

## EMPLOYMENT LAW

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*Bonnie Mayfield provides practical tips to minimize labor and employment risks arising from the Coronavirus in the workplace and workforce.*

## Practical Tips to Minimize Labor and Employment Risks Arising from the Coronavirus in the Workplace and Workforce

### ABOUT THE AUTHOR



In addition to trying labor and employment matters in different venues, **Bonnie Mayfield**, a Member of the Dykema Gossett law firm, regularly advises and counsels clients about administrative, internal, employment and labor matters. In addition to scoring three, successive, employment law victories at three different trials for one client, she made legal history for a different client by winning the first ever award in a particular type of labor arbitration. She can be reached at [bmayfield@dykema.com](mailto:bmayfield@dykema.com).

### ABOUT THE COMMITTEE

The Employment Law Committee serves members who represent employers and their insurers. Committee members publish newsletters and Journal articles and present educational seminars for the IADC membership-at-large and mini-seminars for the committee's membership at the Annual and Midyear Meetings. The Committee presents significant opportunities for networking and business referrals. The goal of the Employment Law Committee is to build an active committee with projects that will attract and energize attorneys who practice employment law on a domestic and international basis. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



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As the world's information about the Coronavirus ("COVID-19") continues to quickly update, employers must remain aware of the many potential legal risks that can rapidly arise when grappling with COVID-19 in the U.S.-based workplace and workforce. The following legal perils await any employer who is unprepared or ill-informed.

### **PRIVACY PERILS**

The confidentiality provisions of the Americans with Disabilities Act ("ADA") and the Rehabilitation Act impose legal obligations to keep medical information confidential, maintain it separately from the general personnel file, and limit access to those with a need to know<sup>1</sup>. Similarly, Family Medical Leave Act ("FMLA") regulations mandate that "[r]ecords and documents relating to certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files."<sup>2</sup> Although the Health Insurance Portability and Accountability Act ("HIPAA") does not provide a private cause of action for individuals who believe their rights have been violated, HIPAA does provide both civil and criminal penalties for improperly handled or disclosed protected health information and also permits enforcement actions by the Department of Health and

Human Services and states attorneys general<sup>3</sup>.

**Practical Tips:** Be very careful with medical information, including medical information regarding COVID-19 exposure. Keep track of whether the health information was voluntarily disclosed or provided in response to an employer inquiry or examination, and the details of any voluntary disclosure or employer inquiry or examination (e.g., date, time, place, location, identifications of the disclosers/recipients/requesters of information, the specific information disclosed and/or requested, etc.). Determine who can legally be allowed (in your management ranks, like HR, supervisors, or managers) to be informed about necessary restrictions on work or duties and the necessary accommodations. Even when dealing with fervent fears about COVID-19 exposure, realize that asking for health information and/or improperly protecting and sharing that information could create privacy issues. Read the EEOC's guidance — Pandemic Preparedness In The Workplace And The Americans With Disabilities Act — that "identifies established ADA principles that are relevant to questions frequently asked about workplace pandemic planning."<sup>4</sup> Not determining what obligations are imposed by and ignoring the nuances of the ADA, Rehabilitation Act, FMLA, HIPAA, and privacy laws could create risk and obviate a defense.

<sup>1</sup>

<https://www.law.cornell.edu/uscode/text/42/12112>

<sup>2</sup> <https://www.law.cornell.edu/cfr/text/29/825.500>.

<sup>3</sup> <https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html>.

<sup>4</sup> [https://www.eeoc.gov/facts/pandemic\\_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html).

## SAFETY PERILS

The Occupational Safety and Health Administration (“OSHA”) has issued guidance specific to COVID-19. OSHA’s Guidance recognizes that, although “[t]here is no specific OSHA standard covering COVID-19[,] ... some OSHA requirements may apply to preventing occupational exposure to COVID-19<sup>5</sup>.” Depending upon the workplace, COVID-19 safety measures may include personal protective equipment like gloves, eye and face protection, and respiratory protection.

For healthcare professionals in particular, COVID-19 safety measures also may include applying OSHA’s Bloodborne Pathogens standard. That standard “applies to all occupational exposure to blood or other potentially infectious materials as defined” by OSHA<sup>6</sup>.”

The Centers for Disease Control and Prevention (“CDC”) has issued separate guides for businesses and employers<sup>7</sup>, healthcare facilities<sup>8</sup>, communities (such as homes, schools and universities)<sup>9</sup>, and mass

gatherings<sup>10</sup>. Each CDC guide provides recommended strategies particular to the grouping.

The Environmental Protection Agency (“EPA”) has published a list of “EPA-registered disinfectant products” that “have qualified under [the] EPA’s emerging viral pathogen program for use against SARS-CoV-2, a coronavirus that causes COVID-19<sup>11</sup>” The EEOC’s emerging viral pathogen program “provides general guidance to registrants that can be used to identify effective disinfectant products for use against emerging viral pathogens and to permit registrants to make limited claims of their product’s efficacy against such pathogens.”<sup>12</sup>

**Practical Tips:** Plan for the likelihood of COVID-19 appearing in your workforce and workplace and regularly consult EPA, WHO, OSHA and CDC guidance as employers have a General Duty, under the Occupational Health and Safety Act, to provide a place of employment that is “free from recognized hazards that are causing or are likely to

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<sup>5</sup> <https://www.osha.gov/SLTC/covid-19/standards.html> (last visited 3/2/2020 at 1:40 p.m.).

<sup>6</sup> <https://www.osha.gov/laws-regs/regulations/standardnumber/1910/1910.1030> (last visited 3/2/2020 at 1:41 p.m.).

<sup>7</sup> [https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fspecific-groups%2Fguidance-business-response.html](https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fspecific-groups%2Fguidance-business-response.html).

<sup>8</sup> <https://www.cdc.gov/coronavirus/2019-ncov/healthcare-facilities/index.html>.

<sup>9</sup> [https://www.cdc.gov/coronavirus/2019-ncov/community/index.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcommunity%2Fmass-gatherings-ready-for-covid-19.html](https://www.cdc.gov/coronavirus/2019-ncov/community/index.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcommunity%2Fmass-gatherings-ready-for-covid-19.html).

[https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/mass-gatherings-ready-for-covid-19.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcommunity%2Fmass-gatherings-ready-for-covid-19.html](https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/mass-gatherings-ready-for-covid-19.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcommunity%2Fmass-gatherings-ready-for-covid-19.html).

<sup>10</sup> [https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/mass-gatherings-ready-for-covid-19.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcommunity%2Fmass-gatherings-ready-for-covid-19.html](https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/mass-gatherings-ready-for-covid-19.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcommunity%2Fmass-gatherings-ready-for-covid-19.html).

<sup>11</sup> <https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2> (last visited 3/9/2020 at 12:28 p.m.).

<sup>12</sup> <https://www.epa.gov/pesticide-registration/guidance-registrants-process-making-claims-against-emerging-viral-pathogens> (last visited 3/9/2020 at 12:31 p.m.).

cause death or serious physical harm<sup>13</sup>.” Convene a task force to examine your preparedness and your current emergency response and safety plans. Clearly communicate with your employees; it is important to let them know that you are committed to providing a safe workplace.

Implement effective (and legal) strategies for managing your business and workforce and ensuring safety. CDC<sup>14</sup> recommended safety strategies<sup>15</sup> include:

- Encouraging sick employees to stay home;
- Separating sick employees in the workplace and sending them home;
- Issuing communications encouraging cough and sneeze etiquette<sup>16</sup> and hand hygiene etiquette<sup>17</sup>.
- Advising employees about risks before travel to locations that have had a COVID-19 outbreak; and
- Informing employees of coworker exposure to COVID-19, but making sure to maintain the confidentiality of the coworker.

Other strategies are:

- Thoroughly cleaning and disinfecting the workplace;

- Contacting and remaining in contact with the CDC and state and local health departments if an employee develops or reports exposure to COVID-19;
- Educating the workforce about COVID-19 and pointing them to sources (e.g., OSHA<sup>18</sup>, CDC<sup>19</sup>, WHO<sup>20</sup>, and the EPA<sup>21</sup>) of evidence-based information;
- Reviewing travel programs and limiting non-essential, business travel to locations that have had a COVID-19 outbreak;
- Restricting workplace visitors;
- Providing telework options;
- Identifying essential staff and functions that must continue if and when a COVID-19 outbreak occurs;
- Installing hand sanitizer dispensers (automatic, not hand pump);
- Training employees on what to do if they think they have been exposed to COVID-19;
- Consulting preexisting, evidence-based healthcare guidance that identifies preventive measures for protecting employees from occupational exposure: (a) OSHA's recommended MERS-CoV guidance

<sup>13</sup> <https://www.law.cornell.edu/uscode/text/29/654>.

<sup>14</sup> <https://www.cdc.gov/>.

<sup>15</sup> [https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fspecific-groups%2Fguidance-business-response.html](https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fspecific-groups%2Fguidance-business-response.html).

<sup>16</sup>

[https://www.cdc.gov/healthywater/hygiene/etiquette/coughing\\_sneezing.html](https://www.cdc.gov/healthywater/hygiene/etiquette/coughing_sneezing.html).

<sup>17</sup>

<https://www.cdc.gov/handwashing/materials.html>.

<sup>18</sup> <https://www.osha.gov/SLTC/covid-19/>.

<sup>19</sup> <https://www.cdc.gov/coronavirus/2019-ncov/index.html>.

<sup>20</sup>

<https://www.who.int/emergencies/diseases/novel-coronavirus-2019>.

<sup>21</sup> <https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2> (last visited 3/9/2020 at 1:09 p.m.).

for employers and employees<sup>22</sup>; (b) OSHA's Bloodborne Pathogens standard<sup>23</sup>; and (c) OSHA's Information Regarding Severe Acute Respiratory Syndrome (SARS)<sup>24</sup>;

- Consulting OSHA's Respiratory Protection standards<sup>25</sup>;
- Recognizing that — depending upon the circumstances — some employees can refuse to work. Section 13(a) of the Occupational Safety and Health Act allows employees to refuse work if they believe they are in imminent danger, which is defined as “any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.”<sup>26</sup> This right is not unlimited. The employee must “believe that death or serious physical harm could occur within a short time.”<sup>27</sup> However “[f]or a health hazard there must be a reasonable expectation that toxic substances or other health hazards

are present and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency. The harm caused by the health hazard does not have to happen immediately.”<sup>28</sup>

### **WAGE AND HOUR PERILS**

COVID-19 can create wage and hour issues that can be avoided. Failure to follow wage and hour laws, however, could result in having to compensate for unpaid wages and also paying “liquidated damages” equal to the amount of unpaid wages. For this reason, employers should know and comply with wage and hour laws, including any local laws dealing with sick time like Michigan’s Paid Medical Leave Act<sup>29</sup>, and stay abreast of the status of contested sick leave ordinances passed by municipalities (like Dallas, San Antonio, and Austin, Texas)<sup>30</sup>.

Notably, guidance issued by the Department of Labor (“DOL”) — Pandemic Flu and the Fair Labor Standards Act<sup>31</sup> — is helpful in determining when an employee dealing with COVID-19 must be compensated. As the DOL’s guidance states, the Fair Labor Standards Act (“FLSA”) generally applies to hours actually worked.

<sup>22</sup>

[https://www.osha.gov/SLTC/mers/control\\_prevention.html](https://www.osha.gov/SLTC/mers/control_prevention.html).

<sup>23</sup> <https://www.osha.gov/laws-regs/regulations/standardnumber/1910/1910.1030>.

<sup>24</sup> <https://www.osha.gov/dep/sars/>.

<sup>25</sup>

<https://www.law.cornell.edu/cfr/text/29/1910.134>.

<sup>26</sup>

<https://www.osha.gov/as/opa/worker/danger.html> (citing Section 13(a) of the Occupational Safety and

Health Act, [https://www.osha.gov/laws-regs/oshact/completeoshact#Section13\(a\)](https://www.osha.gov/laws-regs/oshact/completeoshact#Section13(a))).

<sup>27</sup>

<https://www.osha.gov/as/opa/worker/danger.html>.

<sup>28</sup> *Id.*

<sup>29</sup> [https://www.michigan.gov/leo/0,5863,7-336-78421\\_94422\\_59886\\_91049---,00.html](https://www.michigan.gov/leo/0,5863,7-336-78421_94422_59886_91049---,00.html).

<sup>30</sup> *San Antonio Sick Leave Appeal On Ice For Austin Decision*, Michelle Casady, Law360 (March 4, 2020, 4:05 PM EST).

<sup>31</sup>

[https://www.dol.gov/whd/healthcare/flu\\_FLSA.htm](https://www.dol.gov/whd/healthcare/flu_FLSA.htm).

- If telework is being provided as a reasonable accommodation for a qualified individual with a disability, or if required by a union or employment contract, then you must pay the same hourly rate or salary.
- If this is not the case and you do not have a union contract or other employment contracts, under the Fair Labor Standards Act (FLSA) employers generally have to pay employees only for the hours they actually work, whether at home or at the employer's office.
- However, the FLSA requires employers to pay non-exempt workers at least the minimum wage for all hours worked, and at least time and one half the regular rate of pay for hours worked in excess of 40 in a workweek.
- Salaried exempt employees generally must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions.<sup>32</sup>

**Practical Tips:** Review the collective bargaining agreement. Pay for hours actually worked unless there is some other legal reason (e.g. contractual provision) to not do so. Determine whether the employee is exempt or non-exempt. Keep track of the number of hours actually worked. Use, if you do not already, software that allows

remote employees options (e.g., via laptop, mobile app, telephone, etc.) to record their time and attendance. Pay the appropriate regular and/or overtime rates. Consider being generous as your employees are one of the strengths of your business. Remember, the costs of litigation can far exceed amounts voluntarily paid as compensation.

### DISCRIMINATION PERILS

The existence or possibility of COVID-19 in the workplace and/or workforce is not a license to discriminate. Yet, misinformation about and/or fear of COVID-19 could result in discriminatory action, which is unlawful and can take many forms. Depending upon the circumstances, ostracization, verbal attacks, physical violence, denial of access and accommodations, and questioning about health information can be forms of discrimination. Reportedly, these circumstances have already occurred in some venues<sup>33</sup>.

Depending upon their circumstances, employer liability for similar, discriminatory actions could implicate a host of local, state, and federal laws such as Title VII, the ADA, the FMLA, the Rehabilitation Act, and local and state civil rights laws like Michigan's Elliott-Larsen Civil Rights Act. Indeed, because there is a lot we do not know about the virus, it remains to be determined

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<sup>32</sup>

[https://www.dol.gov/whd/healthcare/flu\\_FLSA.htm](https://www.dol.gov/whd/healthcare/flu_FLSA.htm).

<sup>33</sup> <https://www.cnn.com/2020/02/14/us/hmong-men-hotel-refusals/index.html>;

<https://www.dailytargum.com/article/2020/02/rutgers-community-weighs-in-on-discrimination-due-to->

[coronavirus](#);

<https://www.nytimes.com/2020/03/02/world/asia/coronavirus-italy-racism.html>;

<https://www.buzzfeednews.com/article/skbaer/coronavirus-racism-attack-london>.



whether suffering from COVID-19's respiratory illness qualifies as a disability.

Notably, OSHA has published COVID-19 specific guidance — Stigma and Resilience<sup>34</sup> — recognizing that “[f]ear and anxiety about a disease can lead to social stigma toward people, places, or things. For example, stigma and discrimination can occur when people associate a disease, such as COVID-19, with a population or nationality, even though not everyone in that population or from that region is specifically at risk for the disease.<sup>35</sup>” “It is important to remember that people – including those of Asian descent – who do not live in or have not recently been in an area of ongoing spread of the virus that causes COVID-19, or have not been in contact with a person who is a confirmed or suspected case of COVID-19 are not at greater risk of spreading COVID-19 than other Americans.”<sup>36</sup> Implicitly, that guidance recognizes that employees who are members of a protected class and who are stigmatized can become discriminated against in the workplace thereby causing legal liability for employers.

Similarly, an employee who has a relationship with “protected” persons also can be discriminated against at work due to the employee’s “association” with members of a protected class. This is because courts have recognized discrimination claims based upon an “association” with individuals who are disabled or who are members of a particular race. Employees, therefore, are protected from discrimination because of their advocacy on behalf of protected class members. For example, if an employee

advocates against discriminatory conduct in the workplace directed towards a member of a protected class, then, depending upon the circumstances, that advocacy, arguably, could be protected, even if the advocating employee is not a member of the protected group and regardless of the degree of the association.

Applying associational discrimination theories (e.g., expense theory, disability by association theory, and distraction theory) to potential COVID-19 situations, associational discrimination could arise in a number of scenarios like the following. An employee, “disabled” because of COVID-19 and covered by the employee's health plan, is discharged because of the cost to the employer. An employer takes an adverse action against an employee who is associated with a person “disabled” by COVID-19, the “disability” is communicable, and the employer fears the employee may develop the disability. An employer takes an adverse action against an employee who is inattentive in the workplace because a protected, associated individual, “disabled” by COVID-19, requires the employee’s attention.

**Practice Tips:** Employers should have in place and published to employees, written policies dealing with attendance, recordation of time, leave, communicable illness, travel, teleworking, and against unprofessional conduct, harassment, retaliation, and discrimination (updated to include prohibition against “associational” bias). A best practice is that each employee provides written acknowledgement that the

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<sup>34</sup> <https://www.cdc.gov/coronavirus/2019-ncov/about/related-stigma.html>.

<sup>35</sup> *Id.* (eliminating footnote).

<sup>36</sup> *Id.*

employee has read the policy and understands the policy. In light of the recent COVID-19 generated fervor to wear respirators, employers should be thoroughly be aware of OSHA's Respiratory Protection standards<sup>37</sup> and well as their company respiratory protection policy and protocol. If applicable to your work environment and if there is no such policy or protocol in place, then establish a policy and protocol.

Discriminatory conduct by employees, consumers, business partners, and others always should be swiftly responded to by employers. Now is a perfect time to make sure that all of the required posters are positioned in the workplace and also to remind all employees: (1) about company policies against unprofessional conduct, harassment, retaliation, and discrimination and the various ways report to the company (e.g. management, HR, anonymous hotline etc.) actual or suspected violations of company policies; (2) that discrimination can arise in a variety of ways, including (a) physical (e.g., touching, blocking normal work movement), (b) verbal (e.g., questioning about health information or associations with protected persons, innuendos, slurs, nicknames, jokes, remarks, threats, and sounds), and (c) non-verbal (e.g., gestures, drawings, cartoons, pictures, graphics, posters); (3) to follow company policies and immediately report unprofessional conduct, harassment, retaliation, and discrimination to the person/entity the company designated to receive such reports, regardless of who has created the situation that potentially

violates company policies. Remain aware that despite COVID-19, the law does not mandate that an employer simply ignore misconduct, even if the employee's behavior is potentially tied to or caused by a medical condition or disability.

### **UNIONIZED WORKFORCE PERILS**

The collective bargaining agreement (“CBA”) governs the terms and conditions of a unionized workforce and can impact transfers, relocations, discipline, layoffs, closing facilities, as well as the issuance of policies. The CBA should have a *force majeure* provision and a Management Rights clause (both of which allow for some unilateral employer action). COVID-19 in the workforce and workplace also may create an exigent circumstance, which excuses obligations to notify and bargain with the union when there is an extraordinary, unforeseen event that has a major economic effect requiring immediate action.

Nevertheless, whether unionized or not, employers should determine their obligations under state and federal laws like the Worker Adjustment and Retraining Notification Act (“WARN”). DOL guidance — EMPLOYER’S Guide to Advance Notice of Closings and Layoffs<sup>38</sup> — provides an overview of WARN’s principal provisions along with frequently asked questions and answers.

Of course, dealing with a COVID-19 related situation does not necessarily have to trigger an employee’s *Weingarten* right to union

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<https://www.law.cornell.edu/cfr/text/29/1910.134>.

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<https://www.dol.gov/sites/dolgov/files/ETA/Layoff/pdfs/EmployerWARN2003.pdf>.



representation<sup>39</sup>. Still, it is important to know that, under *Weingarten*, an employee, upon request, has the right to union representation at investigatory interviews that the employee reasonably believes may result in discipline to the employee. A corollary part of the *Weingarten* right is the employee's opportunity to meet with a union representative before the investigatory interview, if the employee requested a union representative and if the employee — or the union representative — invoked the right to a pre-interview consultation.

**Practical Tips:** In the haste of dealing with COVID-19, do not forget that unionized employees have rights governed by a CBA. The CBA should be reviewed before employer action affecting the terms and conditions of unionized employment, including before adopting any kind of new policy as well as engaging in mass layoff, relocation, or discipline. Analyze situations to determine if there has been a trigger of an employee's *Weingarten* right to union representation and/or pre-interview consultation with a union representative. Even if a *force majeure* provision, Management Rights Clause, or exigent circumstances permit unilateral employer changes to certain terms and conditions of employment, it is always best to try to get union (and non-union) buy in before unilateral employer action.

### **CONCERTED ACTIVITY PERILS**

There is bound to be a lot of permissible employee activity and discussion about COVID-19. Section 7 of the National Labor Relations Act ("NLRA") guarantees employees the right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection."<sup>40</sup> Notably, protected concerted activity does not have to be union-related. It can include employee efforts to improve working conditions or terms of employment.

Depending upon the circumstances, employee discussion and/or complaints related to COVID-19 could be protected concerted activity. For example, if a group of employees approached an employer about informing the workforce about cough and sneeze etiquette, hand hygiene etiquette, or safety precautions (e.g., the use of gloves, eye and face protection, and respiratory protection), then that is protected concerted activity under the NLRA because the action was not about a specific employee.

Concerted activities are protected even if the discussion and/or complaints are rude and insulting. The protection, however, applies only to complaints made on behalf of others, not to individual gripes.

**Practical Tips:** Even when dealing with an allegedly discriminatory statement related to COVID-19, employers should carefully analyze the statement and circumstances to determine any interplay with Section 7 of the NLRA as it is important to remember that

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<sup>39</sup> *N.L.R.B. v. J. Weingarten*, 420 U.S. 251 (1975).

<sup>40</sup> <https://www.law.cornell.edu/uscode/text/29/157>.

group activity, discussion and/or complaints, even if obnoxious, might be protected concerted activity under the NLRA. Determine the place where the supposed protected activity took place, the subject matter and nature of the activity, and whether there was any provocation for and the employer's role in the possible provocation of the alleged protected activity. Evaluate whether the act or comment was profane, defamatory, or malicious. Discover whether the act or comment was about the employee's individual matters or was engaged in to further the employee's individual, self-interest. Ascertain whether the employee was attempting to initiate, to induce, or to prepare for group action and whether the employee's act was engaged in with other employees or on the authority of other employees. Also, consider whether management knew of the concerted nature of the employee's activity. Before taking any adverse employment action (like a termination), identify the reasons/motivation for taking the adverse employment action. Of course, protected concerted activity should not be the motive for adverse action.

## **CONCLUSION**

COVID-19 is creating rapidly changing conditions. Mishandling labor and employment nuances arising from COVID-19 in the workplace and workforce can create costly legal risks. As each situation will be fast-moving and very fact and workplace-specific, proactive preparedness and swift consultation with your legal team is even more fundamental than before COVID-19.

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