

# COVID-19 SERIES WRAP UP: A Discussion of Emerging Issues and The Latest Legal Guidance

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Littler

### Presented by



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# DEVELOPING A RETURN TO WORK PLAN:

- What's new?
- What's next?
- Final thoughts



# WHAT'S NEW?

# Open Texas Plan

- Governor's report issued 4/27/20
  - minimum standard health protocols/checklists
  - industry-specific guidance for some industries



# Open Texas Plan

- Guidance frequently added and updated
  - stay informed: <a href="https://gov.texas.gov/organization/opentexas">https://gov.texas.gov/organization/opentexas</a>



# Open Texas Plan

- Train all employees on cleaning/disinfection, hand hygiene and respiratory etiquette
- Screen employees before coming into the business
  - Send home employees with listed symptoms



# EXPOSED PERSONS IN THE WORKPLACE

# Exposed Employees, Customers, Vendors, Visitors

**Primary:** 

Exhibiting symptoms of COVID-19 or tested positive for COVID-19.

**Secondary:** 

Has been in the presence of a person with primary exposure.

**Tertiary:** 

Has been in the presence of a person with secondary exposure.



A MARKING THE STREET

# Primary Exposure – Action Steps



- Send the employee home for at least 14 days from last possible exposure and advise to seek medical treatment.
- Texas guidance: employee may return to work when all three of the following criteria are met
  - At least 3 days have passed since recovery (i.e. no fever)
  - Employee has improvement in respiratory symptoms
  - At least 7 days have passed since symptoms first appeared



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10

# Primary Exposure – Action Steps



- Clean and disinfect work areas CDC and OSHA guidance.
- Notify appropriate employees, vendors, customers. Do not mention name of individual.
- Recommended: Notify public health authorities for further information if employee is a "confirmed" case.



# Secondary Exposure – Action Steps



- If living in same household with a person with primary exposure, send the employee home for at least 14 days from last possible exposure and advise to seek medical treatment. (Texas guidance is the same)
- Clean and disinfect work areas CDC and OSHA guidance.
- Optional: Notify public health authorities for further information if relative is a "confirmed" case.



# Tertiary Exposure – Action Steps



Instruct all employees to:

- Frequently clean hands by using soap and hot water or, when a sink is not available, use alcohol-based hand sanitizer.
- Use disinfectant wipes to clean door handles and surfaces before you touch them.
- If you have cloth or paper face masks available to you, please wear one to work every day, as recommended by the CDC.
- Avoid close contact with your colleagues, remaining at least
   6 feet apart wherever possible.



# **OSHA** Reporting



Just yesterday, OSHA reversed its April 10, 2020 announcement that most employers wouldn't be required to track workplace COVID-19 cases.

# **OSHA** Reporting

- Employers that maintain OSHA injury/illness logs must record COVID-19 cases that are work-related
  - Agency acknowledges work-related determination will be difficult
- Will resume in-person inspections for medium/low risk areas
- In high risk areas, remote investigations may continue under some circumstances.

#### **OSHA**

- COVID-19 is a recordable illness if
  - There is a confirmed case of COVID-19, as defined by CDC
  - The case is work related as defined by 29 CFR § 1904.5
  - The case involves 1 or more of the general recording criteria in 29 CFR § 1904.7
    - Death, days away from work, restricted work, medical treatment beyond first aid, loss of consciousness, significant injury or illness.



# Can we get a history lesson in 60 seconds or less?





# NLRA 1935



# Now can you address the current state of the union?



# State of the Union



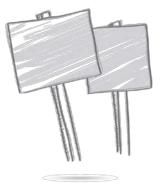
# Why does the NLRA apply to non-unionized employees?



- The NLRA protects <u>employees</u>.
- Protects concerted activity
- Subject must be terms and conditions of employment
- Remains in effect during pandemic







# What issues might cause employees to explore concerted activity?



- Safety/PPE
- Hazard Pay
- Furloughs/Layoffs
- Paid/Unpaid leave

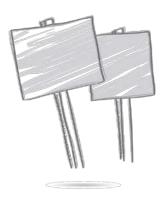


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- Wages
- Benefits
- Staffing
- Resources



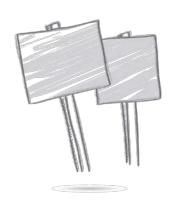




- Training
- Fairness
  - Discipline
  - Promotion
  - Scheduling



June Harrison



# What does concerted activity look like?



- Refusal to work
- Protests
- Strikes
- Walk outs



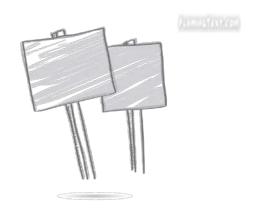




- Complaints, demands
- Social and other media
- Video/Recording of working conditions



Solicitation



- No protection for activity that is:
  - Unlawful
  - Violent



(ALCOHOLD SEED)

- NLRB will generally protect criticism of employer's COVID-19 response
- Narrow exceptions
  - certain "disparaging attacks" calculated to harm company
  - certain "egregious or opprobrious"
     misconduct
  - certain "disloyal" behavior
  - maliciously false statements



June Life Co.

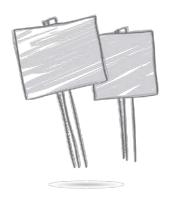
# What can we do about it?



- Communicate listen
- Resolve issues
- Maintain credibility
- Provide accurate and timely information







- Anticipate concerted activity
- Map out practical responses
- Ensure compliance with all guidance from CDC, OSHA, etc.
- Ensure compliance with all other laws



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# What can't we do about it?



#### **Labor Relations**

#### DO NOT

- Threaten
- Interrogate
- Threaten
- Spy





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#### **Labor Relations**

## Did any of the recent legislation in response to the pandemic affect labor relations?



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#### **Labor Relations**



- Notable strings attached to lending program for mid-size U.S. businesses include:
  - Honoring CBAs (page 523); and
  - Remaining "neutral" in any union organizing effort (page 524)

RESIDENCE

 Strings do not apply to SBA loans under Paycheck Protection Program



### WHAT'S NEXT?

## What labor relations issues should we expect to see in the new normal?





BURNETH PROCESS

- More virtual organizing
  - Low cost
  - Effective in reaching mass groups quickly
  - Consistent with physical distancing climate



- Mail ballot elections
- Collective bargaining by teleconference
- Arbitrations by teleconference

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## What labor organizing themes do we anticipate?







- Income inequality; COVID-19 pay increases should be retained
- Paid sick leave should be adopted, continued or applied more broadly
- Safety measures (temperature checks, antibody testing) and hazard pay should be standard

- Safety nets are needed for laid-off or furloughed employees
- Expanded use of telework and remote work arrangements

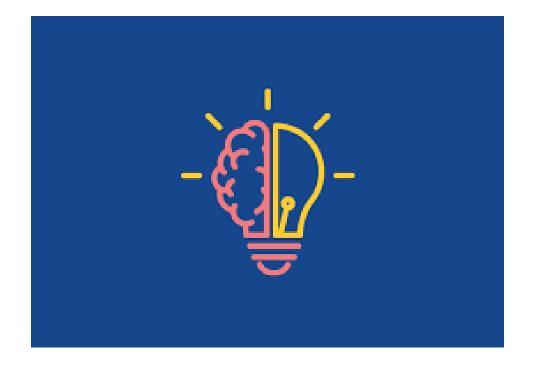


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## FINAL THOUGHTS

- Fluid situation requires knowledge, so:
  - Seek information
  - Study information
  - Identify red flags
    - Seek help when necessary



- Fluid situation requires flexibility, so:
  - Be willing to change
  - Implement change
  - Embrace change



- Fluid situation requires endurance, so:
  - Stay in shape
  - Maintain balance
  - Be confident in your ability to cross the finish line



- Fluid situation requires
  - Knowledge
  - Flexibility
  - Change
  - Stamina

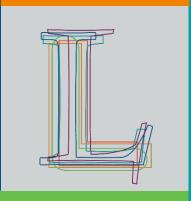


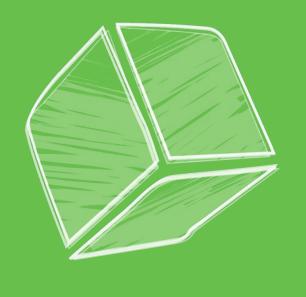
#### "I Don't Feel Safe!"

# What if an employee refuses to return to work?









## Thank You!

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.