



COVID-19 – Back To Work An Employment Law Series

Part 3: Return to the Workplace October 20, 2020

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



GENERAL  COUNSEL^{PC}

ATTORNEYS AT LAW



About General Counsel, P.C.

- Offices in McLean, VA
- Founded 2004
- 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, 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



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: October 29th: Professional Roundtable

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

GENERAL  COUNSEL^{PC}

ATTORNEYS AT LAW



Part 3: Return to the Workplace

1. Safe Work Environment
2. Employee Health and Testing
3. How to Respond to Covid-19 Infection/Exposures
4. Bringing Employees Back – Fear, Flexibility, and Business Judgment
5. ADA: Covid-19 Related Accommodations and Challenges
6. Protections: FFCRA, FMLA, and Related Issues
7. End of Coverage / Employment Separations
8. Necessary / Recommended Policy Updates
9. Questions

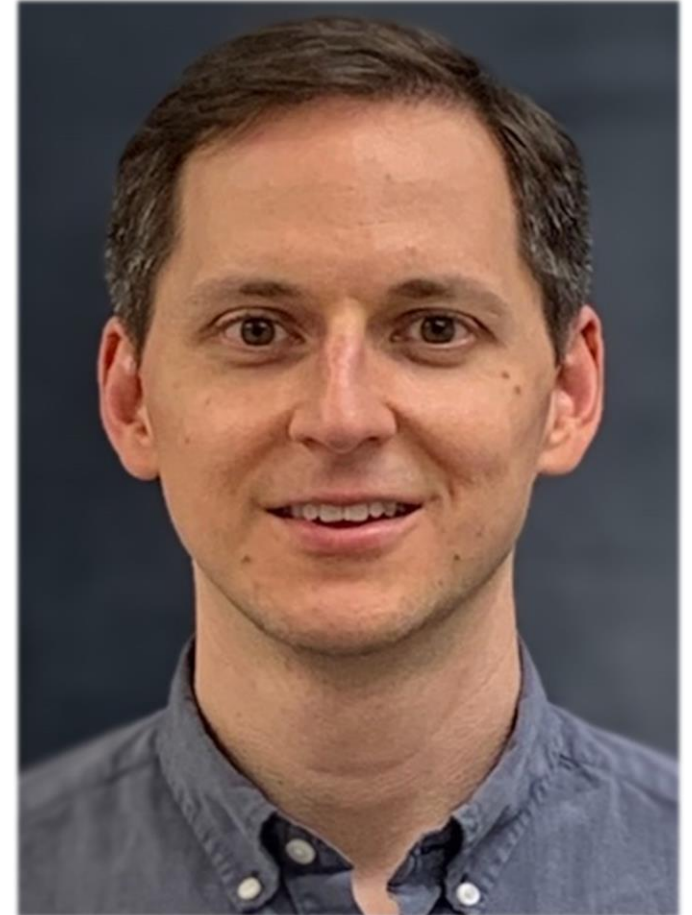


About J. Stephen Hoffman

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.



GENERAL  COUNSEL^{PC}

ATTORNEYS AT LAW



1. Safe Work Environment

- CDC recommends Daily health checks, Hazard assessment, Encouraging masks, Implementing distancing, Improving building ventilation, etc.
- OSHA General Duty to furnish “employment and a place of employment, which are free from recognized hazards ... likely to cause death or serious physical harm.”
 - Covid is contagious – but Infectious Disease Plans can provide a framework for exposures to bodily fluids, e.g., OSHA’s Bloodborne Pathogens Standard
 - 28 State Plans, e.g., Cal/OSHA has an Aerosol Transmissible Disease Standard
- EPA and some state laws regulate certain hazardous chemicals, some of which may be used by an employer or its contractor to sanitize the workplace.
- Virginia Emergency Temporary Standard
 - The First State-Specific Workplace Safety Plan for Covid-19
 - Has required social distancing plan, forms, training, etc.
 - Obligations due by August 26th & September 25th



2. Employee Health and Testing

ADA requires that any mandatory medical test of employees be “job related and consistent with business necessity.” Consistent with CDC guidance, EEOC views Covid-19 as a “direct threat” to self/others – a sufficient “business necessity” to mandate ADA-outlined medical exams and/or inquiries.

Timing and Types

- ✓ Uniform: During this pandemic, employer may check all employees, daily/hourly:
 - Non-invasive medical exam – an infrared (forehead) temperature check is okay.
 - Neutral inquiry – ‘Yes/No: Had symptoms, or contact with someone who has?’
 - However, do not ask questions about the family members specifically (GINA)
- ✓ Singled Out? You may temperature check a single employee – if “reasonable belief based on objective evidence that this person might have the disease”
- ✓ Send for testing. If you have such reasonable belief, you may send to a clinic to get a Covid test before allowing return to work. But do not require Antibody Test
- ✓ New offer may be contingent on exam – avoids new direct threats to self/others



3. How to respond if Covid-19 Infection/Exposure?

- **Suspected** – You may send for testing if you have EEOC-described “reasonable belief based on objective evidence.” Learn this phrase!
- **Confirmed** – Implement OSHA/State Infectious/Aerosolized Plan
 - Sanitize, and follow EPA/State requirements for disinfectants.
 - Follow local/state/federal reporting requirements. The ADA does not interfere, even if the anonymous description may lead some to guess the identity, e.g., one out on fourth floor.
- **Quarantine** – Example: Virginia Emergency Temporary Standard prohibits employees who are known/suspected to have contracted COVID-19 from return to work for: 10 days after first symptoms, three days after recovery, or until two negative tests.



4. Bringing Employees Back to the Workplace

- **Fear** of catching Covid, and concern of bringing home to Family? These are generally not covered by ADA Accommodations or federal/state/local leave programs, whether paid or unpaid.
- **Flexibility** with the job description, during this pandemic, is something that the EEOC allows. Changes in job duties/location can be temporary – so these do not change the original Job Description.
- **Business Judgment** can be applied to job flexibility and family fears; and remember that our Fourth Circuit Court (MD/VA/etc) will not be a ‘super personnel department’ to second-guess your decisions.



5. ADA: Covid-19 Accommodations and Challenges

- **Qualified Disability:** May include asthma, allergy to latex or some masks.
- **Telework Option.**
 - This is not required, and employer may consider all factors when determining whether to give any specific employee this option.
 - However if teleworking meets a qualified individual's needs, then the EEOC guides employers to consider this option where already available, e.g., Let employee continue to telework if was already teleworking when office was closed, or Waive rules that would restrict teleworking to employees having worked one year or more.

Discrimination. Among many listed by the EEOC, this example contains noteworthy phrasing: Providing reasonable accommodations for temporary conditions (like Covid) but not for pregnancy (PDA).



6. Protections: FFCRA, FMLA, and related Leave Issues

Families First Coronavirus Response Act (FFCRA)

- This paid job protection does not provide leave for the employee who elects to keep a child home from a school that offered the option to return
- Families First expires at the end of this year on December 31, 2020

Family Medical Leave Act (FMLA)

- This unpaid job protection does not provide leave for an employee wanting to avoid work because a family member at home is at high risk.
- Employer may require that any remaining paid leave programs be used concurrently with FMLA. This minimizes overall time available for leave.

Leave Balances should be accessible. Generally this is required by law and often is an employee's choice how to sequence the use of these balances.



7. End of Coverage / Employment Separations

- When FFCRA/PTO/other balances exhaust/expire or accruals do not carry over; or if coverage simply does not apply (fears and risks to family), then an employer has no obligation to retain such employee.
- Flexibility remains an option within employer's business judgment, so long as not discriminating against others on specific protected basis.
- Firing an employee sees complications during this pandemic:
 1. Know the local Laws timing/penalties. Your payroll team/contractor may need extra time to print and distribute that final check.
 2. Consider after hours exit interviews to limit risk of spitting – and consider mailing pouch to former employee's home to collect keycards/devices.
 3. Examine the option of emailing separation agreement. This approach might provide the time adequate to ensure release is “knowing and voluntary.” This agreement must provide 21 days – if former worker is forty or older.



8. Necessary / Recommended Policy Updates

- **Safe Workplace, Infectious Disease, Training Plans** as employees return (OSHA, NIOSH, CDC, FDA, EEOC, DOL, USDA, EPA, State Plans, etc.)
- **Conspicuous Notice** of all the safety/leave requirements, and emailed announcements (to be socially distanced and to have written record)
- **Clearly Published Promotion Opportunities** because social distancing, teleworking and current health/economy/political fears fuel rumors and concerns of fairness – leading to preventable EEOC complaints
- **Multi-State Employers** should consider a Handbook Appendix to ensure compliance with differing company/local/state/federal programs.
- **Use-It-Or-Lose-It Rules.** Handbooks should be updated, if they have not been, to clearly specify Carryover Caps for applicable PTO Accruals.



Our Next Back-To-Work Webinars

On October 29th at 10 a.m., please join us for Special Back to Work Webinar featuring:

Merritt Green / Steve Hoffman – General Counsel, P.C.

Mark Stevenson – SmarHR

Russell Rowzie – Trimark Corporation – Commercial Real Estate

Joe Potthast – Foundation Insurance - Insurance

Stephanie Eberhart – Talent Remedy – Recruiting

This will be “Roundtable” of professionals discussing Back to Work issues from their unique perspectives.

GENERAL  COUNSEL^{PC}

ATTORNEYS AT LAW



Our Next Back-To-Work Webinars

Part 5. Recap and Impact of Election – Nov. 10th

- Covid Pandemic – Updates to the Law
- Highlights on Remote Working Issues
- Return to Work Challenges and Pathways
- Election Issues – Surveying the Road Ahead



October 22nd at Noon - Politics in the Workplace: Employer and Employee Rights Webinar

Politics in the Workplace: Employer and Employee Rights

Join us for a webinar on October 22, 2020 at 12:00 PM EDT.

[Register now!](#)

With an election quickly approaching, employers may be wondering how much political talk amongst employees they can and should allow. Such discussions may distract workers from completing tasks as well as create or increase tension or discord between coworkers. Moreover, many issues discussed during campaigning involve topics that are protected under various statutes.

Join [Merritt Green](#) and [Lewis Rhodes](#) from the law firm General Counsel, P.C. (www.gcpc.com) for this timely discussion.



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.
- The ETS is likely to become permanent in January. So, if your business is open or plans to reopen, you MUST comply.
- 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

GENERAL  COUNSEL^{PC}

ATTORNEYS AT LAW



Thank You & Questions

Mark Stevenson

mstevenson@smarthrinc.com



Merritt Green

mgreen@gcpc.com

Steve Hoffman

shoffman@gcpc.com

