

Employment Law Issues at Play when Managing In-office Workers, Teleworkers and Furloughed Employees during the COVID-19 Pandemic

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Presented by

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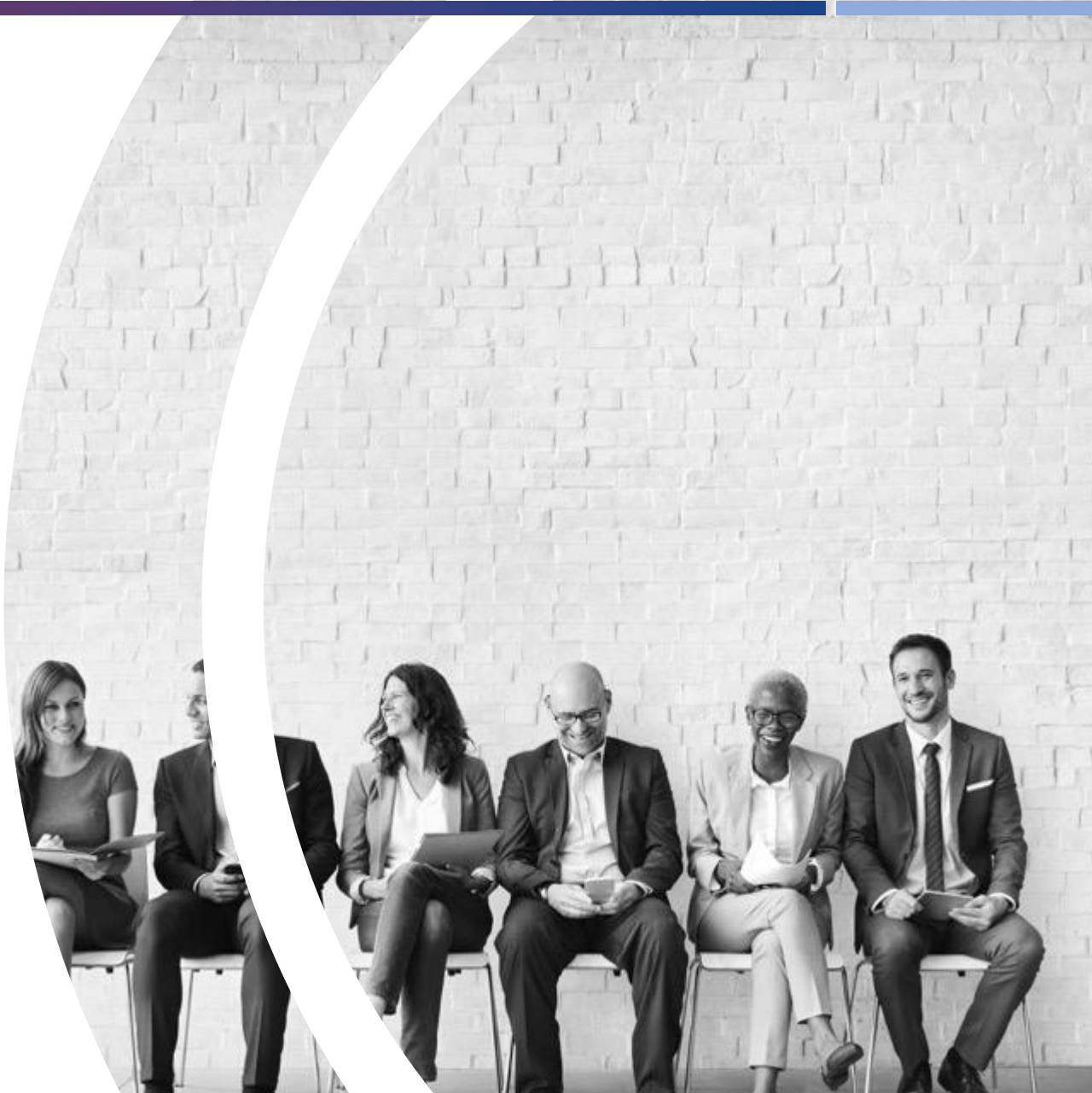
How We Got Here and Current Status

- Many states or counties issued “stay at home” orders that are now being lifted.
- This will be specific to where your business is located.
 - Be mindful that your employees may be subject to different orders that must be complied with.



Returning to Work

- Employers have options:
- Recall/Rehire employees from furlough or layoff
 - Require employees to return to the Office
 - Partial
 - Shifts
 - Require or allow employees to work remotely
 - Full-time, part-time
 - Intermittently



Recalling Employees

- Notice to employees of start date & schedule
- Notice of position and job duties
- Notice of pay rate
- Notice of “at-will” status
 - Additional notice that due to the pandemic, there may be future layoffs, furloughs or pay cuts for that reason
- If rehire:
 - I/9 documents and other standard rehire paperwork
 - Sign Policy Manual Acknowledgement
 - Sign any Non-compete agreements/NDA

Managing Change

- Identify what will change
- Communicate
- Monitor and manage challenges and issues
- Continuously review and improve your approach





OSHA and COVID-19

OSHA's General Duty Clause applies:

Requires employers to provide a workplace free from recognized hazards that are causing or likely to cause death or serious physical harm.



OSHA and COVID-19

www.osha.gov

OSHA Industry Specific Guidance

OSHA-approved State plans

OSHA's Guide: Preparing the Workplace for COVID-19

Risk Assessment

- Risk Ranges: Lower (caution), Medium, High & Very High. Based on:
 - Industry Type
 - Need for contact w/in 6 feet of people known to be, or suspected to be, infected with COVID-19
 - Need repeated or extended contact with people known to be, or suspected to be, infected with COVID-19

Lower Exposure Risk jobs do not require contact with people known to be, or suspected to be infected nor have frequent close contact (w/in 6 ft. of) the general public. Minimal contact at work with co-workers and the public.



OSHA and COVID-19

www.osha.gov/Publications/OSHA3990.pdf

Lower Risk: “Steps All Employers Can Take to Reduce Worker’s Risk of Exposure to SARS-CoV-2” (p. 7 of OSHA Guide)

OSHA: Workplace Controls

- **Install high-efficiency air filters.**
- **Increase ventilation rates in the work environment.**
- **Install physical barriers, such as clear plastic sneeze guards.**
- **Consider appropriate restrictions to socially distance in common areas: restrooms, kitchens, lobbies, conference rooms, elevators, time clock, fitness centers, locker rooms, etc.**
- **Install a drive-through window for customer service or tape appropriate spacing.**
- **Replace face-to-face meetings with virtual communications.**
- **Consider establishing policies and practices, such as flexible worksites (e.g., telecommuting) and flexible work hours (e.g., staggered shifts), to increase social distancing.**
- **Discontinue nonessential travel & follow CDC travel guidelines.**
- **Provide resources that promote personal hygiene (e.g. tissues, no-touch trash cans, hand soap, sanitizer, disinfectants, and disposable towels for workers to clean their work surfaces).**

Safety at the Office: Have an Infectious Disease Preparedness and Response Plan

- Policies on Infection Prevention
 - Follow OSHA/CDC Guidelines
- Policies on screening per EEOC (States may vary)
 - Take Temperatures (100.4)/ Can Require Testing
 - Isolate/send home sick employees
 - Notify others that were in contact
 - Require self-reporting
- Policies to meet other Third Party Requirements:
 - Landlord
 - Insurance





Infection Control (Post CDC Signs)

- deep clean (EPA approved products for COVID-19)
- soap/sanitizer; encourage handwashing
- respiratory etiquette
- PPE (if in close contact with infected person)
- spacing out; barriers
- social distance; no gatherings no shared equipment
- tissues and trash cans

Employer Screening for COVID-19

- Under the Americans With Disabilities Act, employers may conduct mandatory medical testing of employees when such testing is “job related and consistent with business necessity.”
- Applying this standard, the EEOC has specified that during the COVID-19 pandemic, employers may conduct medical screening and testing to determine if employees entering the workplace have COVID-19.
- This is permissible under the circumstances because an individual with the virus will pose a direct threat to the health of others.
- Employer may ask screening questions, take temperatures and/or require employees to undergo COVID-19 testing.

Health Screening Questions

Per EEOC, it will not violate the ADA for an employer to ask employees if they have COVID-19 symptoms:

- fever, chills, cough, shortness of breath, sore throat, difficulty breathing, new loss of smell or taste, muscle pain, and gastrointestinal problems, such as nausea, diarrhea, and vomiting.
- “Rely on the CDC, other public health authorities, and reputable medical sources for guidance on emerging symptoms associated with the disease.”



Taking Temperatures

Per EEOC, it will not violate the ADA for an employer to require employees to have their temperature taken before entering the workplace:

- Require of all employees
- Maintain confidentiality (conduct in private place)
- Use touchless thermometer
- Wear a cloth mask; person taking temperature may also wear gloves
- Keep records in separate medical file
- Isolate and send employee home if running fever of **100.4** degrees or higher
- Pay employees for time spent waiting and having their temperature taken

* **CONSIDER THERMAL SCAN CAMERA**





COVID-19 Testing

EEOC has made clear that employers must “ensure that the tests are accurate and reliable.”

The EEOC directs employers to use guidance from the U.S. Food and Drug Administration, the CDC and other public health authorities to evaluate what may or may not be considered safe and accurate testing.

- Any outside company contracted to conduct the testing should be thoroughly vetted, but will likely be better equipped than many employers to safely conduct the testing.
- Employer should seek legal counsel to ensure compliance with applicable federal and state laws, which may also vary.

COVID-19 Testing

- The decision to implement such a testing program, and the decision on who should conduct the testing, will require a case by case analysis. Legal counsel should be sought.
- This analysis may include many factors, such as the size of the workforce, proximity of the workers to each other, the prevalence of the virus in the local community, the feasibility and expense of conducting the testing, the accuracy and reliability of the available testing and the limits of the information obtained.
- The EEOC points out that many tests may result in false-negatives or false-positives and, regardless, accurate testing only reveals if the virus is present at that time.



What if Employee Refuses?

Employer has several options depending on what policy it has put in place for refusal.

1. Send home without pay (place on leave).
2. Disciplinary Action
3. Termination
4. Allow the employee to Resign
5. Allow such employees to work remotely if that is a reasonable solution.

The employer needs to be consistent in its response to a refusal to submit to testing.

- Exceptions may be considered if, for example, an employee is refusing to submit to testing based on a legally protected religious belief. In that situation, the employer will need to determine whether a reasonable accommodation can be made for this employee, such as working remotely.



Masks

- Nonmedical grade face coverings are not PPE according to OSHA (not regulated)
- They may prevent the wearer from spreading the virus (carriers without a positive test or symptoms)
- Some states may require and dictate terms
- Employers may require
 - If require, pay for mask or consider subsidy for materials and cleaning, training.
- **Post CDC guidance.**



Safety Issues Remote Workers

- OSHA requires employers to provide a safe working environment.
 - In a prior directive, OSHA stated it would not conduct inspections of employees' home offices, nor would it hold employers liable for employees' home offices.
 - Best Practice: Have teleworker do a Home Safety Checklist.



Provide Safe Equipment for Remote Workers

Per OSHA, Employers are responsible for hazards in a home work site caused by materials, equipment, or work processes which the employer provides or requires to be used in an employee's home.



Workers' Compensation

Eligibility for workers' compensation benefits varies by state.

- Generally, workers' compensation benefits will apply if the employee suffers an injury or occupational illness during the course and scope of employment.
- COVID-19 infection may be covered.
- Even if excluded from WC, employer may be liable for negligence.
- Non-subscriber's may be liable if an employee suffers an injury or illness during the course and scope of employment due to the employer's negligence.



The Fearful Employee

- **Communication is Key**
- **If fearful because of unsafe conditions at work:**
 - **Communicate efforts; compliance with CDC guidance**
 - **Deep leaning; soap/sanitizer/Social Distancing; Barriers; Spacing; PPE; restrict gatherings; no wandering around; stay in office; taking temperatures; testing**
- **If fearful because of an underlying condition that puts them at high risk for complications if they contract COVID-19:**
 - **Interactive process**
 - **Reasonable Accommodation such as teleworking or leave**
 - **If a doctor has advised the employee self-quarantine, then provide EPSL if available and employee is unable to telework;**
 - **Unpaid leave**



The Fearful Employee

If just fearful:

Can allow teleworking

Can allow PTO

Can allow unpaid leave or furlough

Can terminate employee

Can allow employee to resign

Will not qualify for unemployment

Leave Requests

- Reason for Leave and Requested Duration
- FFCRA? Other law? (FMLA, ADA)
- What do your leave policies say?
- Required documentation for FFCRA Leave:
 - Name
 - Date
 - Reason and Statement that unable to work or telework
 - Documentation per IRS:
 - Name of government entity or healthcare provider ordering quarantine; name & relationship to individual caring for;
 - If school/daycare closed: name & age of child; name of school/daycare; no other person able to care for child; if child over 14, then state special circumstances that require care during the day.



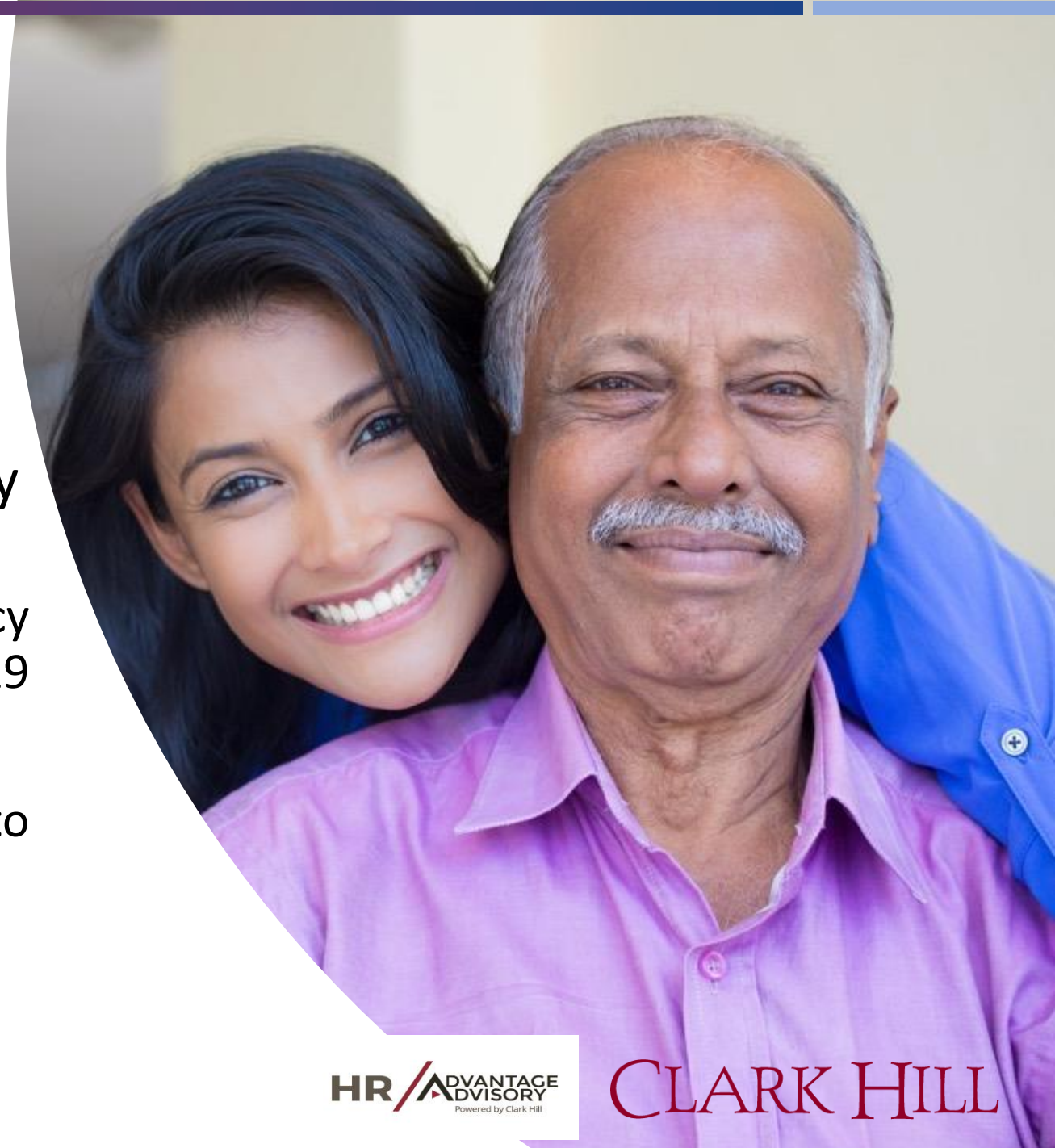


When to Telework during the Pandemic?

- Based on the COVID-19 pandemic, the Department of Labor verified that employers can encourage or require employees to telework (if the job can be done remotely).
- Additionally, state and local COVID-19 Orders, including shelter-in-place or other similar orders, may require it to be allowed (if it can be done).
- Teleworking may also be allowed as a reasonable accommodation for a disability under the Americans With Disabilities Act and similar state statutes.

Legal Considerations: Have a Policy

- Issue a **Temporary** Teleworking Policy for dealing with COVID-19.
 - Specify that it is a temporary policy and is specific to the COVID-19 pandemic.
 - Specify that the policy is subject to change at the Employer's discretion.



Policy Considerations

- Clarify which positions are eligible for telework.
- Require employees to:
 - Communicate with their manager on the status of activities;
 - Notify their manager if there are reasons the employee cannot work;
 - Maintain a safe remote working environment.



More Policy Considerations

- Employees must:
 - Continue to comply with company policies, this includes attendance, overtime, anti-harassment policies.
 - Safeguard equipment and maintain the confidentiality and trade secrets of the employer and its clients.
- Confidentiality compliance is key if information contains confidential financial information.

Wages when Working from Home

- Remote workers get paid!
- Employers must pay employees for time worked, *regardless of where that work occurred.*



Non-Exempt Hourly Employees

- When Working or Teleworking, employers must pay the employee's regular hourly rate for hours worked (must be at least the applicable minimum wage; varies by state).
- For each hour the non-exempt employee works in excess of 40 hours in a workweek, the employee is entitled to overtime pay.
- Overtime pay is calculated at time and one-half the employee's regular rate of pay.





“Hours Worked”

- “Hours worked” has been generally understood to include:
 - Time an employee must be on duty, on the employer’s premises or at any other prescribed place of work; and
 - Any additional time the employee is **allowed** (i.e., **suffered** or **permitted**) to work (even if not requested by the employer)

“Off the Clock”

- Very fact intensive inquiry
- However, the case law generally requires an employer pay an employee for time “off the clock” if:
 1. The employee **performed “work”**;
 2. For more than a ***de minimis*** amount of time; and
 3. The employer **knew or had reason to know** about the work





Policies to Help Control Hours

- Specify the procedure that non-exempt employees will use to record and report working time;
- Communicate the employer's policy regarding overtime, including the requirement to seek pre-approval for overtime;
- Specify the expected hours of work for each employee;
- Identify the expected rest and lunch breaks that each employee should take;
- Discuss how and when employees will communicate with their co-workers.
- Have a reporting policy for improper pay, including overtime hours.

Employee Privacy Issues

Computers and other Equipment and systems provided by the Employer are the property of the Employer.





No Expectation of Privacy

- Employees should be placed on written notice that they have **no expectation of privacy in any activity they perform using the Employer's property.**
- This includes:
 - All internet activity
 - Emails
 - Texts (if employer provides smart phone)
 - Voicemails
 - Documents
 - Other information or electronic communications stored on the employer's property or systems.



Have a Policy & Get Consent

Best practice is to have a policy that:

1. places employees on written notice that the employer has the right to view any and all electronic information stored on its property, including its computers, tablets, email systems, software programs, etc.; AND
2. obtain employee's written acknowledgment and consent.



Other Prohibitions

- Employers must:
 - Not view information for an illegal reason (such as to monitor to deter union activity).
 - Comply with anti-discrimination laws (no selective viewing based on legally protected status; no discrimination if learn of a protected trait).
- Limit access to monitored information to those with a business need to know.
- Some states may vary



Safeguard Employer's Property & Confidential Information

Require employees to keep equipment in a safe place and maintain the confidentiality of the employer's trade secrets and other confidential information. For remote workers:

- Separate workspace; ideally a room that can be locked
- Locked files for paper documents or other items
- Keep others out
- Do not leave lap top in car, with another person, etc.
- Comply with company policies on confidentiality



Cybersecurity

- Employers must work with IT to ensure laptops and other remote devices are secure.
- Instruct employees to comply with all policies on use of employer computers and other electronic systems.
 - Devices are password protected
 - Other applications have different passwords
 - Do not use public Wi-Fi
 - Turn off smart speakers or other listening devices
 - Be mindful of hackers and scammers
 - Report any suspected breach immediately



Wrap Up

- Understand your legal obligations and considerations
- Update or create a policy/guidelines - Leave room for adjustments as needed
- Consider the needs of the team and the company's culture
- Manage the change

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To help provide perspective and education on COVID-19, Clark Hill attorneys have produced several pieces of thought leadership to assist clients and colleagues through this difficult and rapidly-changing time.

Please visit www.clarkhill.com/pages/covid-19 for access a wide range of resources related to coronavirus.

Thank You



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Legal Disclaimer

This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.