



The Current State of the US Labor Market as a Result of the Pandemic, Return to Work, and Potential Employment Litigation Risks

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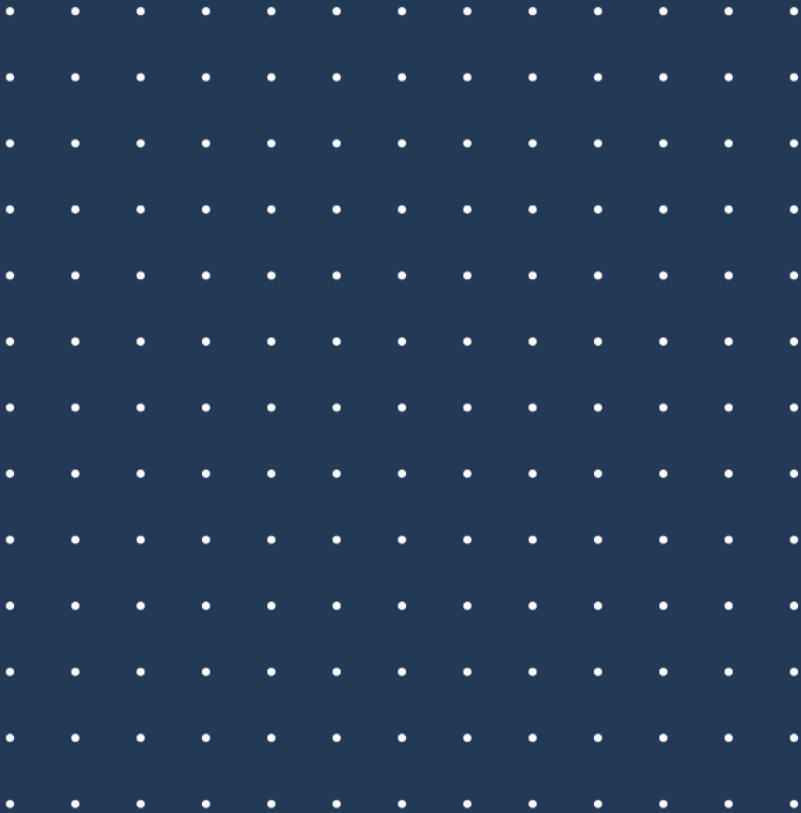


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INTELLIGENCE THAT WORKS





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The global public health crisis associated with COVID-19 has had an unprecedented effect on the US economy. Some economists predict that the pandemic may send the economy into a decline that could exceed what was experienced during the 2008 financial crisis and could match the devastation of the Great Depression of the 1930s. Some have compared the impact on the economy and the anticipated economic recovery to taking the elevator down a hundred floors and getting back up using stairs. Others are debating whether the economic recovery will be “U” shaped, “V” shaped, or “W” shaped. Nevertheless, most agree that the pandemic will most likely have long-term effects on the US economy and on our way of work and life. When and how quickly the economy will start the recovery are yet to be seen.

Despite a continuation of the economic decline and many new cases of COVID-19 infections per day, active discussions and policy debates are taking place across the entire United States on ways to start and reopen the economy, allowing the US workforce to get back to work. The Trump administration and many states have issued preliminary guidelines and criteria for their own localities. As of mid-May 2020, most US states and a handful of localities had lifted or are planning to lift “stay-at-home” directives and reopen certain types of businesses in certain locations.

Effect of the COVID-19 Pandemic on the US Labor Market

A number of observations have been made about the effect of the pandemic on the current labor market:

1. **Number of Workers Applying for Unemployment Insurance Benefits.** Between the weeks of March 16, 2020, and April 27, 2020, about 33.5 million US workers submitted new claims for unemployment insurance benefits. Before this seven-week period (as of March 13, 2020), 7.1 million workers had applied for such benefits, resulting in a total of over 40 million workers who applied for unemployment benefits up to May 2020. As of the week ending April 18, 2020, the highest insured unemployment rates were in Vermont (25.2%), West Virginia (21.9%), Michigan (21.7%), Rhode Island (20.4%), Nevada (19.9%), Connecticut (18.7%), Puerto Rico (17.9%), Georgia (17.3%), New York (17.2%), and Washington (17.1%).² The largest increases in initial claims for the week ending April 25, 2020, were in Washington (56,030), Georgia (19,562), New York (14,229), Oregon (12,091), and Alabama (8,534).³

Historical data from the Bureau of Labor Statistics (BLS) shows that only about one in four US workers applies for unemployment insurance benefits, and only about one in six collects such benefits.⁴ Given that over thirty-three million workers have already applied for unemployment insurance benefits (some of which are newly eligible independent contractors and gig workers, per the CARES Act), the seasonally adjusted insured unemployment rate of 15.5%⁵ significantly underestimates the real unemployment rate.

2. **Official and Estimated Real Unemployment Rate.** As of April 2020, the official national unemployment rate had risen to 14.7% (from 4.4% in March 2020).⁶ For the same time period, the unemployment rate for men sixteen years and older was 13.3%; for women sixteen years and older, it was 15.7%. The unemployment rate for African American workers was 16.4%, and for Hispanic/Latino workers it was 18.5%. By education, the highest unemployment rate was for workers with less than a high school degree at 20.9%, and a high school degree (no college) at 17%. The unemployment rate for disabled workers jumped from 6.3% in April 2019 to 18.9% in April 2020. Of the workers who are counted as unemployed by government statistics, almost 80% indicated that they are on temporary layoff, while 11% indicated they had experienced a permanent job loss.

Survey data shows that many of the newly unemployed are not presently looking for new work. To be included in the unemployment figures, individuals need to be actively seeking employment. As such, those workers that are not presently looking for work are not included in the unemployment calculations. According to the latest figures from the Department of Labor, about 9.9 million unemployed persons were not included in the unemployment figures because they were not actively looking for work or were unavailable to take a job. Therefore, by considering all unemployed workers (including those that are not presently looking for work due to stay-at-home directives), the current real unemployment rate is estimated to be significantly higher than the official rate of 14.7% - some say greater than 25%. According to alternative measures of labor underutilization, the BLS estimates that the current unemployment rate is about 22.8%.

While these statistics are startling, they don't provide a complete picture of the total effect of the pandemic on the US workforce. In addition to layoffs, furloughs, and reduced hours, many employers have been adjusting their workforce through providing reduced compensation or fringe benefits, and some have transitioned all or parts of their workforce to remote work settings. Recent research shows that about 41% of

2 US Department of Labor (DOL), “News Release: Unemployment Insurance Weekly Claims” (May 7, 2020), available at: <https://www.dol.gov/sites/dolgov/files/OPA/newsreleases/ui-claims/20200871.pdf>

3 Ibid.

4 Bureau of Labor Statistics (BLS), “Economic News Release: Table 1. Unemployment insurance (UI) benefit applicants and recipients among unemployed persons who had worked in the past 12 months by selected characteristics, 2018,” US Department of Labor (November 7, 2019), available at: <https://www.bls.gov/news.release/uisup.t01.htm>

5 DOL (2020).

6 BLS, “Economic News Release: Employment Situation Summary” (May 8, 2020), available at: <https://www.bls.gov/news.release/empsit.nr0.htm>

individuals who were working in February 2020 reported lower earnings between the week of March 29 and the week of April 12,⁷ including about 16% who are still employed but earning less. In April 2020, the number of individuals working part time for economic reasons (i.e., “involuntary part-time workers”) almost doubled, increasing by 5.1 million to 10.9 million.⁸ Per the BLS, “This increase reflects a sharp rise in the number of people whose hours were cut due to slack work or business conditions.”⁹ Additionally, most employers have instituted hiring freezes, postponed promotions, or delayed start dates for new hires, and some have been offering early retirement packages. These additional adjustments and reductions are not reflected in the actual or estimated unemployment rate.

3. **Reduction in Hours Worked.** Based on a Real-Time Population Survey (RPS) conducted in two waves in March and April 2020,¹⁰ hours worked per working-age adult have declined 29% relative to the March 8 to 14, 2020, time period. Early in the pandemic, the reduction in hours was due to reductions in employment and reductions in hours per employed, almost equally. Recently however, reductions in employment have continued, while hours per employed have remained relatively constant.
4. **Early Retirement.** The labor-force participation rate (the percentage of the population that is either working or actively looking for work) has declined from 64.2% to 60%, which is an unprecedented decline considering the short time period over which it happened. Research shows that this decline in the number of individuals who are considered part of the active labor force is explained partially by early retirement, with women and African American workers driving a large part of the decline.¹¹
5. **The Most Affected Sectors.** Six of the most directly exposed sectors have included Restaurants and Bars, Travel and Transportation, Entertainment (e.g., casinos and amusement parks), Personal Services (e.g., dentists, daycare providers, barbers), other Sensitive Retail (e.g., department stores and car dealers), and Sensitive Manufacturing (e.g., aircraft and car manufacturing).¹² These sectors account for over 20% of all US payroll employment, and shutdowns of these sectors have led to the massive declines in employment. These declines have been offset partially by increased hiring in grocery stores and package delivery, reducing the blow slightly.

The share of employment in the most directly affected sectors varies greatly by state. The most affected states have been those where a large share of employment is in the travel and transportation sectors, reflecting the importance of tourism: Nevada (34.3%), Hawaii (31.1%), Florida (23.7%), and South Carolina (23.1%) all have more than 23% of their employment concentrated in the highly exposed sectors.

The Department of Labor of the State of New York has been publishing weekly reports on the profiles of workers applying for unemployment insurance benefits. The industries with the highest number of workers applying for unemployment insurance benefits in New York are Accommodation and Food Services, Administrative and Support Services, Health Care and Social Assistance,¹³ and Retail Trade.¹⁴

6. **Indirect Impacts to Other Sectors.** The shutdown orders have had a profound indirect impact on sectors that provide inputs to the directly affected sectors. The BLS publishes input-output tables that trace the full effect of a loss in employment in one sector to employment losses in all other sectors. By BLS estimates, for every 10 workers laid off in the hotel industry, about 8 workers will lose their jobs in other industries. Further, for every 10 workers that lose their jobs due to declining sales in restaurants and bars, an additional 3.11 workers lose their job elsewhere in the economy. The BLS analysis explains how the shutdown of hotels, restaurants, and bars due to social distancing has had a significant spillover effect on employment in the rest of the economy. In locations such as New York, Miami, San Francisco, and Washington, DC, where the Accommodation and Food Services sectors account for a large share of the local economy, the BLS estimates may provide a conservative estimate for the size of the shock.
7. **The Female Face of the Impacted Workers.** Based on BLS data, many occupations affected significantly by reductions in force and furloughs are dominated by female employees. The chart below reports the occupations (the listed sub-occupations represent over thirty three million workers in the US labor market) that have been impacted directly by the pandemic and subsequent layoffs and furloughs; the occupations consist mostly of female employees.

7 Bick, Alexander, and Adam Blandin, Real-Time Labor Market Estimates During the 2020 Coronavirus Outbreak, working paper (current version May 11, 2020), visited April 24, 2020, at: https://alex.bick.weebly.com/uploads/1/0/1/3/101306056/bb_covid.pdf

8 Statement of William W. Beach, Commissioner, Bureau of Labor Statistics, (May 8, 2020), available at: <https://www.bls.gov/news.release/pdf/jec.pdf>

9 Ibid.

10 Bick and Blandin (2020).

11 Coibion, Olivier, Yuriy Gorodnichenko, and Michael Weber, Labor Markets During the COVID-19 Crisis: A Preliminary View, Chicago Booth working paper No. 2020-41 (April 2020), available at: https://bfi.uchicago.edu/wp-content/uploads/BFI_WP_202041.pdf

12 Vavra, Joseph S., “Shutdown Sectors Represent Large Share of All US Employment,” Key Economic Facts About COVID-19 (March 27, 2020), Becker Friedman Institute, University of Chicago, available at: <https://bfi.uchicago.edu/insight/blog/key-economic-facts-about-covid-19/>

13 In healthcare, the employment decline was led by losses in offices of dentists, physicians, and other healthcare practitioners. Employment also declined in social assistance, reflecting job losses in child daycare services and individual and family services.

14 New York Department of Labor, “Initial Claims Data,” Division of Research and Statistics, Research Notes (April 30, 2020), available at: <https://www.labor.ny.gov/stats/PDFs/Research-Notes-Initial-Claims-WE-4252020.pdf>

Major Occupational Groups and A Selection of Sub-Occupations	Total Employment (In Thousands)	Percent Female
<u>Food preparation and serving related occupations</u>	8,378	55
Waiters and waitresses	2,038	71
Food preparation workers	1,079	59
First-line supervisors of food preparation and serving workers	597	57
Bartenders	464	53
Hosts and hostesses, restaurant, lounge, and coffee shop	322	82
<u>Personal care and service occupations</u>	5,968	77
Personal care aides	1,458	86
Childcare workers	1,193	93
Hairdressers, hairstylists, and cosmetologists	803	92
Recreation and fitness workers	440	63
<u>Healthcare support occupations</u>	3,758	87
Nursing, psychiatric, and home health aides	2,086	88
Medical assistants	596	93
Dental assistants	284	95
<u>Office and administrative support occupations</u>	17,789	71
Secretaries and administrative assistants	2,688	93
Customer service representatives	2,552	64
Office clerks, general	1,355	83
First-line supervisors of office and administrative support workers	1,306	69
Receptionists and information clerks	1,288	89
Bookkeeping, accounting, and auditing clerks	1,015	89
<u>Sales and related occupations</u>	15,582	49
First-line supervisors of retail sales workers	3,232	46
Cashiers	3,164	71
Retail salespersons	3,105	49
Real estate brokers and sales agents	1,095	59
<u>Building and grounds cleaning and maintenance occupations</u>	5,746	42
Maids and housekeeping cleaners	1,475	89
First-line supervisors of housekeeping and janitorial workers	352	42

Source: "Table 11: Employed person by detailed occupation, sex, race, and Hispanic or Latino ethnicity, 2019," Labor Force Statistics from Current Population Survey, US Department of Labor.

Researchers at the Federal Reserve Bank of St. Louis¹⁵ estimate that about sixty-six million workers, or 46% of the total workforce, are employed in occupations that have been at high risk of layoff or furlough. The largest share of these workers is in food preparation or serving-related occupations, followed by sales occupations.

Additionally, many occupations considered "Essential Workers" (except for protective services and transportation occupations), which are at the forefront of fighting the pandemic and/or working in essential businesses, are disproportionately female:

¹⁵ Gascon, Charles, "COVID-19: Which Workers Face the Highest Unemployment Risk?," Federal Reserve Bank of St. Louis (March 24, 2020), available at: <https://www.stlouisfed.org/on-the-economy/2020/march/covid-19-workers-highest-unemployment-risk>

Selected Occupations Considered "Essential Workers"	Total Employment (In Thousands)	Percent Female
Registered nurses	3,242	89
Physicians and surgeons	1,098	41
Health practitioner support technologists and technicians	710	79
Licensed practical and licensed vocational nurses	687	91
Diagnostic related technologists and technicians	398	70
Pharmacists	341	60
Clinical laboratory technologists and technicians	323	74
Physical therapists	304	68
Nurse practitioners	225	88
Medical records and health information technicians	185	93
Miscellaneous health technologists and technicians	152	65
Other healthcare practitioners and technical occupations	133	50
Physician assistants	131	71
Phlebotomists	124	89
Respiratory therapists	112	67
Cashiers	3,164	71
Food service managers	1,249	47
Food preparation workers	1,079	59
First-line supervisors of food preparation and serving workers	597	57
Combined food preparation and serving workers, including fast food	372	62

Source: "Table 11: Employed person by detailed occupation, sex, race, and Hispanic or Latino ethnicity, 2019," Labor Force Statistics from Current Population Survey, US Department of Labor.

Consequently, a significant number of workers affected by the pandemic, either as a result of layoffs and furloughs or by being considered "Essential Workers," have been female workers.

Managing Employment Litigation Risks during the Reopening

It is clear that returning to work will differ from locality to locality, will be gradual in most instances, and will be conducted in phases. The reopening will vary by sector, business type and size, and the health status and availability of workers. Continued social distancing, use of personal protective equipment (PPE), potential contact tracing, and other protective measures will be part of every business's reality for the foreseeable future.

Based on guidance from federal, state, and local authorities, public health officials, and relevant trade associations, each business should devise a strategy and specific plans for reopening. A business should consider not only ways to keep its workforce, customers, and visitors healthy and safe, but also ways it will remain compliant to federal, state, and local antidiscrimination laws and whistleblower protection. The current unprecedented circumstances present a heightened risk for employment discrimination, personal injury, and wrongful death lawsuits.

Sometimes conflicting guidance provided by various authorities at the federal and state levels adds to the confusion and potential risk. Lawsuits have already been filed, and the legal community is anticipating a number of new worker class-actions and grievances filed by individuals. Many companies and government entities are facing new worker class and collective actions involving COVID-19. According to the COVID-19 Complaint Tracker,¹⁶ 1,155 lawsuits related to COVID-19 had been filed as of May 19, 2020. Among the top five categories of lawsuits filed are those involving civil rights, insurance, consumer cases, and labor and employment.¹⁷

¹⁶ Hunton Andrews Kurth LLP, COVID-19 Complaint Tracker, available at: <https://www.huntonak.com/en/covid-19-tracker.html>

¹⁷ Ibid.

Federal, state, and local agencies have issued guidance and created task forces to be responsive to the needs of employers and employees, and to prepare for a potential increase in employment litigation. For example,

- Equal Employment Opportunity Commission (EEOC):
 - o The EEOC recently implemented a code in its charge management system that will identify bias claims that are specifically related to COVID-19 filed by workers. In a similar fashion, after the 9/11 attacks, the EEOC tracked race, national origin, and religious discrimination charges filed by Arab, Muslim, Middle Eastern, South Asian, and Sikh workers, or those perceived to be.
 - o The EEOC's published guidance¹⁸ for companies dealing with the pandemic suggests that employers may deploy certain risk-reduction measures to protect their workers and others. These measures may include asking employees about symptoms, taking employees' temperatures, and sending symptomatic employees home, without running the risk of noncompliance to the Americans with Disabilities Act. It is not clear whether EEOC's guidance also applies to employers using antibody tests.
- The Occupational Safety and Health Administration (OSHA) reports that it has received thousands of complaints over the past two months relating to the coronavirus,¹⁹ including claims that employees were disciplined or terminated after reporting allegedly unsafe work practices or conditions. As a result, on April 8, 2020, OSHA issued a statement "reminding employers that it is illegal to retaliate against workers because they report unsafe and unhealthful working conditions during the coronavirus pandemic."²⁰
- The New York City Commission on Human Rights established a coronavirus response team to handle reports of harassment and discrimination related to the outbreak. The team is composed of attorneys and members of the agency's law enforcement and community relations departments. Since February 2020, the agency has recorded 248 reports of harassment and discrimination related to the coronavirus, more than 40% of which have been anti-Asian.²¹ During the same time frame last year, the agency received five anti-Asian discrimination reports.

Potential Employment Risks to Manage Carefully

The president of the US Chamber of Commerce recently indicated that exposure to liability as a result of the reopening, including exposure to a wave of labor and employment lawsuits, is the largest area of concern for US businesses.²² Below is a non-exhaustive list of potential risks to keep in mind when designing plans and strategy for a reopening, and the steps employers may consider taking in response:

Hiring and Rehiring

When bringing back employees from furlough or rehiring workers, ensure that the decisions made on who and when to reemploy do not result in a disparate impact on any of the protected classes, especially female, minority, and older employees who have been particularly affected by the pandemic in terms of unemployment and COVID-19-related infection and death rates. Below are examples of employer actions that may increase the risk of adverse employment actions:

- o **Example 1:** Not rehiring older employees because of a perception that they are a higher-risk age group in contracting COVID-19.
- o **Example 2:** Screening only Asian job applicants for symptoms of COVID-19 after making a conditional job offer. According to the EEOC,²³ an employer 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.
- o **Example 3:** Delaying or postponing the return to work for a disproportionate number of minority employees.

18 EEOC, "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act" [March 21, 2020], available at: <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>

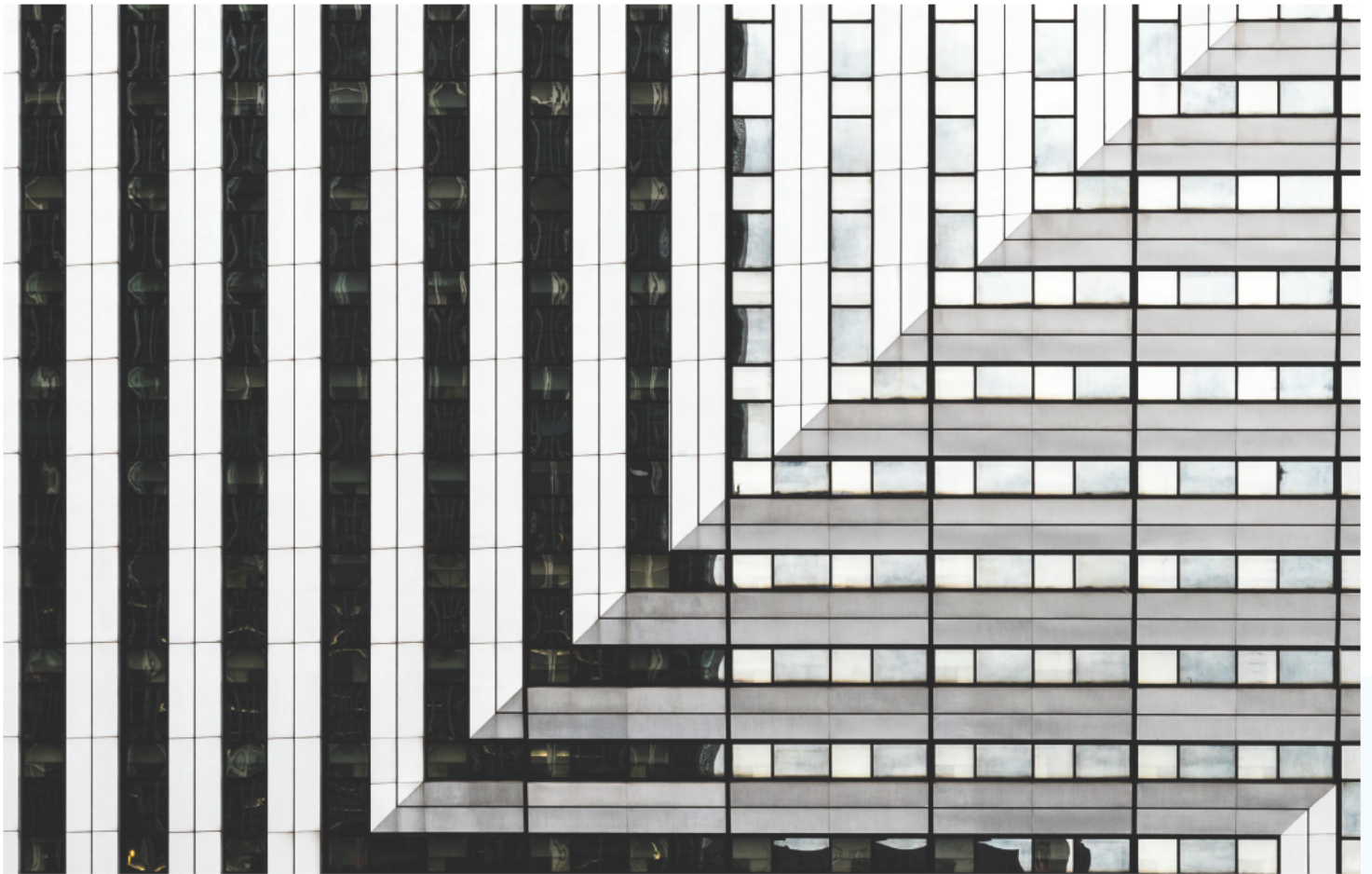
19 Whoriskey, Peter, Jeff Stein, and Nate Jones, "Thousands of OSHA complaints filed against companies for virus workplace safety concerns, records show," The Washington Post (April 16, 2020), available at: <https://www.washingtonpost.com/business/2020/04/16/osha-coronavirus-complaints/>

20 OSHA, "U.S. Department of Labor Reminds Employers That They Cannot Retaliate Against Workers Reporting Unsafe Conditions During Coronavirus Pandemic," OSHA National News Release (April 8, 2020), available at: <https://www.osha.gov/news/newsreleases/national/04082020>

21 Yang, Stephanie, "New York City Has Logged 248 Complaints of Coronavirus Discrimination," The Wall Street Journal (April 19, 2020), available at: <https://www.wsj.com/articles/new-york-city-has-logged-248-complaints-of-coronavirus-discrimination-11587308400>

22 Clark, Suzanne, "Implementing a National Return to Work Plan," US Chamber of Commerce (April 13, 2020), available at: <https://www.uschamber.com/coronavirus/implementing-national-return-to-work-plan#liability>

23 EEOC, "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act" (updated March 21, 2020), available at: <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>



Employers that continue to make adjustments to their workforces through reductions in force or furloughs should be mindful of the disparate impact certain actions may have on protected classes. While employers may eliminate positions that, for example, cannot be performed remotely or any other way, or may terminate employees based on their seniority or performance, performing proactive disparate impact analyses under privilege may help identify potential risks and exposure for the employer. To reduce the risk of potential discrimination claims, employers should base their decisions on well-documented and objective business considerations and criteria.

Particular attention should be paid to the federal Worker Adjustment and Retraining Notification Act (WARN Act). The EEOC recently issued frequently asked questions (FAQs) with respect to the WARN Act and COVID-19.²⁴ The FAQs provide information on which types of employers are required to provide notice to their employees, and under what circumstances. Employers who previously carried out a short-term layoff or furlough (six months or fewer), and later extend the layoff or furlough beyond six months due to business circumstances are required to give notice at the time of the extension.

Paid Time Off

Reopening of the economy will likely involve additional testing and contact tracing. Employees who become infected or are identified during a contact-tracing process may be required to take time off. Employers should establish clear policies regarding leave and time off. At a minimum, each employer should identify jobs and/or employees eligible for leave, the length of the leave period, and pay during leave.

In March, Congress passed the Families First Coronavirus Response Act (FFCRA), which imposes the first-ever federal paid sick-time and family medical leave mandates. Employers may face lawsuits alleging they did not fulfill their obligations under the FFCRA.

²⁴ EEOC, "Worker Adjustment and Retraining Notification Act Frequently Asked Questions," available at: <https://www.dol.gov/sites/dolgov/files/ETA/Layoff/pdfs/WARN%20FAQ%20for%20COVID19.pdf>

Eligibility for Certain Pay and/or Benefits

Employers should develop specific guidelines on which positions and jobs are eligible for certain pay and/or benefits. Guidelines should be created for:

- Hazard pay
- Flexible work arrangements
- Telecommuting
- Workshare programs
- Paid expenses due to working from home (e.g., printers, separate telephone line)
- Other pay or benefits

Additionally, a reduction in hours worked may cause certain employees to become ineligible for particular fringe benefits, such as healthcare benefits. Employers should review their individual plans, as there may be provisions allowing for extended coverage for employees on a leave of absence, furlough, or temporary layoff. Also, employers may consider updating their respective health plans and policies to allow for coverage during employee absence, furlough, and/or layoff.

Wage and Hour Considerations

Tracking of Hours Worked and Paid Time

Employers track hours worked, including the start and end times of work, meal breaks, and/or the tasks that are being performed, in a number of different ways. Because of the disruption the pandemic has placed on the way many employers conduct their business and how employees perform their work, including telecommuting, tracking employee time may be challenging. This could expose the employer to costly wage and hour lawsuits

Additionally, as businesses start reopening, new procedures may be instituted to address health and safety issues in the workplace (e.g., temperature checks, wearing or cleaning of PPE). Employers should determine whether they need to consider the additional time spent by non-exempt employees in performing such required procedures when calculating hours worked. Whether they need to make these adjustments will vary by particular jurisdiction. While donning and doffing class-action lawsuits filed to date have involved mostly workers who are required to wear some type of protective gear or clothing, all types of employers are now considering PPE for their workforce in response to the pandemic. As such, employers in a wide range of industries could be exposed to risk of this type of litigation.

Exempt Employees

Reducing wages of exempt employees either through furloughs or by cutting pay by a percentage to retain employment can impose risk not only if there is disparate impact by demographic group status, but also if these reductions violate federal and state wage and hour laws. Exempt employees who work less than an entire workweek because of a furlough or reduction of work still must be paid their salary. If an employer reclassified an exempt employee to nonexempt or decided to reduce the employee's salary in response to the pandemic, it is important that this process is done in a way that does not result in a disparate impact on any of the protected classes, and that such pay reductions are not viewed as an attempt to evade the salary requirements per federal and state wage and hour laws.

Additionally, as exempt employees start returning to work, careful consideration needs to be given to the duties these employees take on during the ramp-up. Due to a lack of non-exempt staff, exempt employees may take on non-exempt-type work that is typically performed by non-exempt employees. It is important for the employer to review and plan for the types of tasks exempt employees are to perform during the ramp-up, and for the amount of time spent on such tasks, so that the employees' exempt status is not jeopardized.

Reasonable Accommodation

Employers can help reduce their exposure to risk by developing specific guidelines, processes, and procedures for providing reasonable accommodations to employees, including PPE and social distancing. Some jobs may require operational changes and adjustments to accommodate the social-distancing requirements (e.g., how employees interact with customers or visitors). Reasonable accommodations may involve developing multiple shifts of work or a combination of both working on site and teleworking.

The EEOC recently issued guidance for employers regarding providing reasonable accommodations to its workforce.²⁵ The guidance, among other things, reminds employers that some employees who do not ordinarily require an accommodation but are at heightened risk of complications from COVID-19 may request reasonable accommodations. The EEOC indicates that employers must still accommodate employees who need reasonable accommodations for disability or religious purposes unless such accommodations would pose undue hardship. The EEOC also suggests that employers may need to be creative and flexible in identifying reasonable accommodations for their workers.

²⁵ EEOC, "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act" (updated March 21, 2020), available at: <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>

Safe Work Conditions

With the reopening of the economy, employers (especially those employing “Essential Workers”) may face a large number of claims for unsafe work conditions, especially brought by those who have been diagnosed with COVID-19. These claims may be brought under OSHA, Workers’ Compensation, and through counsel. Employers should stay up to date on guidance issued by federal, state, and local authorities, public health officials, and relevant trade associations; and devise specific plans and internal processes and procedures for keeping their workers, customers, and visitors safe and healthy. Such plans may involve providing reasonable accommodations to certain employees, as well as testing (e.g., temperature checks) and contact tracing.

Worker Discipline

Specific decisions and guidelines should be created to address situations when employees refuse to return to work due to perceptions on their safety or refuse to follow safety guidelines the employer has developed in response to COVID-19. For example, the employer should develop guidelines on how to handle a situation in which an employee refuses to wear face mask coverings while at work. Again, the guidelines should be created and executed in a way to avoid allegations of disparate impact and/or disparate treatment.

Whistleblower Protection

Employers may experience increased risk of whistleblower claims from employees who allege they were disciplined or discharged for complaining about health or safety concerns relating to the coronavirus. In addition to offering an internal reporting process that employees would feel safe to use, employers should also be mindful of various protections provided to whistleblowers. For example, the OSHA Whistleblower Protection Program covers employees who report concerns about violations of various health and safety laws, including those related to COVID-19. Acts of retaliation can include terminations, demotions, denials of overtime or promotion, or reductions in pay or hours.²⁶

Hostile Work Environment

As a result of COVID-19, employers face a potential increase in claims of a hostile work environment and harassment based on an employee’s race or national origin, especially for Asian employees. After 9/11, the US saw a significant increase in instances and claims of hostile work environment and employment discrimination put forth by individuals of Arab, Muslim, Middle Eastern, South Asian, and Sikh origins, or those perceived to be. In the initial months after 9/11, the EEOC saw a 250% increase in the number of religion-based discrimination charges involving Muslims.²⁷ Today, we are seeing a similar significant increase in instances of harassment of individuals of Asian origin.

Additionally, workers returning to work after fighting COVID-19 or after helping a family member fight the virus may be subjected to certain stigma, resulting in a hostile work environment and harassment.

Finally, stigma and false perceptions may lead some employees to hide symptoms of COVID-19 to avoid losing earnings or experiencing a hostile work environment. In this regard, particular attention should be paid to African American and Hispanic employees. Centers for Disease Control and Prevention (CDC) data shows that African Americans are overrepresented among patients hospitalized for COVID-19, and New York City identified death rates among African American and Hispanic/Latino individuals “to be substantially higher than that of white or Asian persons.”²⁸

To reduce the possibility that employees may be subjected to discriminatory or harassing behavior, employers should take proactive steps to remind employees, vendors, customers, and visitors of their antidiscrimination and anti-harassment policies; take the necessary steps to explain their leave and return-to-work criteria and procedures; and provide a credible internal-reporting process.

Employers should also consider the effect that implicit bias may have in the workplace. Implicit bias refers to unconscious attitudes or stereotypes that impact one’s understanding, actions, behaviors, and decisions. These biases are involuntarily generated assumptions. Employers should be mindful of the potential impact of implicit biases in their own decision-making processes and in employee conduct.

²⁶ DOL, “Whistleblower Laws Enforced by OSHA,” available at: <https://www.whistleblowers.gov/>

²⁷ Yang, Jenny, “A Message from the Chair,” EEOC (May 27, 2016), available at: <https://www.eeoc.gov/message-chair-4>

²⁸ CDC, “COVID-19 in Racial and Ethnic Minority Groups” (April 22, 2020), available at: <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html>

Privacy Considerations

Privacy concerns are being raised as the government, employers, and workers try to find ways to balance the need to reopen the economy with securing the health and safety of company workers, customers, and visitors. For example, the use of cellphone technology in the contact-tracing process has raised significant concerns around the privacy of individuals. A recent survey conducted by the Pew Research Center²⁹ shows that American adults are split on the use of such technology, while six out of ten believe that such technology will not help in fighting the spread of the COVID-19 virus. Those businesses that decide to implement periodic or regular testing of their workforces should develop detailed and clear policies and procedures regarding testing protocols, including who will have access to the results, who will be notified of the results, and back-to-work procedures after a positive diagnosis. Again, these policies and procedures should be created in a way such that they don't result in adverse impact to any of the protected classes.

How employers will fair in the future will depend on not only processes, procedures, and behaviors during the reopening phase, but also how they handled issues and challenges with their workforce in the last two months (i.e., during the pandemic). As was written recently in the *Wall Street Journal*, "If we want America to recover with any speed from this pandemic recession, we can't have a lawsuit epidemic too."³⁰ With a review of prior decisions made and their potential effect, and proper planning and a detailed strategy for the future, employers may not only provide a safe and healthy work environment for employees, but also minimize employment litigation risks and potential exposure. This is particularly important, given that it is not clear whether the government will provide immunity to employers (beyond the immunity provided to some under the Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19)³¹ as protection from litigation stemming from the COVID-19 pandemic.



29 Auxier, Brooke, "How Americans see digital privacy issues amid the COVID-19 outbreak," Pew Research Center (May 4, 2020), available at: <https://www.pewresearch.org/fact-tank/2020/05/04/how-americans-see-digital-privacy-issues-amid-the-covid-19-outbreak/>

30 Editorial Board, "Stopping a Lawsuit Epidemic," *The Wall Street Journal* (April 23, 2020), available at: <https://www.wsj.com/articles/stopping-a-lawsuit-epidemic-11587683263>

31 Health and Human Services, "Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19" (March 17, 2020), available at: <https://www.federalregister.gov/documents/2020/03/17/2020-05484/declaration-under-the-public-readiness-and-emergency-preparedness-act-for-medical-countermeasures>

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