attendance policies relaxed to encourage sick employees to stay home.
- Time-off request procedures clarified to indicate when time off can be required by the employer, should sick employees need to be sent home.
- Flexible scheduling options implemented allowing for compressed workweeks and flexible start and stop times.
- Meal and rest break policies adjusted to stagger times and processes implemented to encourage physical distancing.

- Travel policies updated to reflect essential versus non-essential travel and the impact of domestic or global travel restrictions.
- Telecommuting policies detailed to reflect the type of work that can be done remotely and the procedures for requesting telework.
- Information technology policies revised to reflect remote work hardware, software, and support.

II. I-9s

During these times of social distancing, stay-at-home orders, quarantines, and working from home, it has been proven increasingly difficult to physically inspect the documents necessary to verify a new employee's eligibility to work by completing the I-9 form. Thankfully the Department of Homeland Security (DHS) announced that it will exercise discretion to defer the physical presence requirements associated with Employment Eligibility Verification (Form I-9) under Section 274A of the Immigration and Nationality Act (INA). This provision only applies to employers and workplaces that are operating remotely. If there are employees physically present at a work location, *no exceptions* are being implemented at this time for in-person verification of identity and employment eligibility documentation for Form I-9, Employment Eligibility Verification. Cities with employees taking physical proximity precautions due to COVID-19 will not be required to review the employee's identity and employment authorization documents in the employee's physical presence. However, employers must inspect the Section 2 documents remotely (e.g., over video link, fax or email, etc.) and obtain, inspect, and retain copies of the documents within three business days for purposes of completing Section 2. Employers also should enter "COVID-19" as the reason for the physical inspection delay in the Section 2 Additional Information field once physical inspection takes place after normal operations resume. Once the documents have been physically inspected, the city should add "documents physically examined" with the date of inspection to the Section 2 additional information field on the Form I-9, or to section 3 as appropriate. These provisions may be implemented by cities up to three business days after the termination of the National Emergency. Employers who avail themselves of this option must provide written documentation of their remote onboarding and telework policy for each employee. This burden rests solely with the employers. Going forward DHS will continue to monitor the ongoing National Emergency and provide updated guidance as needed. Employers are required to monitor the DHS and ICE websites for additional updates regarding when the extensions will be terminated and normal operations will resume.

III. Worker's Compensation

City employees who are injured at work are entitled to the coverage and protections of worker' compensation. When a city employee tests positive for COVID-19, a threshold question arises as to whether or not the injury occurred "at work". The exposure to COVID-19 is similar to an exposure to other illnesses (like tuberculosis or the flu) in that exposure itself does not constitute an injury. An "injury", from a workers' compensation standpoint (in this case, a potential occupational disease), occurs when someone contracts that disease and can demonstrate that their exposure was work related. With the exception of first

responders, this determination will be made on a case by case basis. The TML Intergovernmental Risk Pool encourages members to report a claim to the Pool when the member knows about an injury. The best option is for the member to call the Workers' Compensation Claims Department to discuss the facts of the exposure with their respective adjuster, supervisor or claims management. The facts will determine the response to the fund member. Generally speaking, the mere exposure to COVID-19 will not trigger a workers' compensation claim. The Pool asks its members to document any exposures they may become aware of but there is no need to submit those exposures to the Pool as a First Notice of Loss (FNOL). Prematurely filing a claim could result in an administrative denial for lack of a diagnosis and create additional misunderstanding and confusion. The investigation will hinge on whether the worker experienced a work-related exposure. As noted below, first responders are at a greater risk than the ordinary public and different statutes apply to them. For non-first responders, the more widespread the outbreak, the more difficult it becomes to identify a specific time, place and event for when the exposure occurred. Those employees who work in an office will have a more difficult time demonstrating their jobs put them at a higher risk than the ordinary public. As employees go to public places like the grocery store, pharmacy, etc. the greater chance employees could be exposed during their time away from work. A workers' compensation investigation conducted by the carrier will determine the eligibility for benefits by sorting through those factual issues.

First responder employees are treated differently because their service on the front lines puts them at a greater risk to contract COVID-19 than most other employees. A positive diagnosis is required to establish a compensable injury. A positive COVID-19 diagnosis includes a positive test, a presumptive positive test (as determined by the CDC), or in the absence of a test, a diagnosis of COVID-19 by a doctor. For first responders that have been on duty and who contract COVID-19 during this time, they are generally entitled to all workers' compensation benefits provided to first responders under the workers' compensation statute and the presumption statute (Chapter 607 of the Texas Government Code). Based on the built-in presumption of coverage, it is almost certain that worker's compensation benefits will be available for public safety employees.

IV. FFCRA: Families First Coronavirus Response Act: Employee Paid Leave Rights

The Families First Coronavirus Response Act (FFCRA or Act) requires certain employers to provide employees with paid sick leave or expanded family and medical leave for specified reasons related to COVID-19. The Department of Labor's (Department) Wage and Hour Division (WHD) administers and enforces the new law's paid leave requirements. These provisions will apply from the effective date through December 31, 2020.

Generally, the Act provides that employees of covered employers are eligible for: Two weeks (up to 80 hours) of paid sick leave at the employee's regular rate of pay where the employee is unable to work because the employee is quarantined (pursuant to Federal, State, local government order, or advice of a health care provider), and/or experiencing

COVID-19 symptoms and seeking a medical diagnosis; or two weeks (up to 80 hours) of paid sick leave at two-thirds the employee's regular rate of pay because the employee is unable to work, or because of a bona fide need to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a health care provider), or to care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor; and up to an additional 10 weeks of paid expanded family and medical leave at two-thirds the employee's regular rate of pay where an employee, who has been employed for at least 30 calendar days, is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

A. Covered Employers

The paid sick leave and expanded family and medical leave provisions of the FFCRA apply to certain public employers, and private employers with fewer than 500 employees. Most employees of the federal government are covered by Title II of the Family and Medical Leave Act, which was not amended by this Act, and are therefore not covered by the expanded family and medical leave provisions of the FFCRA. However, federal employees covered by Title II of the Family and Medical Leave Act are covered by the paid sick leave provision.

All employees of covered employers are eligible for two weeks of paid sick time for specified reasons related to COVID-19. Employees employed for at least 30 days are eligible for up to an additional 10 weeks of paid family leave to care for a child under certain circumstances related to COVID-19.

Where leave is foreseeable, an employee should provide notice of leave to the employer as is practicable. After the first workday of paid sick time, an employer may require employees to follow reasonable notice procedures in order to continue receiving paid sick time.

B. Qualifying Reasons for Leave

Under the FFCRA, an employee qualifies for paid sick time if the employee is unable to work (or unable to telework) due to a need for leave because the employee: 1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19; 2. has been advised by a health care provider to self-quarantine related to COVID-19; 3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis; 4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2); 5. is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or 6. is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury. Under the FFCRA, an employee qualifies for

expanded family leave if the employee is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19.

C. Duration of Leave

A full-time employee is eligible for 80 hours of leave, and a part-time employee is eligible for the number of hours of leave that the employee works on average over a two-week period if the employee is; subject to a Federal, State, or local quarantine or isolation order related to COVID-19; or has been advised by a health care provider to self-quarantine related to COVID-19; or is experiencing COVID-19 symptoms and is seeking a medical diagnosis; or is caring for an individual subject to an order described in (1) or self-quarantine as described in (2); or is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury:

If an employee is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19 then a full-time employee is eligible for up to 12 weeks of leave (two weeks of paid sick leave followed by up to 10 weeks of paid expanded family & medical leave) at 40 hours a week, and a part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

D. Calculation of Pay

Employees taking leave are entitled to pay at either their regular rate or the applicable minimum wage, whichever is higher, up to $511 per day and $5,110 in the aggregate (over a 2-week period) if the employee is; subject to a Federal, State, or local quarantine or isolation order related to COVID-19; or has been advised by a health care provider to self-quarantine related to COVID-19; or is experiencing COVID-19 symptoms and is seeking a medical diagnosis. Employees taking leave are entitled to pay at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to $200 per day and $2,000 in the aggregate (over a 2-week period) if the employee is; caring for an individual subject to an order described in (1) or self-quarantine as described in (2); or, is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

If the employee is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19, the employees taking leave are entitled to pay at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to $200 per day and $12,000 in the aggregate (over a 12-week period).

V. COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

The EEOC enforces workplace anti-discrimination laws, including the ADA and the Rehabilitation Act (which include the requirement for reasonable accommodation and non-discrimination based on disability and rules about employer medical examinations and

inquiries), Title VII of the Civil Rights Act (which prohibits discrimination based on race, color, national origin, religion, and sex, including pregnancy), the ADEA, and the GINA.

Title I of the ADA applies to all state and local government employers. As such, the EEO laws, including the ADA and Rehabilitation Act, continue to apply during the time of the COVID-19 pandemic but they do not interfere with or prevent employers from following the guidelines and suggestions made by the CDC or state/local public health authorities about steps employers should take regarding COVID-19. Cities should remember that guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, cities should continue to follow the most current information on maintaining workplace safety.

A. Disability-Related Inquiries and Medical Exams

During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA. Cities should rely on the CDC, other public health authorities, and reputable medical sources for guidance on emerging symptoms associated with the disease.

B. Confidentiality of Medical Information

The ADA requires that all medical information about a particular employee be stored separately from the employee's personnel file, thus limiting access to this confidential information. An employer may store all medical information related to COVID-19 in existing medical files. This includes an employee's statement that he has the disease or suspects he has the disease, or the employer's notes or other documentation from questioning an employee about symptoms. Additionally, an employer must maintain the confidentiality of the results of a required temperature check if the employer keeps a log of the results. However, an employer can disclose the names of an employee to a public health agency if that employee has COVID-19.

Similarly, a temporary staffing agency or contractor may notify the employer and disclose the name of the employee who has COVID-19 because the employer may need to determine if this employee had contact with anyone in the workplace.

C. Hiring and Onboarding

A city may screen job applicants for symptoms of COVID-19 after making a conditional job offer as long as it does so for all entering employees in the same type of job. This ADA rule applies whether or not the applicant has a disability. In addition and as noted above, an employer can take an applicant’s temperature as part of a post-offer, pre-employment medical exam. Any medical exams are permitted after an employer has made a conditional offer of employment.

An employer can delay the start date of an applicant who has COVID-19 or associated symptoms or withdraw a job offer when it needs an applicant to start immediately. However, an employer cannot postpone the start date or withdraw a job offer because the individual is 65 years old or pregnant, both of which place them at higher risk of COVID-19. The fact that the CDC has identified those who are 65 or older, and pregnant women, as being at greater risk does not justify unilaterally postponing the start date or withdrawing a job offer. However, an employer may choose to allow telework or to discuss with these individuals if they would like to postpone the start date.

D. Reasonable Accommodation

There may be reasonable accommodations that could offer protection to an individual whose disability puts him at greater risk from COVID-19 and who therefore requests such actions to eliminate possible exposure. Even with the constraints imposed by a pandemic, some accommodations may meet an employee's needs on a temporary basis without causing undue hardship on the employer.

Low-cost solutions achieved with materials already available or easily obtained may be effective. If not already implemented for all employees, accommodations for those who request reduced contact with others due to a disability may include changes to the work environment such as designating one-way aisles, using plexi-glass, tables, or other barriers to ensure minimum distances between customers and coworkers whenever feasible per CDC guidance or other accommodations that reduce chances of exposure.

Flexibility by employers and employees is important in determining if some accommodation is possible in the circumstances. Temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment may also permit an individual with a disability to safely perform the essential functions of the job while reducing exposure to others in the workplace or while commuting.

An employee with a pre-existing mental illness or disorder that has been exacerbated by the COVID-19 pandemic may request a reasonable accommodation. As with any accommodation request, employers may: ask questions to determine whether the condition is a disability, discuss with the employee how the requested accommodation would assist him and enable him to keep working, explore alternative accommodations that may effectively meet his needs, and request medical documentation if needed.

An employee who was already receiving a reasonable accommodation prior to the COVID-19 pandemic may be entitled to an additional or altered accommodation, absent undue hardship. For example, an employee who is teleworking because of the pandemic may need a different type of accommodation than what he uses in the workplace. The employer may discuss with the employee whether the same or a different disability is the basis for this new request and why an additional or altered accommodation is needed.

A city may ask questions or request medical documentation to determine whether the employee has a "disability" as defined by the ADA. Similarly, an employer may ask questions or request medical documentation to determine whether the employee's disability necessitates an accommodation, either the one he requested or any other.

Given the pandemic, some employers may choose to forgo or shorten the exchange of information between an employer and employee known as the "interactive process" (discussed above) and grant the request. In addition, when government restrictions change, or are partially or fully lifted, the need for accommodations may also change. This may result in more requests for short-term accommodations. Employers may wish to adapt the interactive process and devise end dates for the accommodation to suit changing circumstances based on public health directives. Whatever the reason for shortening or adapting the interactive process, an employer may also choose to place an end date on the accommodation (for example, either a specific date such as May 30, or when the employee returns to the workplace part- or full-time due to changes in government restrictions limiting the number of people who may congregate). Employers may also opt to provide a requested accommodation on an interim or trial basis, with an end date, while awaiting receipt of medical documentation. Choosing one of these alternatives may be particularly helpful where the requested accommodation would provide protection that an employee may need because of a pre-existing disability that puts her at greater risk during this pandemic. This could also apply to employees who have disabilities exacerbated by the pandemic. Employees may request an extension that an employer must consider, particularly if current government restrictions are extended or new ones adopted.

Cities may ask employees with disabilities to request accommodations that they believe they may need when the workplace re-opens. Cities may begin the "interactive process", the discussion between the employer and employee focused on whether the impairment is a disability and the reasons that an accommodation is needed.

A city does not have to provide a particular reasonable accommodation if it poses an "undue hardship," which means "significant difficulty or expense." A city may consider whether current circumstances create "significant difficulty" in acquiring or providing certain accommodations considering the facts of the particular job and workplace. For example, it may be significantly more difficult in this pandemic to conduct a needs assessment or to acquire certain items, and delivery may be impacted, particularly for employees who may be teleworking. It may be significantly more difficult to provide employees with temporary assignments, to remove marginal functions, or to readily hire temporary workers for specialized positions. If a particular accommodation poses an undue hardship, employers and employees should work together to determine if there may be an alternative that could be provided that does not pose such problems.

Prior to the COVID-19 pandemic, most accommodations did not pose a significant expense when considered against an employer's overall budget and resources (always considering the budget/resources of the entire entity and not just its components). But, the sudden loss of some or all of an employer's income stream because of this pandemic is a relevant consideration. Also relevant is the amount of discretionary funds available at this

time when considering other expenses and whether there is an expected date that current restrictions on an employer's operations will be lifted (or new restrictions will be added or substituted). These considerations do not mean that an employer can reject any accommodation that costs money. An employer must weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic. For example, even under current circumstances, there may be many no-cost or very low-cost accommodations.

The ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom she is associated. For example, an employee without a disability is not entitled under the ADA to telework as an accommodation in order to protect a family member with a disability from potential COVID-19 exposure. Of course, an employer is free to provide such flexibilities if it chooses to do so. An employer choosing to offer additional flexibilities beyond what the law requires should be careful not to engage in disparate treatment on a protected EEO basis.

E. Pandemic-Related Harassment Due to National Origin, Race, or Other Protected Characteristics

Cities can help reduce the chance of harassment by explicitly communicating to the workforce that fear of the COVID-19 pandemic should not be misdirected against individuals because of a protected characteristic, including their national origin, race, or other prohibited bases.

A city may remind all employees that it is against the federal EEO laws to harass or otherwise discriminate against co-workers based on race, national origin, color, sex, religion, age (40 or over), disability, or genetic information. It may be particularly helpful for employers to advise supervisors and managers of their roles in watching for, stopping, and reporting any harassment or other discrimination. An employer may also make clear that it will immediately review any allegations of harassment or discrimination and take appropriate action. Managers should be alert to demeaning, derogatory, or hostile remarks directed to employees who are or are perceived to be of Chinese or other Asian national origin, including about the coronavirus or its origins.

All cities should ensure that management understands in advance how to recognize such harassment. Harassment may occur using electronic communication tools – regardless of whether employees are in the workplace, teleworking, or on leave – and also in person between employees at the worksite. Harassment of employees at the worksite may also originate with contractors, customers, clients, or, for example, with patients or their family members at health care facilities, assisted living facilities, and nursing homes. Managers should know their legal obligations and be instructed to quickly identify and resolve potential problems before they rise to the level of unlawful discrimination.

Employers may choose to send a reminder to the entire workforce noting Title VII's prohibitions on harassment, reminding employees that harassment will not be tolerated,

and inviting anyone who experiences or witnesses workplace harassment to report it to management. Employers may remind employees that harassment can result in disciplinary action up to and including termination.

F. Return to Work

The ADA permits employers to make disability-related inquiries and conduct medical exams if job-related and consistent with business necessity. Inquiries and reliable medical exams meet this standard if it is necessary to exclude employees with a medical condition that would pose a direct threat to health or safety. A direct threat is to be determined based on the best available objective medical evidence. The guidance from CDC or other public health authorities is such evidence. Therefore, employers will be acting consistent with the ADA as long as any screening implemented is consistent with advice from the CDC and public health authorities for that type of workplace at that time.

An employer may require employees to wear protective gear such as masks and gloves and observe infection control practices like regular hand washing and social distancing protocols. However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, modified face masks for interpreters or others who communicate with an employee who uses lip reading, or gowns designed for individuals who use wheelchairs), or a religious accommodation under Title VII (such as modified equipment due to religious garb), the employer should discuss the request and provide the modification or an alternative if feasible and not an undue hardship on the operation of the employer's business under the ADA or Title VII.

If an employee is at a higher risk for severe illness from COVID-19 and needs an accommodation that employee or a third party, such as an employee's doctor must let the employer know that she needs a change for a reason related to a medical condition. The employee or her representative should communicate that she has a medical condition that necessitates a change to meet a medical need. After receiving a request, the employer may ask questions or seek medical documentation to help decide if the individual has a disability and if there is a reasonable accommodation, barring undue hardship, which can be provided.

If an employer is concerned about an employee's health being jeopardized upon returning to the workplace, the ADA does not allow an employer to exclude the employee – or take any other adverse action – solely because the employee has a disability that the CDC identifies as potentially placing him at "higher risk for severe illness" if he gets COVID-19. Under the ADA, such action is not allowed unless the employee's disability poses a "direct threat" to his health that cannot be eliminated or reduced by reasonable accommodation.

The ADA direct threat requirement is a high standard. As an affirmative defense, direct threat requires an employer to show that the individual has a disability that poses a "significant risk of substantial harm" to his own health under 29 C.F.R. section 1630.2(r) (regulation addressing direct threat to health or safety of self or others). A direct threat

assessment cannot be based solely on the condition being on the CDC's list. The determination must be an individualized assessment based on a reasonable medical judgment about this employee's disability, not the disability in general, using the most current medical knowledge and/or on the best available objective evidence. The ADA regulation requires an employer to consider the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm. Analysis of these factors will likely include considerations based on the severity of the pandemic in a particular area and the employee's own health (for example, is the employee's disability well-controlled), and his particular job duties. A determination of direct threat also would include the likelihood that an individual will be exposed to the virus at the worksite. Measures that an employer may be taking in general to protect all workers, such as mandatory social distancing, would also be relevant.

Even if an employer determines that an employee's disability poses a direct threat to his own health, the employer still cannot exclude the employee from the workplace or take any other adverse action unless there is no way to provide a reasonable accommodation (absent undue hardship). The ADA regulations require an employer to consider whether there are reasonable accommodations that would eliminate or reduce the risk so that it would be safe for the employee to return to the workplace while still permitting performance of essential functions. This can involve an interactive process with the employee. If there are not accommodations that permit this, an employer must consider accommodations such as telework, leave, or reassignment (perhaps to a different job where it may be safer for the employee to work or that permits telework). An employer may only bar an employee from the workplace if, after going through all these steps, the facts support the conclusion that the employee poses a significant risk of substantial harm to himself that cannot be reduced or eliminated by reasonable accommodation.

Accommodations may include additional or enhanced protective gowns, masks, gloves, or other gear beyond what the employer may generally provide to employees returning to its workplace. Accommodations also may include additional or enhanced protective measures, such as erecting a barrier that provides separation between an employee with a disability and coworkers/the public or increasing the space between an employee with a disability and others. Another reasonable accommodation may be the elimination or substitution of particular "marginal" functions (less critical or incidental job duties as distinguished from the "essential" functions of a particular position). In addition, accommodations may include temporary modification of work schedules (if that decreases contact with coworkers and/or the public when on duty or commuting) or moving the location of where one performs work (for example, moving a person to the end of a production line rather than in the middle of it if that provides more social distancing).

The ADA and the Rehabilitation Act permit 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. If requests are received in advance, the employer may begin the interactive process. An employer may choose to include notice to all of the CDC-listed medical conditions that may place people at higher risk of serious

illness if they contract COVID-19, provide instructions about who to contact and explain that the employer is willing to consider on a case-by-case basis any requests from employees who have these or other medical conditions.

An employer also may send a general notice to all employees who are designated for returning to the workplace, noting that the employer is willing to consider requests for accommodation or flexibilities on an individualized basis. The employer should specify if the contacts differ depending on the reason for the request (for example, if the office or person to contact is different for employees with disabilities or pregnant workers than for employees whose request is based on age or child-care responsibilities).

Regardless of the approach, employers should ensure that whoever receives inquiries knows how to handle them consistent with the different federal employment non-discrimination laws that may apply, for instance, with respect to accommodations due to a medical condition, a religious belief, or a pregnancy.

G. Age

The ADEA prohibits employment discrimination against individuals age 40 and older. The ADEA would prohibit a covered employer from involuntarily excluding an individual from the workplace based on his or her being 65 or older, even if the employer acted for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19.

Unlike the ADA, the ADEA does not include a right to reasonable accommodation for older workers due to age. However, employers are free to provide flexibility to workers age 65 and older; the ADEA does not prohibit this, even if it results in younger workers ages 40-64 being treated less favorably based on age in comparison.

Workers age 65 and older also may have medical conditions that bring them under the protection of the ADA as individuals with disabilities. As such, they may request reasonable accommodation for their disability as opposed to their age.

H. Caregivers/Family Responsibilities

Employers may provide any flexibility as long as they are not treating employees differently based on sex or other EEO-protected characteristics. For example, under Title VII, female employees cannot be given more favorable treatment than male employees because of a gender-based assumption about who may have caretaking responsibilities for children.

I. Pregnancy

Sex discrimination under Title VII of the Civil Rights Act includes discrimination based on pregnancy. 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 involuntary leave, layoff, or furlough.

There are two federal employment discrimination laws that may trigger accommodation for employees based on pregnancy. First, pregnancy-related medical conditions may themselves be disabilities under the ADA, even though pregnancy itself is not an ADA disability. If an employee makes a request for reasonable accommodation due to a pregnancy-related medical condition, the employer must consider it under the usual ADA rules.

Second, Title VII as amended by the Pregnancy Discrimination Act specifically requires that women affected by pregnancy, childbirth, and related medical conditions be treated the same as others who are similar in their ability or inability to work. This means that a pregnant employee may be entitled to job modifications including telework, changes to work schedules or assignments, and leave to the extent provided for other employees who are similar in their ability or inability to work. Employers should ensure that supervisors, managers, and human resources personnel know how to handle such requests to avoid disparate treatment in violation of Title VII.

VI. Furloughs and Layoffs- How to Conduct a Layoff or Reduction in Force

Conducting a layoff is a difficult process that some cities may have to face as a result of the economic impacts of COVID-19. The starting place for any of these processes begins with the city's personnel policy. Due process and equal employment laws will require that any such policy be consistently applied to all similarly situated employees. The basic compliance components to review during the layoff/RIF process are outlined below.

A. Select Employees for Layoff

After a city has designed its future organizational structure, a system for determining who will stay and who will go must be created. The selection criteria should be designed to identify the employee traits that will be instrumental in meeting the company's goals. Several factors can be used in deciding the selection process, including seniority, performance, job classification or job knowledge and skills. However, an organization should not consider criteria such as leave status or protected conduct (i.e., whistle-blower). By aligning the future goals of the organization with the best selection process, the company will be able to determine its success going forward.

B. Avoid Adverse Action/Disparate Impact

An organization should review the selected employees for layoff to determine if an adverse (disparate) impact exists for a protected class. Protected classes include individuals who are members of a certain race, color, ethnicity, national origin, religion, gender, genetic information, age (40 or over), those with a disability or those who have veteran status. States may have additional protected classes, such as sexual orientation, marital status, or smokers. Any protected class that may have a disproportionately larger percentage affected by the layoff (e.g., employees reaching retirement age) will need to be evaluated and substantiated.

C. Older Workers Benefit Protection Act (OWBPA) Regulations for Compliance

If releases from age discrimination are used in exchange for severance pay, they must comply with the OWBPA to effectively release claims under the Age Discrimination in Employment Act. The OWBPA addresses four different release scenarios, and each scenario contains five steps that must be followed to be compliant. Under the OWBPA, employers also need to provide workers age 40 and over a consideration period of at least 21 days when one older worker is being separated, and 45 days when two or more older workers are being separated. Additionally, employees must receive a revocation period of at least seven days.

During a reduction in force or as part of a voluntary exit incentive program, two additional requirements are needed to validate the releases. The employer must publicly identify the targeted employees, and secondly, the affected employees must be informed in writing of the job titles and ages of all individuals selected for the group program, along with employees in the same job classification or unit that were not selected for the program.

D. Determine Severance Packages and Additional Services

Many cities offer severance packages to their displaced employees. A written severance package policy allows employees to realize the steps involved in the involuntary termination. Employers are not obligated to provide severance to laid-off employees under federal law, but severance packages may lessen the chance of legal action filed on behalf of former employees. However, some states have specific criteria for required severance. Severance packages may include salary continuation, vacation pay, continued, employer-paid period of benefits coverage; employer-paid COBRA premiums, outplacement services, counseling and resume workshops, and more.

E. Alternatives to Layoffs

While layoffs have become a standard business practice, there has been little research on the effectiveness of job-trimming practices in improving an organization's fortunes. Employers routinely resort to mass layoffs to help meet financial forecasts and stay within budgets, but they often ignore innovative cost-reduction solutions that may fit their cost-cutting environment.

Anyone who has ever been laid off or required to implement a layoff understands the importance of considering alternatives to a layoff that may not only be more palatable but also be more effective than a layoff. As with so much of effective human resource management, recognizing and implementing alternatives to layoffs require a strategic approach.

Alternatives to layoffs include:

- Reducing hours worked to spread the economic consequences of cost-cutting among all employees rather than targeting a few persons for layoff.
- Adopting a voluntary separation program (VSP). VSPs are particularly good at reducing the risks of legal liability associated with terminating employees.
- Identifying and eliminating wasteful practices.

F. Laws providing for reinstatement rights.

The FMLA as well as the Uniformed Services Employment and Reemployment Rights Act (USERRA) and similar state laws**,** provide for employee reinstatement under certain conditions.

An employee on FMLA leave is entitled to be reinstated to the same position or an equivalent position—in terms of pay, benefits, and other terms and conditions of employment—except in the case of any of the following:

- Bona fide job elimination.
- Termination for reasons not related to the employee's medical condition or use of leave.
- The employee's inability to return to work upon the expiration of all available leave.

USERRA applies to all employers, regardless of size, and to all regular employees, regardless of position or full- or part-time status. It regulates leaves of absence taken by members of the uniformed services, reservists, National Guard members for training, periods of active military service (whether voluntary or involuntary,) funeral honors duty, and time spent being examined to determine fitness to perform such service.

Like the FMLA, USERRA has special rules for reinstatement that are important to note in the context of a layoff. There are three exceptions to USERRA's re-employment obligations:

- The employer's circumstances have so changed as to make such re-employment impossible or unreasonable.
- Re-employment would impose an undue hardship on the employer.
- The employment from which the person leaves to serve in the uniformed services is for a brief, non-recurrent period, and there is no reasonable expectation that such employment will continue indefinitely or for a significant period.

A city can require a returning employee who had COVID-19 to bring a doctor’s note certifying fitness for duty. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.

VII. Fair Labor Standards Act

The fundamental premise of the FLSA is that cities must pay their non-exempt employees for all work suffered or permitted. COVID-19 has placed flexible work arrangements, especially telework, in the spotlight and that can add to the challenges of FLSA compliance. With the Governor’s initial stay-at-home orders cities were forced to

implement flexible work options on the fly. Now that social distancing orders are being modified or lifted, employee requests for flexible hours and remote-work arrangements may be part of the new normal. Also, now that many employers have experienced how successful telecommuting can be for their organization or how work hours that differ from the normal 9-to-5 can be adopted without injury to productivity, offering flexible work arrangements may become even more commonplace.

Even in the absence of a pandemic, flexible work arrangements can improve recruitment and retention efforts, augment organizational diversity efforts, encourage ethical behavior, and help the organization's efforts to be socially responsible. Cities can experience cost savings, improved attendance, productivity, and an increase in employee engagement.

A. OPPORTUNITIES

Flexible work arrangements offer numerous benefits to both employers and employees. Such benefits include:

- Assisting in recruiting efforts.
- Enhancing worker morale.
- Managing employee attendance and reducing absenteeism.
- Improving retention of good workers.
- Boosting productivity.
- Creating a better work/life balance for workers.
- Minimizing harmful impact on global ecology. Certain flexible work arrangements can contribute to sustainability efforts by reducing carbon emissions and workplace "footprints" in terms of creation of new office buildings.
- Allowing for business continuity during emergency circumstances such as a weather disaster or pandemic.

A company-wide policy at Unilever permits more than 100,000 employees, everyone except factory production workers, to work anytime, anywhere, as long as they meet business needs. Leadership identified the following benefits when making the business case for the policy:

- **Travel.** Conferencing technology like Skype would reduce travel expenses.
- **Technology.** Upgrading technology would help the company stay competitive and build Unilever's brand as a best place to work. Costs would be offset by other savings.
- **Real estate.** Cubicles and offices would be converted to communal facilities, thereby reducing space requirements by 30 percent. Sites would be converted gradually as leases expired.
- **Health.** Onsite fitness facilities would increase employee satisfaction, help reduce illness and cut insurance costs.
- **Work/life balance.** Empowering workers would enhance work/life balance. Satisfaction ratings would rise and recruitment would become easier.
- **Sustainability.** Reducing travel, office energy costs, and paperwork would decrease the environmental footprint.

- **Retention and engagement.** Flexibility would enhance the employer value proposition, improving retention, and supporting diversity.

B. CHALLENGES

Managers tasked with implementing strategic goals related to flexible work arrangements need to keep many things in mind:

- Keeping programs relevant to workers' real needs/wants.
- Focusing on the unique needs of specific groups of workers without creating a second class of workers and without engaging in unlawful disparate treatment or disparate impact discrimination.
- Communicating broadly to achieve the benefits of flexible work arrangements.
- Exercising caution when eliminating a program that is not working or is no longer relevant to enough workers. Any loss of a benefit can impair morale, even if only a few workers had used it. Employers should consider phasing out unproductive programs over time.

In addition, managing the change from a traditional work environment to one with more flexible work arrangements can create or throw a spotlight on various managerial trouble spots, such as:

- Upper management's resistance to change.
- Control issues, especially in terms of supervision of work.
- Working as a team with distanced members and highly variant schedules.
- Maintaining safety and security of personnel and data.

C. Schedule Flexibility

There are several types of schedule flexibility:

- Flextime.
- Compressed workweek.
- Shift work.
- Part-time schedules.
- Job-sharing.

Not all types are manageable or worthwhile for all sizes of cities, so every city considering this arrangement should undertake an organizational assessment to determine whether and what kind of flexible scheduling will meet its needs.

D. Telecommuting

Telecommuting, also known as telework, involves the use of computers and telecommunications technology to overcome the constraints of location or time on work. In a global economy, physical location has become less important than efficiency of operations. Telework may occur from home, a telework center, or on an airplane or bus. Telework is best suited for jobs that require independent work, little face-to-face

interaction, concentration, a measurable work product, and output-based (instead of time-based) monitoring. Nevertheless, telecommuting is not unknown in jobs—even HR jobs—that do not fit this mold.

Telework also may be offered as a reasonable accommodation under the ADA.

Telecommuting has become a widely accepted practice and most organizations that do permit it develop metrics to track their return on investment. Telework often includes these three different types:

- Regular, recurring telework, such as an employee spending every workday or regularly scheduled workdays working from a home office or other remote office.
- Brief, occasional telework, such as an employee writing a report or preparing a spreadsheet from a home office after hours or on weekends, or just working from home to avoid interruptions.
- Temporary or emergency work, such as working from home to ensure business continuity during inclement weather, a natural disaster or an event such as a political convention that causes significant traffic and parking disruptions.

E. FLSA Wage and Hour Compliance

Cities must be mindful of both federal and state wage and hour laws in implementing flextime. For example, if non-exempt employees are allowed flextime, it is especially important to track their actual work hours to ensure compliance with the FLSA. Mechanical and computerized time clocks are valuable tools in this regard.
State wage and hour laws may pose challenges to the use of flexible work arrangements, such as daily overtime requirements.
Telecommuting raises even more issues, including:

- Identifying compensable working time.
- Controlling unauthorized off-the-clock work.
- Controlling unauthorized reported work.
- Managing overtime pay obligations.

Applicable laws should play a major role in the decision of whether to implement flexible work arrangements. Below are some legal issues to consider in terms of alternative work arrangements.

F. Equal employment opportunity

Equal employment opportunity laws mandate non-discrimination in wages, hours, and other terms and conditions of employment. Accordingly, employers should take steps to ensure that all such arrangements are offered and implemented without discrimination on any prohibited basis. Despite an organization's best intentions and non-discriminatory business motivations, some groups of employees may reap more of the benefits of flexible work arrangements than others simply because their circumstances make such options

more attractive to them. As with all other employment practices, clear policies, consistent decision-making, and careful documentation are needed to fend off possible discrimination charges.

VIII. Vaccinations

One question that could become quite common in the next year or two is whether or not employers should make a COVID-19 vaccination mandatory. While employers can make the vaccine a requirement for employees, there are a number of factors to consider when contemplating this decision. Traditionally, employers have steered away from requiring vaccines for their employees because of objections over medical conditions, religious beliefs and disabilities. These objections are protected by the EEOC, which has resulted in the EEOC advising employers to encourage employees to get vaccines rather than requiring them.

By in large adults in Texas are reluctant to get vaccines (in 2018 only 25% of Texans got the flu and pneumonia vaccine). This could mean that there will be a lot of resistance to a requisite COVID-19 vaccine. The push back on required masks in Texas was fairly severe with Governor Abbott being reluctant to require them in the first place. Therefore, it is unlikely that the population of Texas with its traditional libertarian roots would be accepting of a mandatory vaccine. Employers should keep this in mind when considering a requisite vaccine.

Regarding employers administering a COVID-19 test, the ADA requires that any mandatory medical test of employees be "job-related and consistent with business necessity." Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others. Therefore an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus.

However, an employer cannot require an antibody test of an employee. An antibody test constitutes a medical examination under the ADA. In light of CDC's Interim Guidelines that antibody test results "should not be used to make decisions about returning persons to the workplace," an antibody test at this time does not meet the ADA's "job related and consistent with business necessity" standard for medical examinations or inquiries for current employees. Therefore, requiring antibody testing before allowing employees to re-enter the workplace is not allowed under the ADA. Please note that an antibody test is different from a test to determine if someone has an active case of COVID-19 (i.e., a viral test). The EEOC has already stated that COVID-19 viral tests are permissible under the ADA. This is subject to change based on updates from the CDC.

On the other hand, a mandatory vaccine would appear to be the best option when compared to another state-wide shut down. Many people are greatly fatigued with the mask requirement and social distancing. Because the pandemic has affected so much of daily life in comparison to something like the flu, it is possible that most people would be willing to

get a vaccine and there would be no need to make it mandatory. Additionally, economic pressure could play a role in the acceptance of a vaccine. If business can boast of being COVID-19 free because all employees are vaccinated and they generate more revenue because of this, there will be a natural pressure for other businesses to do likewise.

Hopefully, COVID-19 numbers go down to such an extent that a requisite vaccine would not be necessary. However, if this is not the case, employers may be faced with this tough question soon – should they require a vaccine for their employees? Each employer must weigh the factors of this decision individually in order to act in the best interest of their business and employees.

IX. Conclusion

COVID-19 has shifted the way the average American workplace operates, including our city clients. In order to combat the dangers of the COVID-19 pandemic much has changed within the workplace. It is essential for employers and employees alike to be aware of how COVID-19 affects them particularly. Adjusting to this new normal will be challenging but not impossible. As always prudence dictates consistency and reasonableness when dealing with human resources issues. Achieving those goals is clearly more problematic in the face of challenges caused by COVID-19.

APPENDIX A

CDC guidance on exposure to COVID-19

Scenario 1: Close contact with someone who has COVID-19—will not have further close contact. I had close contact with someone who has COVID-19 and will not have further contact or interactions with the person while they are sick (e.g., co-worker, neighbor, or friend).

The last day of quarantine is 14 days from the date you had close contact.

Scenario 2: Close contact with someone who has COVID-19—live with the person but can avoid further close contact. I live with someone who has COVID-19 (e.g., roommate, partner, family member), and that person has isolated by staying in a separate bedroom. I have had no close contact with the person since they isolated**.**

The last day of quarantine is 14 days from when the person with COVID-19 began home isolation.

Scenario 3. Under quarantine and had additional close contact with someone who has COVID-19. I live with someone who has COVID-19 and started my 14-day quarantine period because we had close contact. What if I ended up having close contact with the person who is sick during my quarantine? What if another household member gets sick with COVID-19? Do I need to restart my quarantine?
Yes. They will have to restart their quarantine from the last day you had close contact with anyone in your house who has COVID-19. Any time a new household member gets sick with COVID-19 and you had close contact, you will need to restart your quarantine.

People who have been in close contact with someone who has COVID-19—excluding people who have had COVID-19 within the past 3 months.

People who have tested positive for COVID-19 do not need to quarantine or get tested again for up to 3 months as long as they do not develop symptoms again. People who develop symptoms again within 3 months of their first bout of COVID-19 may need to be tested again if there is no other cause identified for their symptoms.