



COVID-19– Back To Work An Employment Law Series

**Part 2: Issues of Remote Working
October 6, 2020**

**Good Morning – Presentation will
begin at 10 a.m.**



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Back to Work Employment Law Series

Part One: September 23rd: COVID-Related Employment Overview. [Here is a link to Presentation.](#)

Part Two: October 6th: Issues Surrounding Remote Working

Part Three: October 20th: Issues Related to Reopening and Bringing Employees Back to Workplace

Part Four: November 10th: Summary, Impact of Election, Hypotheticals



About General Counsel, P.C.

- Offices in McLean, VA
- Founded 2004 by Merritt Green
- Serving as outside general counsel to small and medium-sized businesses, non-profits, individuals, and foreign companies for their business in the United States
- Primary Practice Areas
 - Corporate/M&A
 - Labor & Employment
 - Government Contracts
 - Dispute Resolution/Litigation



About Smart HR

- Smart HR, founded in 2001, by Mark Stevenson, has been providing high-value HR outsourcing solutions to business and not-for-profit organizations for over 20 years.
- Our programs are designed to offer complete HR support to organizations in the Washington, DC metro area. Our clients, generally between 15 and 150 employees, receive high-level HR expertise to create programs typically costing 50% less than hiring an internal HR department.
- HR Services include:
 - HR Outsourcing & Consulting
 - Recruiting & Talent Acquisition
 - Management Coaching and Talent Management
 - HR Audit & Compliance



Virginia Emergency Temporary Standard Requirements

- Reminder for all Virginia Employers. As of August 26th ALL Employers were required to comply with the VA ETS. And, as of September 25th, higher risk or medium-risk employers with 15 or more employees were required to have Infectious Disease Plan.
- Failure to comply can result in fees / penalties.
- Use the code WEBINAR to receive 10% discount to obtain compliance materials at www.gcpc.com or www.covidcomplianceplans.com.



Virginia Emergency Temporary Standard Requirements

The VES Forms Generator asks a few simple questions that will quickly allow you to determine which requirements you need to meet, and then generate the documents to help you quickly get started.

Start Here to Find the Package You Need to Comply

Please note that your information is saved on our server as you enter it.

Company Name*

Enter the company name as you would like to see it in the documents.

Email*

We will send the documents to the email address you provide here.

Is your business within Healthcare, Laboratory or Mortuary industry where there is significant potential for exposure with individuals known or suspected to have Covid-19 or do your employees handle specimens from individuals known or suspected to have COVID-19?

Yes

No

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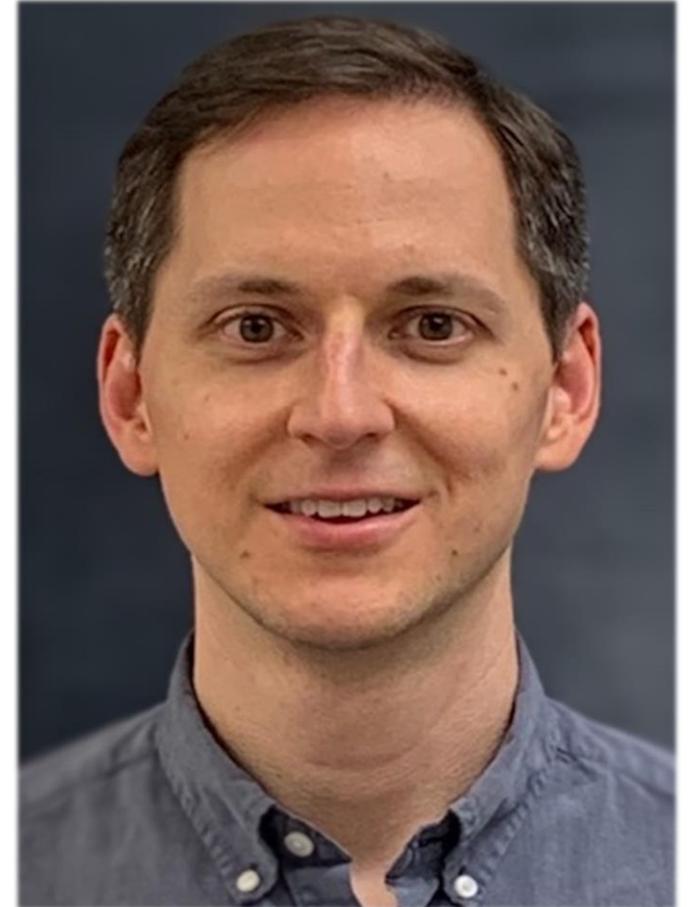


About J. Stephen Hoffman

Steve is a Senior Attorney of General Counsel, P.C., within the Practice Groups of Employment Law and Corporate Law.

Steve has led compliance efforts for rapidly scaling startups as well as for restructures at large employers with billions of dollars in their annual payrolls.

Steve has been commissioned by a few governments for clarity; keynoted at companies; presented at a SHRM annual conference; and taught at universities.



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Issues of Remote Working

1. Hiring, Firing and Recalling Employees. Issues to Consider
2. Employer obligations (and potential liabilities) related to remote workspace?
3. Employer obligations to pay for / reimburse employees to facilitate teleworking.
4. How can we ensure the integrity of our company data and its devices?
5. Can we monitor all employee activity – and what about privacy concerns?
6. How can a supervisor address when caregiving obligations are impacting work?
7. Employee Leave Issues and Employer Policies
8. Issues related to proper pay for teleworking employees
9. Where can we enhance culture, team morale, and overall sense of fairness?
10. What tips do you have to successfully measure employee effectiveness?



1. Hiring, Firing and Recalling Employees

- **Hiring:** Use objective, job-related qualification standards that do not discriminate on bases protected by federal/state/local laws.
- **Screening:** Next, a job offer may be contingent on a medical examination or inquiry to avoid any ‘direct threat to self/others,’ e.g., Covid or Asthma.
- **Accommodating under ADA:** Interactive Process if qualified disability, e.g., Asthma.
- **Firing:** Related events are complicated by remote work. (1) Know your Local Laws timing/penalties for Payroll (possibly working remotely) to print and distribute that final check. (2) Balance risk of face-to-face exit interviews (after hours to avoid violence / spitting). (3) Consider a mail pouch to collect/deactivate keycards, devices, etc. (4) Separation agreements may be emailed because these typically allow 72 hours.
- **Recalling:** EEOC has allowed for temporary changes in either job duties or location based on Covid, for example. This will not change the original Job Description. Use business judgment to determine how flexible you can/should be and remember the Federal Fourth Circuit Court: We will not be a ‘super personnel department.’



2. Employer obligations (and potential liabilities) related to remote workspace?

- OSHA encourages Home-Based Worksites as “family-friendly, flexible and fair” options that “can benefit individual employees and their families, employers, and society as a whole.”
- OSHA will advise any complainant of this policy and may notify the employer. However, OSHA/Employer are not expected to inspect such home offices, nor will OSHA hold employer liable.
- ADA obligations may be more lenient at home – If employee has a qualified disability, EEOC suggests that employer may have an easier time demonstrating undue hardship when the accommodation would occur within an employee’s home.



3. Employer obligations to pay for / reimburse employees to facilitate teleworking

- There is no obligation to pay for telework tools (computer, high speed internet, desk, telephone equipment). Rather, teleworking may be offered as an option if the employee has the tools.
- However, if an employer does offer telework, then any employee with qualified disability must receive an equal opportunity to participate, e.g., waive a rule that might generally restrict teleworking until after one full year of employment.
- While not providing tools may seem like a short-term savings, carefully consider the costs to productivity of subpar tools – and especially the potential breaches of company/client data integrity due to use of personal devices on unsecured, public networks.



4. How can we ensure the integrity of our company data and its devices?

- Data breaches can cost millions of dollars and are a major focus of Privacy Law, which has become the 15th specialty accredited by the American Bar Association.
- Briefly to put these on your radar, here are a few laws in each transactional arena:
 - **Online/Cross-Border Sales/Storage:** EU's GDPR, APEC's CBPR, CA's CPA, COPPA
 - **Medical/Health:** HIPAA/HITECH, GINA, SUD Patient Records Rule, Cures Act
 - **Finance:** FCRA, FACTA, GLBA, Dodd-Frank, RFPA, BSA, IMLA
 - **Education:** FERPA, PPRA, NCLBA, and Student-Privacy Pledges
 - **Telemarketing:** TCPA, TSR, JFPA, CAN-SPAM, CPNI, Cable Coms, VPPA, CalOPPA
- Cost. These laws – and some much stronger state laws – require notifying victims, regulators, and sometimes the media in addition to paying steep fines sometimes serving not insignificant prison terms.
- Safe Harbor. However, many laws will not punish a businesses that has taken preventative measures, e.g., encrypting the data, using virtual private networks (VPNs), and having a data protection officer (DPO) to design policies and training.



5. Can we monitor all employee activity – and what about privacy concerns?

- Electronic Communications Privacy Act of (ECPA) prevents monitoring of communications by employers. Here are key exceptions:
 - **Business Purpose Exception** – Permits monitoring of oral and electronic [business] communications, where employer has legitimate business purpose.
 - **Consent Exception** – Permits monitoring of all communications – if consented, e.g., new hire signs a consent to the monitoring of all communications on any employer device. This may include personal communications, so related policy should require employee to never make personal use of a work devices.
 - Courts view emails as “electronic communications” only during sending process.
 - **Stored Communications Act** (SCA within ECPA) – Once sent, email is not electronic communication. Stored on a server, it is now reviewable like any paperwork.
- Cameras are generally permitted for business purposes like security – not hidden nor in bathroom or locker room, where there may be “reasonable expectation of privacy.”



6. How can a supervisor address when caregiving obligations are impacting work?

- EEOC recognizes that caregiving responsibilities might constitute discrimination based on sex, disability or other characteristics protected by federal employment discrimination laws.
- Numerous studies have found that flexible workplace policies enhance employee productivity, reduce absenteeism, reduce costs ... and appear to positively affect recruitment, retention and profits.
- Be aware: ADA, EO 13152 & PDA, EPA, ERISA, FMLA, GINA, Title VII, etc.
- Provide a policy with examples of prohibited conduct (EEOC has a list):
 - Denying only males of schedule flexibility for family
 - Asking only females about their childcare responsibilities
 - Providing reasonable accommodations for temporary conditions like Covid, but not for pregnancy (PDA).



7. Employee Leave Issues and Employer Policies

- **Conspicuous Notice** must be provided to employees of all federal/state/local leave programs, e.g., FMLA, FFCRA, and a few new programs within District of Columbia or California, for example.
- **Multi-State Employers** should consider a Handbook Appendix schedule of these leave programs to ensure compliance with laws and consistent application of policies – but balance business need.
- **Remaining Leave Time Balances** must be made readily available for each employee to access and, in many cases, for an employee to elect use of one balance before another. But remember that, as an employer, you may require such balances concurrent with unpaid FMLA.
- **Use-It-Or-Lose-It Rules.** FFCRA expires Dec 31, 2020. Furthermore, your handbook should include a Carryover Cap for any PTO accruals.



8. Issues related to proper pay for teleworking employees

- Timekeeping for FLSA Non-Exempt Employees can become harder when the employee cannot be observed working – or clocking in / out.
- Department of Labor does not expect employers to regularly check this in real time each pay period.
- To ensure overtime / compensation requirements, reduce your risk by having the Non-Exempt employees, themselves, do the following:
 - Sign a Self-Reporting Policy that any overtime requires pre-approval by a manager, and
 - Sign or Authenticate all hours at the end of each pay period, for example within an online timekeeping portal.



9. Where can we enhance culture, team morale, and overall sense of fairness?

- EEOC Guidance is unchanged on KPI Best Practices:
“Analyze the duties, functions, and competencies relevant to jobs. Then create objective, job-related qualification standards related to those duties, functions, and competencies. Make sure they are consistently applied when choosing among candidates” (emphasis added).
- Federal/State/Local laws require protection of certain classes of individuals when an employer decides, for example to strengthen:
 - ✓ Corporate mission about what you produce / who you serve
 - ✓ Team recognition and reward of certain top achievers
 - ✓ Performance assessment and feedback mechanisms



10. What tips do you have to successfully measure employee effectiveness?

- EEOC Best Practices speak clearly on this:
 - ✓ *Ensure selection criteria do not disproportionately exclude [protected traits] unless ... valid predictors of successful job performance and meet the employer's business needs. For example, ... educational requirements ... may be illegal if not important for job performance or business needs.*
 - ✓ *Make sure promotion criteria are made known, and that job openings are communicated to all eligible employees.*
- EEOC on September 8, 2020, noted that any change is temporary:
“The fact that an employer temporarily excused performance of ... essential functions when it closed the workplace and enabled employees to telework for ... COVID-19, ... does not ... permanently [change] a job’s essential functions” (emphasis added).



Practical Counsel

- Covid has been a moving target. So, Local/State/Federal stimulus programs may continue to arrive/adjust well into upcoming 2021.
- We are a Virginia employer. Some of us have returned to our workplace, while others are continuing to work remotely.
- Many of our attorneys have worked in-house. We have grown, restructured and managed the operations and diverse teams.
- That's why we can advise employers. We offer clarity on practical policies – within your control today, to prevent liabilities tomorrow.



Our Next Back-To-Work Webinar

Part 3. Return to the Workplace

- Safeguards at the Workplace
 - Federal Laws on Testing, Vaccines, and Travel Limits
 - Waivers, Workers Comp, and Infectious Disease Plans
 - State/Local including Virginia Emergency Temporary Standard
- Accommodations and Separations
 - Did Remote Working change our employees' Job Descriptions?
 - Accommodations, Fear and Recent EEOC Guidance
 - Updating the Handbook, Policies and Procedures
 - Calculating Final Payment Amounts and Timing



Thank You & Questions

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