

# COVID-19 AND EMPLOYMENT LAW: Pandemic II

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# The Laws

- OSHA
- The ADA
- Title VII
- Pregnancy Discrimination Act
- FMLA/HFL
- NLRA
- FLSA
- WARN



# The HR issues:

- Those working
- Those working remotely
- Those who are laid off/furloughed
- Vaccinations

# Preventing the Spread of Covid in the Workplace



- Employers should implement COVID-19 Prevention Programs
- Under the OSH Act, employers are responsible for providing a safe and healthy workplace free from recognized hazards likely to cause death or serious physical harm.
- In addition, employers should be aware that reprisal or discrimination against an employee for speaking out about unsafe working conditions or reporting an infection or exposure to COVID-19 to an employer or OSHA would constitute a violation of Section 11(c) of the Act.
- In addition, 29 CFR 1904.35(b) also prohibits discrimination against an employee for reporting a work-related illness.



# OSHA New Guidance on COVID-19 in the Workplace

(<https://www.osha.gov/coronavirus/safework>)

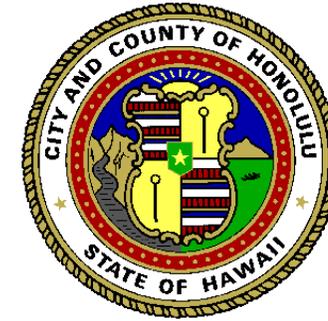
- **The most effective COVID-19 prevention programs engage workers and their representatives in the program's development and implementation at every step, and include the following elements:**
- ***Assignment of a workplace coordinator*** who will be responsible for COVID-19 issues on the employer's behalf.
- ***Identification of where and how workers might be exposed to COVID-19 at work.***
- ***Identification of a combination of measures that will limit the spread of COVID-19 in the workplace, in line with the principles of the hierarchy of controls.***
- ***Consideration of protections for workers at higher risk for severe illness through supportive policies and practices.***
- ***Establishment of a system for communicating effectively with workers and in a language they understand.***
- ***Educate and train workers on your COVID-19 policies and procedures using accessible formats and in a language they understand.***

# OSHA New Guidance on COVID-19 in the Workplace

- ***Instruct workers who are infected or potentially infected to stay home and isolate or quarantine*** to prevent or reduce the risk of transmission of COVID-19.
- ***Minimize the negative impact of quarantine and isolation on workers.***
- ***Isolating workers who show symptoms at work.***
- ***Performing enhanced cleaning and disinfection after people with suspected or confirmed COVID-19 have been in the facility.***
- ***Providing guidance on screening and testing.***
- ***Recording and reporting COVID-19 infections and deaths.***
- ***Implementing protections from retaliation and setting up an anonymous process for workers to voice concerns about COVID-19-related hazards.***
- ***Making a COVID-19 vaccine or vaccination series available at no cost to all eligible employees. Not distinguishing between workers who are vaccinated and those who are not.***

# OSHA New Guidance on COVID-19 in the Workplace

- **Workers who have or likely have COVID-19 should be isolated until they meet CDC guidelines for exiting isolation:**
- **A)** If they think or know they had COVID-19 and had symptoms, they can return after:
  - At least 10 days since symptoms first appeared **and**
  - At least 24 hours with no fever without fever-reducing medication **and**
  - Other symptoms of COVID-19 are improving (loss of taste and smell may persist for weeks or months and need not delay the end of isolation).
- **B)** Some workers might need to stay home and isolate longer than 10 days, as recommended by their healthcare providers.
- **Workers should quarantine if they have been exposed to COVID-19.**



# EMERGENCY ORDER NO. 2021-03

- The intent is to move the city to Tier 3 of Honolulu's COVID-19 Reopening Framework. The order is effective until April 30, 2021.
- Indoor and outdoor social gatherings of more than ten (10) individuals are prohibited.
- Up to ten (10) individuals may engage in any lawful activity (e.g., walking, running, biking, sitting, fishing, etc.) as a group at City Parks, State Parks, and beaches.
- Essential Business:
  - Plumbers, electricians, exterminators, and other service providers who provide services that are necessary to maintaining the safety, sanitation, and essential operation of residences, .....
  - Critical trades. ....cleaning and janitorial staff for commercial and governmental properties, security staff, operating engineers, HVAC, painting, moving and relocation services, and other service providers who provide services that are necessary to maintaining the safety, sanitation, and essential operations of residences ....

# High-Rise Building Guidance for COVID-19

- Additional Measures in Response to COVID-19 in Hawaii:
- Employees who are well but who have a sick family member at home with COVID-19 should notify their supervisor and refer to CDC guidance for how to conduct a risk assessment of their potential exposure.
- If an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (ADA). Employees exposed to a co-worker with confirmed COVID-19 should refer to CDC guidance for how to conduct a risk assessment of their potential exposure.

# OSHA/HIOSH Reportable workplace injury

- Is confirmed as a COVID-19 illness;
- Is work-related as defined by 29 CFR 1904.5; and
- Involves one or more of the general recording criteria in 29 CFR 1904.7, such as medical treatment beyond first aid or days away from work.

# Hawaii Workers' Compensation

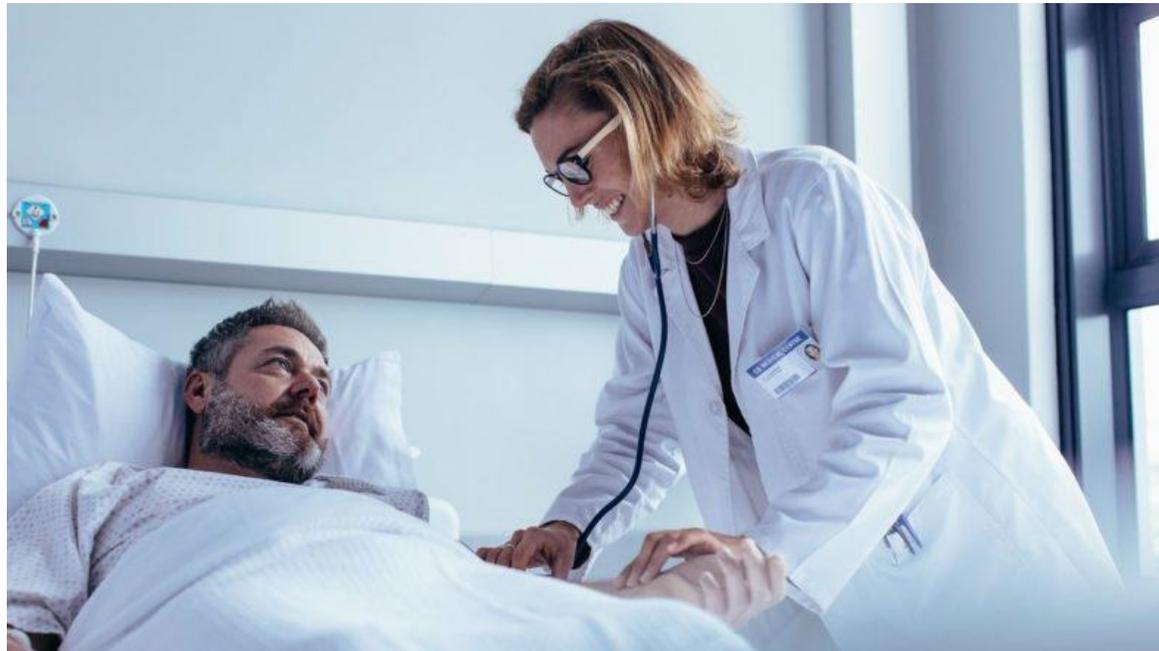
- IS COVID-19 A RECOGNIZED WORK-RELATED INJURY?
- Yes, under certain circumstances, if the employee was exposed to or directly contracted COVID-19 in the course of his or her work duties.
- AN EMPLOYEE INFORMED ME THAT S/HE WAS EXPOSED TO COVID-19. WHAT SHOULD I DO?
- If the employee reported being exposed to COVID-19 in the course of doing his or her work duties, please contact your insurance carrier to submit a WC-1 Employer's Report of Injury and follow the OSHA Guidance on Preparing Workplaces for COVID-19.

<http://labor.hawaii.gov/covid-19-employer-workers-compensation-faqs/>



- Woman who contracted chronic respiratory illness after being exposed to Influenza B while traveling in Asia. The Supreme Court of Minnesota ruled the woman was eligible for workers compensation because she was on work-related business, and the disease was not one she would have contracted in the United States.

- The only opportunity for an employee who contracts coronavirus to seek damages outside of workers' compensation is if their company has behaved recklessly—such as by ordering them to Wuhan, the epicenter of the virus.



May an ADA-covered employer send employees home if they display influenza-like symptoms during a pandemic?

- Yes. The CDC states that employees who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace. Advising such workers to go home is not a disability-related action if the illness is akin to seasonal influenza or the 2009 spring/summer H1N1 virus. Additionally, the action would be permitted under the ADA if the illness were serious enough to pose a direct threat.
- [https://www.eeoc.gov/facts/pandemic\\_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html)

Can I fire an employee for refusing to come to work because of fear of contracting the coronavirus?

• **Yes.**

During a pandemic, may an employer take its employees' temperatures to determine whether they have a fever?

- Yes, during the declared pandemic.

# Can I require daily checks of symptoms?

- Yes, but...
- Not if teleworking.
- If done before work time may require pay if more than de minimus amount of time

When an employee returns from travel during a pandemic, must an employer wait until the employee develops influenza symptoms to ask questions about exposure to pandemic influenza during the trip?

- No. These would not be disability-related inquiries. If the CDC or state or local public health officials recommend that people who travel out of state quarantine, an employer may ask, even if the travel was personal.



# EEOC v. Massage Envy (11<sup>th</sup> Cir. 2019)

- A massage therapist who was fired by Massage Envy in South Tampa, FL, due to concerns she might contract the Ebola virus in a planned visit to Ghana in West Africa in 2014.
- “[E]ven construing the statute broadly, the terms of the ADA protect persons who experience discrimination because of a current, past, or perceived disability – not because of a potential future disability that a healthy person may experience later.”

# Paid or Unpaid?

- If you require employees not work for 14 days, do they have to be paid?
- Can you allow an employee to use paid sick leave?
- If an employee exhausts paid leave benefits, can they be on unpaid leave?
- Does it matter if they are salaried exempt or non-exempt? YES!
  - See DOL Opinion Letter FLSA2005-41 (10/24/05)

# The NLRA

- Employees might refuse to work unless their work environment is sanitized, they get to wear a mask, they ask for protective equipment, particularly if someone at the workplace had been sick. Or employees might protest co-workers not washing their hands.
- These acts may be protected concerted activity for which the employer may not discipline an employee.

# Telecommuting

- Eligibility

- Job is of exempt status
- Work is information based
- Productivity can be monitored/measured easily
- Position is able to typically work alone on assignments
- Job duties of the individual do not require frequent supervision, direction or input from company personnel
- Physical presence at the worksite is not an essential job requirement or necessary to perform essential job functions



# The Vaccines in Hawaii

- Healthcare personnel and long-term care facility residents, which is estimated to be 6% of Hawaii's total population;
- Frontline essential workers and adults 75 years of age and older, which is about 20% of Hawaii's population; and
- Adults age 65 to 74 years, persons 16 to 64 years with high-risk medical conditions, and essential workers not included in the other categories, which is 47% of the state's population.
- Based on the estimated number of people in each of these priority groups, 73% of Hawaii's population will receive the vaccination if all those in Phase 1 receive the vaccine.

# Can You Require Vaccination?

- Under Disability law, YES.
- Two Exceptions:
  - A health condition that places the employee at higher risk
  - A sincerely held religious objection to vaccination
- Both may require reasonable accommodation..... will require an employer to examine the effectiveness of measures such as social distancing and masking. Scheduling work time and remote work arrangements raise some complications that would require individualized assessment.
- <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

# Emergency Use Authorization Issues

- “FDA must ensure that recipients of the vaccine under an EUA are informed, to the extent practicable given the applicable circumstances, that FDA has authorized the emergency use of the vaccine, of the known and potential benefits and risks, the extent to which such benefits and risks are unknown, that they have the option to accept or refuse the vaccine, and of any available alternatives to the product.”
- Refusal based on FDA EUA status may create potential issues under Hawaii wrongful discharge law in violation of public policy.
- Offset by public policy to prevent direct threat to public/coworker health and safety
- Pre-offer question: Would you be willing to get a covid vaccine if offered employment?

# Mahalo

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