

Employer Liability Issues: Litigation, Potential Claims & Legal Strategies Relating to COVID-19

Reusable Industrial Packaging Association Webinar
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Littler[®]

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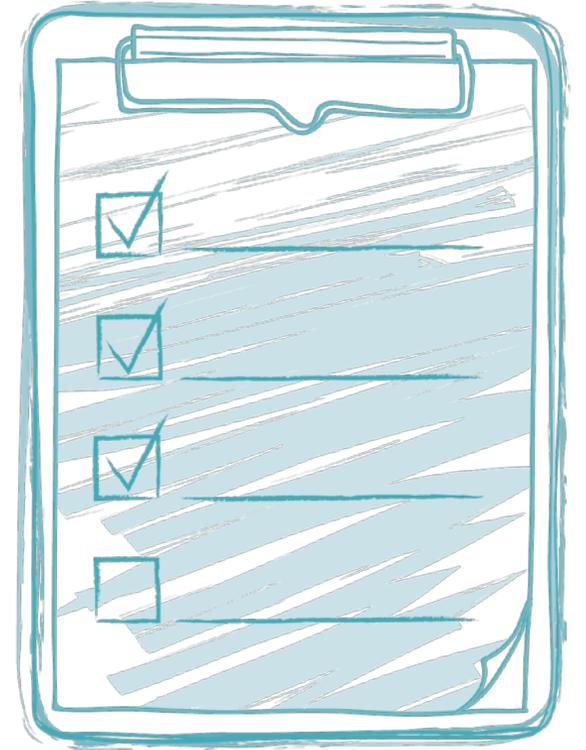
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Agenda

Litigation and potential claims that likely are on the horizon:

- ❖ OSHA Safety-Related Complaints and Exposures
- ❖ Whistleblower Claims
- ❖ Workers' Compensation Remedies & Related Claims
- ❖ Wage and Hour Law Exposures
- ❖ FFCRA/CARES and Discrimination Claims



OSHA Safety-Related Complaints & Exposures; Employer Compliance Strategies

Safety and Health Plan

- **Designate Responsibilities**
- **Cleaning and Disinfecting the Workplace**
- **Engineering and Administrative Controls**
- **Face Coverings**
- **Responding to Cases**



Safety and Health Plan



Responsibilities:

- All managers and supervisors must be familiar with the policies and be ready to answer questions from employees.
- Employees must be made aware of the policies and must be held accountable if not following them.
- Involve safety, risk management, human resources, and legal.

Safety and Health Plan

Cleaning and Disinfecting

- All frequently touched surfaces should be cleaned, as necessary. Once cleaned, all frequently touched surfaces should be disinfected with disinfectant wipes or a bleach and water mixture. Any person performing the cleaning must be trained on the cleaning task and the Safety Data Sheet (“SDS”) of the cleaning products.
- If performing cleaning in-house, ensure that you have the appropriate cleaning and disinfecting supplies and SDS information relating to the supplies, as well as any related personal protective equipment (“PPE”) in stock to meet the additional cleaning demands.



Safety and Health Plan

Cleaning and Disinfecting

- If a vendor is performing cleaning services for the Company, ensure that they are capable of performing the same enhanced cleaning steps safely.
- Cleaning staff should use appropriate PPE. Appropriate PPE includes disposable gloves and gowns for all cleaning tasks, including handling trash.



Safety and Health Plan

Engineering controls are physical modifications to the work environment that isolate workers from hazards.

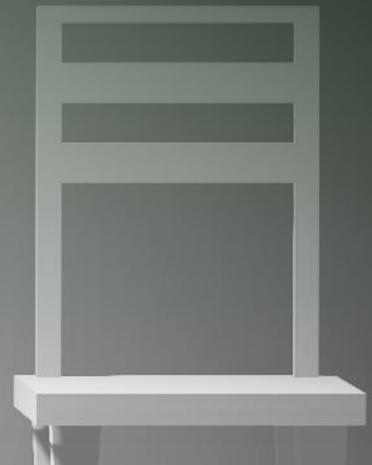
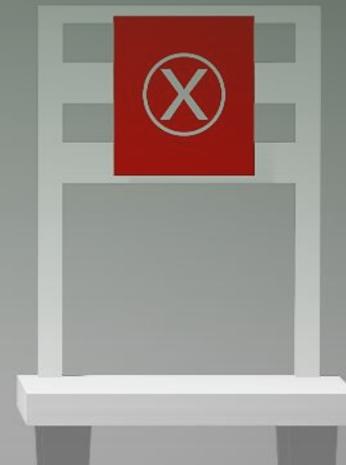
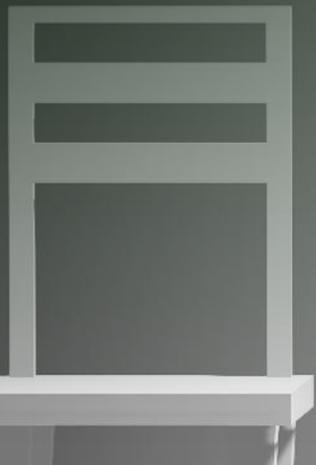
High-efficiency air filters.

Increased ventilation rates.

Increased percentage of outdoor air that circulates into the system.

Increase physical space between employees by decommissioning work stations and cubicles.

Reduce the number of chairs at in break rooms and conference rooms.



Safety and Health Plan

Administrative controls are work procedures meant to reduce exposure to hazards.

Requiring employees to complete a wellness questionnaire or answer health-screening questions prior to admittance to the workplace.

Requiring symptomatic workers to stay home and direct those workers that become symptomatic during the day to go home.

Minimizing contact among workers, clients and customers by replacing in-person meetings with virtual meetings.

Allowing employees who are able to work from home to continue to do so.

Establishing alternating days and create extra shifts to reduce the total number of employees in the office at a given time.

Allowing employees to maintain social distancing while maintaining a full onsite work week whenever possible.



Safety and Health Return to Work Plan

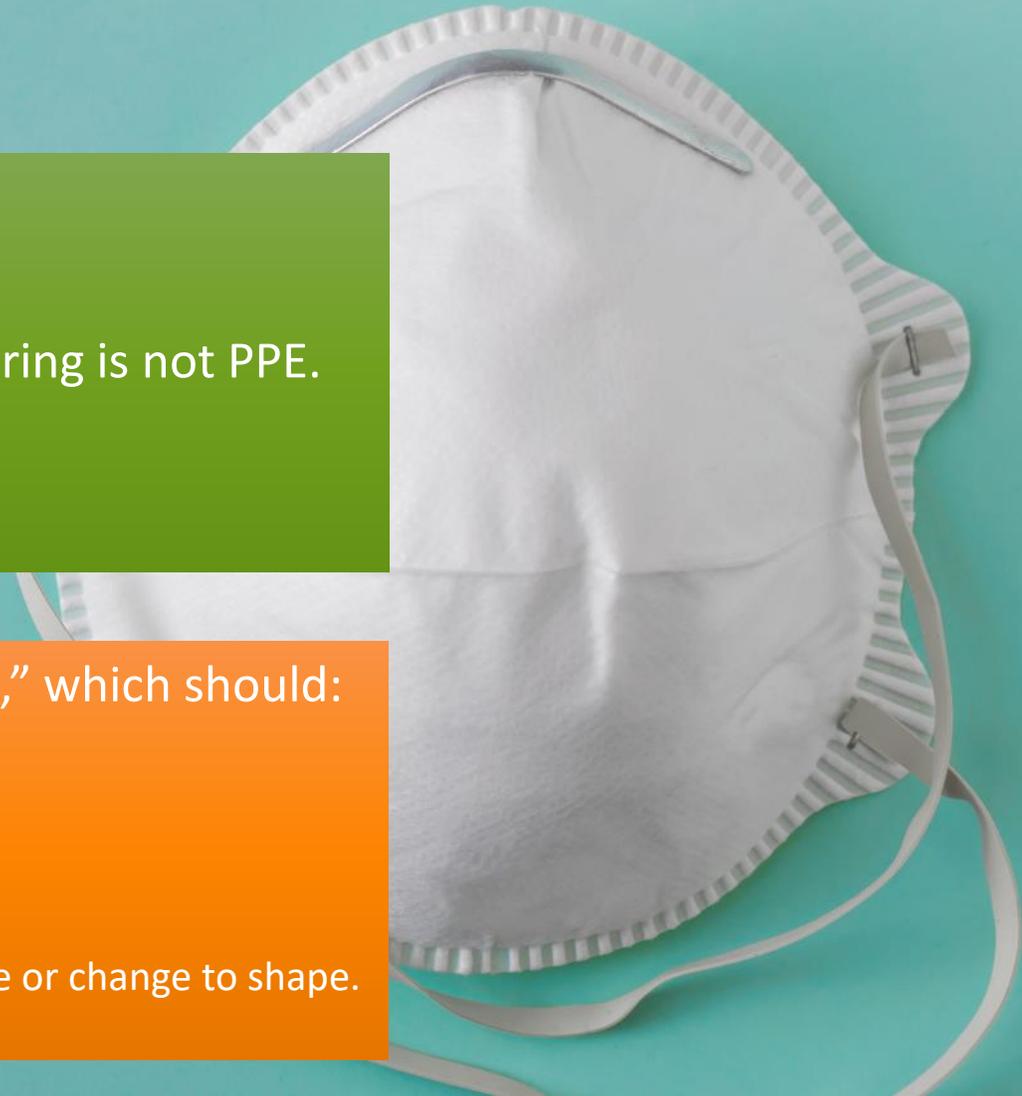
Face Coverings

According to the CDC, the use of face coverings may slow the spread of COVID-19 by helping to prevent asymptomatic people from unknowingly transmitting the virus.

A face covering is not PPE.

The CDC lists five criteria for “cloth face coverings,” which should:

- Fit snugly but comfortably against the side of the face;
- Be secured with ties or ear loops;
- Allow for breathing without restriction;
- Include multiple layers of fabric;
- Be able to be laundered and machine-dried without damage or change to shape.



Occupational Safety and Health Act (OSHA)

- **Investigations**
 - Typically initiated through serious accident, complaint, or if client is in a High-Hazard Industry, but can be random
 - Increased policing due to COVID-19 reopening
- **General Duty Clause**
 - Policies
 - Training
- **Failure to Provide Personal Protective Equipment (PPE)**
 - Gloves, eye and face protection, respiratory protection when job hazards warrant



When Should Employer Record or Report COVID-19 to OSHA?

- If COVID-19 claim is accepted as work-related, then record on OSHA 300 Log
 - Suspected or pending determination of work-relatedness, hold on recording
 - Denied claim (even if disputed) do not record until determined/concluded to be work-related
 - EXCEPT – If there are multiple cases of employees who work together without alternative explanation – Is likely recordable
- If there is a COVID-19 work-related fatality or in-patient hospitalization
 - Reporting obligation is time-limited
 - If fatality due to COVID-19 occurs after 30 days from the workplace incident leading to illness, reporting is not required
 - If in-patient hospitalization occurs after 24 hours from the workplace incident leading to the illness, reporting is not required



Whistleblowing and Retaliation Claims

Whistleblower Claims under OSHA and State Laws



- **Increasing Number of Claims: 2,000+** COVID-19-related whistleblower complaints filed since February 18, 2020.
- **OSHA Retaliation**
 - Occupational Safety and Health Act (“The OSH Act”)
 - Adjudicated by ALJ within the Department of Labor (“DOL”)’s Whistleblower Unit
 - No private cause of action available

Types of Whistleblower Claims on the Horizon

- Occupational Safety and Health Act (OSH Act)
 - No COVID-19 specific protections (but see Virginia OSHA)
 - Other anti-retaliation protections apply: e.g., Section 1(c)
 - Health care worker complaints regarding improper PPE
- National Labor Relations Act (NLRA)
 - Two or more employee complaints about unsafe working conditions
 - Protests or Walk-outs
 - Retailer sued regarding response to social media post
- State Law claims
 - States have implemented numerous COVID-19 measures to protect health care and other workers
 - Public policy/wrongful discharge claims



Types of Whistleblower Claims on the Horizon

- ADA-related claims
 - High Risk Individuals
 - Adverse action resulting from alleged failure to accommodate
- Families First Coronavirus Response Act/CARES Act
 - Retaliation for taking Leave
 - False Claims Act for improper use of relief funds
- FLSA complaints
 - Frontline Workers
 - Extended Hours/Shifts



Tips to Avoid Whistleblower and Retaliation Claims

- Develop and periodically update pandemic response plan
- Be transparent and communicate about workplace conditions
- Update discrimination, accommodation policies and stay current on EEOC guidance
- Document rationale regarding response to complaints
- Adverse action taken only after careful consideration of business and legal risks
- Train or retrain supervisors and managers/Be more flexible



Workers' Compensation Remedies & Related Claims

Workers' Compensation Liability and Claims



- **Increasing number** of workers' compensation claims for Essential and Frontline Workers

Rebuttable presumption of compensability???

- At least 18 states passed or are considering more expansive workers' compensation rules for essential workers

Other Potential Liabilities

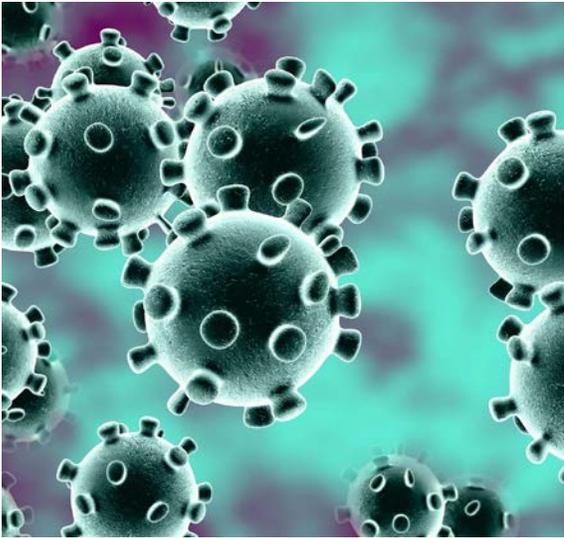
- Retaliation Claims
- Wrongful Death
- Serious and “Willful” Claims (e.g., California under Labor Code Section 4553)

Occupational Diseases Pre-COVID-19

- Workers' Compensation Laws State Specific
- All Provide Coverage for Occupational Diseases
 - Asbestosis/Mesothelioma
 - Long term chemical exposures
 - Hearing Loss
 - Cumulative Trauma
- Common Colds/Flu – Not Compensable Occupational Diseases
- Must be Increased Risk or Peculiar to the Employment



Some States Have Taken Action Through Laws & Executive Orders



- Some states have Executive Orders or Laws specifying when COVID-19 diagnoses are covered under workers compensation
 - Identify types of employment and workers
 - Many have “sunset” provisions or in effect only while SIP/Stay Home Orders in place
 - Some state COVID-19 is presumed work-related but rebuttable
- Some proposing Orders or Laws
 - California floating proposal that anyone working during an existing SIP/Stay Home Order who contracts COVID-19 is conclusively found to have a compensable work comp injury – no rebuttal
 - Also proposing that COVID-19 work comp cases will not impact experience or mod-rating and apportionment of permanent partial disability would still be permitted

What Should Be Reported to Workers' Compensation Insurer?

- Check State Laws – Are there specific COVID-19 Laws or Orders?
 - Essential worker designations?
 - Do you (Employer) have a company-wide plan on handling workers' compensation claims across jurisdictions?
- No specific Laws or Orders directing handling:
 - Report those that are either alleged/noticed to you by employee testing/diagnosed positive
 - Report if employer has knowledge of a workplace contraction
 - Do not report those suspected exposures or those placed out to quarantine without diagnosis
 - Insurer/Adjuster will investigate, process and make liability determination
- Specific Laws or Orders directing handling – Comply by reporting claim to insurer

Historically – Workers' Compensation is Exclusive Remedy

- Workers' compensation has long been held to be exclusive remedy for employees to claim benefits/recovery against their employers
 - Still believed to be the case
 - Some states will permit tort claim outside of workers compensation in cases of intentional bad acts or willful disregard by the employer to the employee
 - Employers instituting recommended safety protocols likely successful in exclusive remedy defense
- Unclear about tort liability in some cases
 - Scenario: Jane contracts at work and husband (Jim) who is not working contracts and becomes ill or dies
 - Unclear if Jim could successfully bring a tort action against Jane's employer
 - If Jim dies, unclear if Jane (who is likely subject to claiming for her own personal injury under the workers' compensation system) could bring a wrongful death claim for loss of her husband.
 - Would such tort claims be covered/defended under a general liability policy?

Takeaway: Mitigate Risk

- Consider best approach for your enterprise
 - Consult with insurance broker/insurer to confirm coverage available and plan for handling
 - Keep up to date on state/local laws in which you have operations
- Take action to document your actions
 - Document measures taken to provide a safe/healthy work environment
 - Job hazard analysis, safety walks with pictures showing plexi-glass, taped distancing,
 - Document whether people complying and correct lack of compliance and document re-education of employees
 - Repeat the safety walks and check-ins with employees

Wage & Hour Exposure (Federal and State Laws)

Potential Wage & Hour Claims

We had very little warning

- Lack of Federal coordination led to piecemeal applications – updated daily
- Inevitable windows of non-compliance
- PLAINTIFFS' ATTORNEYS KNOW THIS
- We are seeing a focus on very large employers right now
 - Deep pockets
 - Limited time period



Are you an **essential worker** in California during the coronavirus pandemic who has not been provided personal protective equipment by your employer? If so, you may qualify to take **legal action.**

1-800-CALL-WALT

Potential Wage & Hour Claims – Federal Law

- Minimum Wage/Overtime
 - Timekeeping is likely to be messy – creating space for minimum wage/overtime claims.
 - Off-the-clock policies are often unwritten.
- Misclassification
 - Exempt/Non-Exempt
 - Misclassification of exempt workers (e.g., shifting to performance of non-exempt work during crisis periods)
 - Independent Contractors
 - ICs are going to push back on classifications with an economic downturn.

Potential Wage & Hour Claims – State Laws

- Expense Reimbursement
 - Essential Workers
 - We already seeing claims for reimbursement of PPE.
 - Given the shifting requirements* employees may have brought their own, had optional PPE, etc.
 - Working from home
 - Home offices carry expenses!
- Final Pay
 - CA and a few other states require vacation be paid out at a termination.
 - Is a furlough a termination?
 - CA: more than a pay period without working can trigger massive waiting-time penalties. There is no furlough.
 - Know your state requirements.
- Meal & Rest Breaks
 - Weak policies have fewer defenses at home.
 - More reason to review timekeeping practices.
- PAGA (California) may compound all of this.

Class and collective action exposure

- **Class, collective and representative actions for off-the-clock work**
- **Class, collective and representative actions for failure to reimburse business expenses**
- **Class and representative actions for failure to timely pay final wages**

The Boundary Between Personal And Work Time Is Blurred

After COVID hit, several new potential off-the-clock theories have surfaced, including:

- Time spent participating in temperature checks at work is work
- Time spent waiting in line for temperature checks at work is work
- Time spent conducting temperature checks at home is work
- The time spent commuting between home and work after a temperature check is work
- Time spent laundering masks or other clothing required for work is work

The Boundary Between Personal And Work Expenses Is Blurred

- **After COVID hit, expense reimbursement claims have expanded:**
 - Thermometers for employees who have been asked to take their temperatures at home
 - The cost of laundering masks on a daily basis
 - The cost of laundering uniforms on a daily basis



Other Legal Boundaries Have Blurred

- **Several states have laws requiring employers to pay final wages, including accrued but unused vacation, upon “termination”**
- **But what constitutes a termination has become blurry**
 - Furlough with full pay, health benefits, and normal “employment status.”
 - Furlough with partial pay, health benefits, and normal “employment status.”
 - Furlough without pay, but with benefits and normal “employment status.”
 - Furlough without pay or benefits, but with normal “employment status.”
 - Furlough without pay or benefits, but with normal “employment status” and a return-to-work date.
 - Furlough without pay, benefits or a return-to-work date, but with normal “employment status.”



COVID-SPECIFIC DEFENSES

In addition to the normally applicable defenses:



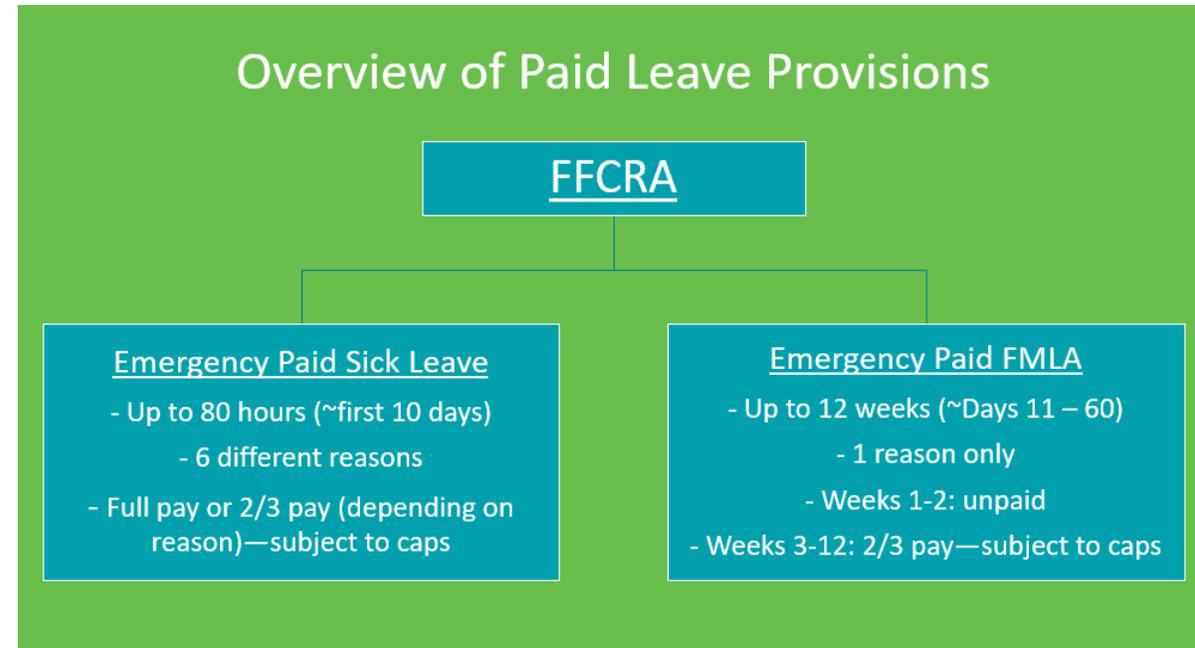
Potential Wage & Hour Claims – Pro-active Steps

- Get a COVID-19 Response Timeline going right away.
 - Match it to the local ordinance timeline.
- Issue an off-the-clock work policy, and simultaneously, require hourly workers to disclose any off-the-clock work.
 - Do it in writing.
 - Then pay it!
- Revisit your classifications.
- Consider quick releases for the messiest cases – can be for low amounts.

New (& Old)
Protections:
FFCRA/CARES and
Discrimination Claims

Return to Work: FFCRA and Paid Sick/Family Leave

- Families First Coronavirus Response Act
 - Up to 10 days of Emergency Paid Sick Leave
 - Up to 12 weeks (10 paid) of Emergency Family and Medical Leave
 - Generally applicable to employers with fewer than 500 employees
 - Paid at reduced rate, reimbursed by Federal government
- Return to Work Issues:
 - Employees diagnosed with COVID-19
 - Employees ordered to quarantine
 - Employees with lack of available child care
 - School closures, child care center closures, summer camp/other closures



Return to Work: CARES Act, Paycheck Protection Program

- PPP Loans
 - Still available
 - Requires maintenance of salary, FTE headcount
 - Calculations can be confusing
 - “Grace Period” to restore employees
- Enhanced Unemployment Benefits
 - Set to expire on July 31st, pending further Congressional action
- **Will there be new legislation, with additional benefits??**



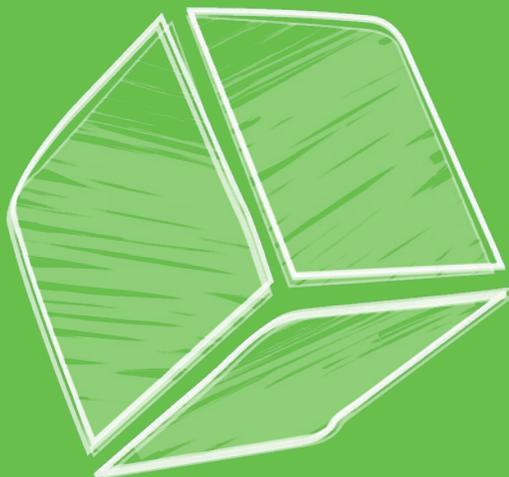
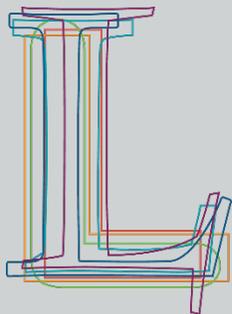
Return to Work: Anti-Discrimination Laws

- Americans with Disabilities Act
 - Testing of employees for return to work
 - Best practices
 - Confidentiality
 - Viral v. Antibody Testing
 - Reasonable Accommodation Requests
 - High risk of severe symptoms if COVID-19 contracted
 - “Fear of COVID” – anxiety and other mental health issues
 - Disability-based objections to masks, gloves



Questions?





Thank You!

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