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Top labor and employment COVID-19 developments for April 2020

By Lisa Milam, J.D.

In case you missed the in-depth COVID-19 coverage in Labor and Employment Law Daily for April, here’s a recap of key labor and employment developments.

NEWS FROM THE WHITE HOUSE

Phase-four legislative relief enacted. On April 24, President Trump signed an interim emergency coronavirus package into law, the fourth legislative response to the pandemic. The Senate amendments to the Paycheck Protection Program and Health Care Enhancement Act (H.R. 266) give the Department of Health and Human Services $75 billion to reimburse hospitals and health care providers for health-care related expenses or lost revenues attributable to COVID-19, according to the House Democrats’ fact sheet. It also provides $25 billion to increase testing for COVID-19. In addition, the legislation gives $2.1 billion to administer SBA programs funded in the bill; $50 billion in loan subsidies to fund about $350 billion in SBA Economic Injury Disaster Loans; and $10 billion for EIDL grants, which can be used for an advance of up to $10,000 on a disaster loan, and which do not need to be repaid.

President unveils reopening plan. Although conceding that authority to “reopen the country” rests largely in the states, President Trump unveiled reopening guidelines, envisioning a three-phase recovery and outlining the criteria to be met in each phase before a state or region proceeds to a phased reopening (though at press time, these criteria appear to have been abandoned). The plan discusses how states should prepare, as well as the responsibilities of employers and individuals at each phase. Trump also encouraged states “to work together to harmonize their regional efforts” (though several governors had already taken steps to coordinate across state lines).

The guidelines instruct employers on required actions at each phase. At all phases, employers are urged to develop and implement appropriate policies, in accordance with federal, state, and local regulations and guidance, and informed by industry best practices, regarding social distancing; PPE; temperature checks; testing, isolating, and contact tracing; sanitation; use and disinfection of common and high-traffic areas; and business travel. The guidelines also provide specific instructions for vulnerable workers and for specific employers, such as schools, hospitals and nursing facilities, gyms, and bars.
**Trump suspends entry of certain aliens.** On April 22, the President issued a proclamation suspending for 60 days the entry of immigrants he deems a risk to the U.S. labor market as the country attempts to recover from the pandemic. National unemployment claims have reached historic levels (as of April 30, over 30 million claims) due to efforts to mitigate the pandemic via shutdown, according to the President; without intervention, he said, the U.S. faces a protracted recovery with persistently high unemployment.

Many have questioned both the wisdom and the potential impact of the proclamation. "The latest limit on legal immigration appears that it will greatly impact those seeking permanent residency through employment or exceptional ability," said Hall Estill attorney Diane Hernandez. "This kind of limit is illogical and seems to serve no rational purpose. Whenever this country emerges from lockdown, we will need these highly qualified workers in industries such as healthcare, education, and STEM fields such as science and engineering to help grow the economy back to prior levels."

The suspension and limitation on entry does not apply to lawful permanent residents, aliens seeking to enter the U.S. on an immigrant visa as a physician, nurse, or other healthcare professional, and a host of other exceptions. "This is another example of where the original Tweet and subsequent press statements differ from the practical effects of the actual order," according to Dorsey & Whitney attorney Rebecca Bernhard. "It appears to be issued as kind of a political document for the Presidential campaign as a way to demonstrate the President’s solidarity with U.S. citizens laid off during the COVID-19 crisis."

The proclamation took effect on April 23 and is set to expire 60 days thereafter, but may be continued as deemed necessary.

**AT THE DOL**

**FFCRA temporary rule is published.** On April 1, the Wage and Hour Division released a temporary rule implementing the new public health emergency leave provisions under the Families First Coronavirus Response Act. The FFCRA, signed into law on March 18, created two new emergency paid leave requirements: the Emergency Paid Sick Leave Act (EPSLA), which entitles certain employees to take up to two weeks of paid sick leave; and the Emergency Family and Medical Leave Expansion Act (EFMLEA), which amends Title I of the FMLA, and permits certain employees to take up to 12 weeks of expanded family and medical leave, 10 of which are paid, for specified reasons related to COVID-19. On March 27, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) was signed into law, providing certain technical corrections to the EPSLA and the FMLA provisions added by the EFMLEA.

The temporary rule provides guidance on qualifying reasons for leave; how intermittent leave may be taken; and leave to care for others (including individuals in isolation or self-quarantine, or children at home due to childcare or school closures). Other topics include quarantine and isolation orders; time off to seek medical diagnosis and await results; notice and documentation requirements; telework; health care coverage; multiemployer plans; return to work; recordkeeping; effect of other laws and collective bargaining agreements; and enforcement.
Enforcement begins. The rule became operational on April 1, was published in the Federal Register April 6, and is set to expire on December 31, 2020. The DOL had delayed the enforcement of FFCRA requirements until April 17. On April 20, the agency announced that the temporary non-enforcement period ended; it later clarified that the limited stay did not excuse compliance from the April 1 effective date, and that the agency would retroactively enforce violations to April 1 if employers have not remedied violations.

By late April, the Wage and Hour Division had already reported two enforcement actions: On April 23, the agency announced that an Arizona electrical company failed to pay an employee for what qualified as paid sick leave covering the hours that he spent at home after the company received documentation of his doctor’s instructions to self-quarantine with potential coronavirus symptoms. The employer, Bear Creek Electrical, will pay the affected employee’s full wages of $20 an hour for 80 hours of leave, $1,600 in total, for refusing to provide him paid sick leave under the FFCRA for the time he was quarantined pursuant to his doctor’s self-quarantine instructions.

And California-based Discount Tire Centers agreed to pay an employee $2,606 in back wages for refusing to provide sick leave under the EPLSA after his healthcare provider advised that he self-quarantine while awaiting a family member’s COVID-19 test. According to the DOL’s April 29 press release, the employer had mistakenly believed the employee had to submit proof of a positive coronavirus test to qualify for paid leave.

"The Final Rule conflicts with the plain language and purpose of the statute Congress enacted..."

APA challenge. Meanwhile, on April 14, New York Attorney General Letitia James filed suit challenging the DOL rule, which she claims unlawfully narrows workers’ rights under the FFCRA to paid sick leave and emergency family leave during the pandemic. At the same time, James filed a motion for summary judgment asking a federal court in New York to block the regulations and to restore the FFCRA to its intended effect.

According to the complaint, brought under the Administrative Procedure Act, the temporary rule exceeds the DOL’s authority under the FFCRA and violates the statute by unlawfully denying paid sick leave and emergency family leave to otherwise-eligible employees if the employer determines—for any reason—that the employer does not have work for the employee; and enabling the denial of the FFCRA’s paid sick leave and emergency family leave benefits to large classes of otherwise eligible workers by including them in an unlawfully broad definition of "health care provider."

"The Final Rule conflicts with the plain language and purpose of the statute Congress enacted by, among other things, (1) codifying broad, unauthorized exclusions from employee eligibility that risk swallowing Congress’s intended protections; and (2) creating from whole cloth new restrictions and burdens on employees that appear nowhere in the text Congress enacted. The Final Rule thus undermines Congress’s public health and economic security goals."
More guidance. The Wage and Hour Division has issued a Q&A document on emergency family leave and emergency paid sick leave under the FFCRA. It periodically updates the resource with additional questions or clarification, including clarification as to the circumstances under which an employer may require an employee to use existing leave under a company policy concurrently with the new FFCRA leave provisions.

But numerous observers noted discrepancies between the text of the FFCRA and the Q&As issued by the Labor Department. Senators Patty Murray (D-Wash.) and Congresswoman Rosa DeLauro (D-Conn.), in an April 2 press release, charged that the DOL guidance “creates gratuitous loopholes that allow employers to shirk their responsibility to provide paid leave, significantly reducing the number of workers who would be able to stay home if they’re sick or need to care for a loved one and still receive a paycheck.” In an April 1 letter to Labor Secretary Eugene Scalia, they cited a number of specific Q&As that are not in accordance with the statute—provisions on certification requirements; intermittent leave; the impact of government stay-at-home directives, among others—and asked that they be removed or revised in accordance with the FFCRA’s text and congressional intent.

The DOL updated its Q&As several times, in part to track with clarifications made in the (subsequently issued) temporary FFCRA rule, and adding additional questions, including provisions related to calculating leave available to seasonal workers.

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Q&As take on WARN Act. The DOL also published FAQs on the Worker Adjustment and Retraining Notification Act amid the COVID-19 pandemic. The FAQ discusses the parameters of the WARN notice requirement, the "unforeseeable business circumstances" exception, and temporary layoff or furlough vs. permanent closure among other topics. The DOL cautioned that its FAQ is not binding in courts; the agency does not enforce the WARN Act but merely provides guidance and information about the statute, which is enforced by private legal action.

EBSA issues relief, guidance. In a joint notice with the Treasury and IRS, the Employee Benefits Security Administration issued deadline relief extending certain timeframes affecting participants’ rights to healthcare coverage, portability, and continuation of group coverage under COBRA, and extending the time for plan participants to file or perfect benefit claims or appeals of denied claims.

In addition, EBSA Disaster Relief Notice 2020-01 extends the time for plan officials to furnish benefit statements, annual funding notices, and other notices and disclosures required by ERISA so long as they make a good-faith effort to furnish the documents as soon as administratively practicable. The notice also includes compliance assistance guidance on plan loans, participant contributions and loan payments, blackout notices, Form 5500 and Form M-1 filing relief, and other general compliance guidance on ERISA fiduciary responsibilities.
OSHA GUIDES, BUT WON’T MANDATE

The Occupational Safety and Health Administration (OSHA) continued to issue guidance to employers on minimizing risk amid the pandemic, but begged off aggressive enforcement or new mandatory directives, prompting pushback from organized labor and worker advocates.

**N95 masks.** OSHA issued an interim enforcement guidance on April 3, expanding on its March 14 temporary guidance addressing shortages of N95 filtering face piece respirators (FFRs) and also explaining a policy of enforcement discretion to permit the extended use and reuse of respirators, and the use of expired respirators. The agency offered further expanded temporary guidance on annual fit-testing requirements for FFRs in an April 8 memorandum which explains that OSHA field offices will exercise discretion in enforcing these requirements as long as employers have made good-faith efforts to comply with the requirements outlined in the agency standard and its March 14 temporary guidance. On April 24, OSHA issued an interim enforcement guidance on reusing disposable N95 FFRs that have been decontaminated.

**Industry-specific COVID-19 guidance.** With an eye toward a reopening of workplaces, OSHA issued a series of industry-specific guidelines for keeping workers safety during the persisting pandemic:

- Retailer employer [alert](#)
- Package delivery industry [alert](#)
- Manufacturing workforce [alert](#)
- Construction industry [guidance](#)
- Meatpacking and processing [guidance](#) (see below)
- Restaurants and establishments with carryout or curbside pickup (this [guidance](#) was issued May 1; watch for more to follow).

**COVID-19 reporting eased.** On April 10, OSHA announced in an interim guidance that until further notice, it will not enforce recordkeeping requirements set forth in 29 CFR § 1904 with respect to COVID-19 cases—as to employers other than those in the healthcare industry, emergency response organizations, and correctional institutions. The agency cited the difficulties of determining whether workers outside these industries who contract COVID-19 did so due to exposure at work. But employers will have to record a confirmed case of COVID-19 if there is objective evidence the case is work-related as defined by 29 CFR 1904.5, the evidence was reasonably available to the employer, 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.

**Guidance to field offices.** OSHA released an interim enforcement response plan on April 13 instructing area offices and inspectors on handling coronavirus-related complaints, referrals, and severe illness reports. The plan gives area offices flexibility and discretion to utilize their inspection resources to protect workers in the evolving pandemic environment. The plan outlines procedures for addressing and prioritizing reports of COVID-19 related to workplace hazards (with additional guidance to identify risk levels in workplace settings to this end) and states that in most cases, area offices should process complaints from non-healthcare and non-emergency response establishments as “non-formal phone/fax,” rather than on-site inspections, following the non-formal complaint and referral procedures in the agency’s Field Operations Manual. The
document also states that COVID-19 inspections are to be treated as novel cases, and outlines how inspections, citations, and compliance activity are to be coded and reported internally.

**Gauging good-faith.** A subsequent interim guidance issued April 16 advises agency inspectors how to evaluate whether an employer has used good-faith efforts to comply with safety and health standards during the pandemic. (The guidance also serves as a useful roadmap for employers on how to avoid OSHA violations.) OSHA’s reasoning is that staff and consultants who normally provide training, auditing, inspections, and other safety services may be unavailable given current lockdown protocols and that business closures and other restrictions may preclude employees from participating in training. Under the guidance, employers that are unable to comply with OSHA requirements because local authorities have required the workplace to close should demonstrate a good-faith attempt to meet applicable requirements as soon as possible upon reopening, and OSHA will take such attempts into “strong consideration” when determining whether to cite a violation. The agency may issue a citation where it finds an employer cannot demonstrate that it had made any efforts to comply.

**Temporary guidance.** In most of its issuances, OSHA states that its guidelines and enforcement plans remain in effect until further notice, and are time-limited to the current public health crisis.

**Critics: OSHA falls short**

**Is OSHA AWOL?** Despite the steady flow of guidance to employers and agency staff, OSHA has not issued any enforceable COVID-specific requirements for employers, an April 28 National Employment Law Project data brief noted. In fact, the worker advocacy group contends, OSHA has "completely abdicated its responsibility to ensure that employers keep workers safe on the job." Tens of thousands of workers already have fallen ill, yet the agency has issued no mandates and is not conducting on-site enforcement. In NELP’s view, however, it’s clear that a voluntary approach to worker safety is not mitigating the public health crisis.

**Enforcement drop-off generally.** Even before the pandemic took hold, OSHA had the lowest number of on-board inspectors in 45 years, with just 862 inspectors covering millions of workplaces. According to NELP, the hollowing out of the inspector ranks corresponds to a precipitous drop in the overall number of inspections—5,000 less per year, on average, than under the past two administrations—and a 38-percent drop in the highest-penalty “significant cases.” (Also, 42 percent of OSHA leadership posts have been left vacant, NELP notes.) Further weakening OSHA’s safety efforts is a sharp reduction in press releases publicizing agency enforcement incidents, NELP says. The deterrent impact of such publication is clear: a new study found that “OSHA would need to conduct 210 additional inspections to achieve the same improvement in compliance as achieved with a single press release."

**Dems want a standard.** In an April 8 letter to Labor Secretary Eugene Scalia, Democrats on the Senate HELP Committee pressed OSHA to use its emergency enforcement mechanism to require employers to develop and implement comprehensive plans to keep essential workers safe as they continue to perform their jobs during the pandemic. The lawmakers want OSHA to issue an Emergency Temporary Standard (ETS) that would provide employers with "a consistent roadmap of standards" to follow and, eventually, a permanent standard, in the event a similar emergency arises in the future.
More lawmakers pile on. In an April 29 letter, a group of 29 Senate Democrats charged that OSHA and the DOL have failed to protect the nation’s workers during the pandemic. The lawmakers called for OSHA to immediately issue an ETS for infectious disease and additional interpretations regarding existing standards to increase enforceable protections; develop comprehensive guidance regarding what all employers must do to protect their workers; and notify employers of OSHA’s intent to enforce key portions of existing CDC and OSHA guidance under the general duty clause—before reopening the economy. They also urged the Secretary to withdraw guidance allowing most employers not to record worker COVID-19 cases, and its policy to forgo on-site inspections of most COVID-19 complaints.

Labor pans OSHA; Scalia replies. AFL-CIO president Richard Trumka also criticized OSHA, charging the agency with being “missing in action” in an April 28 letter to Scalia and, in a separate press release, urging immediate action to protect workers from exposure. Scalia responded swiftly, mapping out OSHA’s flexible approach to protecting workers during the pandemic and rebutting many of Trumka’s contentions. "OSHA’s website contains extensive guidance on the virus for the benefit of workers and employers and in fact, the cop is on the beat,” he wrote in an April 30 response.

Scalia also took issue with the “false” notion that OSHA’s guidelines are merely “voluntary” and the suggestion that employers have no compliance obligations related to the pandemic. OSHA’s coronavirus guidance, together with CDC guidance and industry standards, “support an enforcement action under the general duty clause,” and also pointed to OSHA standards on PPE, respiratory protection, and other mandates. Acknowledging the novelty of the virus, the lack of "scientific certainty" around it, and the fact that circumstances are changing day to day, he added: "Guidelines allow flexibility and responsiveness to that change, in a way a rule would not." Scalia made clear, however: “OSHA will not use guidelines as a substitute for enforcement—rather, the agency has the tools and intent to pursue both avenues; that is our two-pronged approach.”

CDC not immune to criticism

The Centers for Disease Control and Prevention (CDC) issued its own interim guidance aimed at ensuring the continued operation of essential functions when critical infrastructure workers have had potential exposure to COVID-19. Under the guidance, essential workers may be permitted to continue working, provided they remain asymptomatic and additional precautions are implemented to protect them and the community.

The Teamsters called for the CDC guidelines to be reversed, contending they reduce safeguards for essential workers whose colleagues are diagnosed with COVID-19, jeopardize the health and safety of those on the job, and threaten to further expose COVID-19 to the general public. "In these challenging times, all government agencies, especially the CDC, should be supporting those who continue to risk their well-being by doing essential jobs that are allowing their fellow Americans to keep their families safe and fed," Teamsters General President Jim Hoffa said. "This new CDC guidance flies in the face of that and needs to be overturned now."

The AFL-CIO’s Trumka also weighed in, saying the CDC guidelines “tell employers to keep potentially infected workers at work, which does not protect essential workers on the front lines and ignores firmly established science that there is significant transmission from asymptomatic
and pre-symptomatic individuals.” And NELP executive director Rebecca Dixon charged that the CDC’s approach to essential workers is “a total reversal of the policy CDC has for the public, which states clearly that people who have been exposed to COVID-19 quarantine for 14 days. These guidelines risk endangering workers, their families, their communities, and the public.”

**Meatpacking: a dangerous disconnect?**

As April drew to a close, incidence of COVID-19 erupted among workers at several of the nation’s meatpacking facilities. On April 26, OSHA and the CDC released joint interim guidance for meatpacking and meat processing employers, including those involved in beef, pork, and poultry operations, on how the industry can reduce the risk of exposure. It describes mandatory safety and health standards already in place, but expressly states that it creates no new legal obligations. It is not a standard or regulation; it gives recommendations which "are advisory in nature, informational in content, and are intended to assist employers in providing a safe and healthful workplace." The guidance also makes clear that the agencies will use enforcement discretion as to employers adhering to appropriate guidance, including the new joint guidance.

**Executive order.** On April 28, Trump invoked the Defense Production Act in an Executive Order to "ensure the continued supply of meat and poultry" during the national emergency prompted by the COVID-19 pandemic. He noted the reduction in production capacity due to outbreaks of COVID-19 at some processing facilities, and recent actions in some states that led to the complete closure of some large processing facilities. “Such closures threaten the continued functioning of the national meat and poultry supply chain, undermining critical infrastructure during the national emergency,” he wrote, and directed the Agriculture Secretary Sonny Perdue to take action to ensure that meat and poultry processors continue operations consistent with the joint CDC-OSHA recommendations.

**Reopening mandatory, enforcement discretionary.** Labor Solicitor Kate O'Scannlain and Principal Deputy Assistant Secretary for OSHA Loren Sweatt followed up the EO with a joint statement on meat and poultry processing facilities, pointing to OSHA’s April 13 enforcement response plan, which recommends that employers conduct worksite assessments to identify COVID-19 risks and implement prevention strategies. "It is important that employers seek to adhere” to the guidance, they wrote, and noted that OSHA does not plan to cite employers that do. “To the extent employers determine that certain measures are not feasible in the context of specific plants and circumstances, they are encouraged to document why that is the case. In the event of an investigation, OSHA will take into account good faith attempts to follow the Joint Meat Processing Guidance."

**States’ hands are tied.** The DOL officials emphasized that state officials may not move to shutter facilities in in an effort to halt the coronavirus spread at plants or among the public, noting that nothing in the joint OSHA-CDC guidance “should be construed to indicate that state and local authorities may direct a meat and poultry processing facility to close, to remain closed, or to operate in accordance with procedures other than those provided for in this Guidance.”

**DOL may join litigation.** If an industry employer operating pursuant to the EO is sued for alleged workplace exposure, the DOL will consider requests to join the litigation in support of the employer’s compliance program if the employer has made good-faith efforts to comply with the joint guidance, the agency officials noted. "Likewise, the Department of Labor will consider
similar requests by workers if their employer has not taken steps in good faith to follow the Joint Meat Processing Guidance."

The fallout. "Without enforecable protections for both front-line plant workers and federal food inspectors, the president’s action will result in more preventable exposures and possibly deaths,” said Everett Kelley, National President of the American Federation of Government Employees (AFGE). To date, two federal inspectors have died after contracting the virus, according to the union.

“[T]he issue of Smithfield’s compliance with OSHA’s guidelines and regulations falls squarely within OSHA/USDA’s jurisdiction[.]”

Smithfield worker files suit. On April 23, a Smithfield Foods cut-floor worker filed a lawsuit over unsafe conditions at its Milan, Missouri plant, citing a litany of safety violations despite “abundantly clear guidance from the [CDC] and state public health officials." The complaint asserts a state-law public nuisance claim alleging that Smithfield’s failure to comply with "minimum basic health and safety standards in its workplace, including the CDC guidelines and other minimum public health standards necessary to stop the spread of COVID-19, is causing, or is reasonably certain to cause, community spread of the disease." They also raised a claim for breach of duty to provide a safe workplace under Missouri law.

The plaintiffs sought only to compel Smithfield, “if it continues to operate,” to “comply with, at a bare minimum, CDC guidance, the orders of state public health officials, and additional protective measures that public and occupational health experts deem necessary based on the particular structure and operation of the Milan plant." They filed a motion for a TRO and for preliminary and permanent injunctive relief. Smithfield filed a motion to dismiss or stay, arguing that the plaintiffs’ request that the court develop, monitor, and administer Smithfield’s occupational health and safety program is "unprecedented and improper." Smithfield also cited OSHA’s regulatory authority as well as the jurisdiction of the Missouri Department of Health and Senior Services. OSHA is already on the case, Smithfield pointed out: on April 22, one day before the worker’s complaint was filed, the company received a "Rapid Response Investigation" requesting information about COVID-19 work practices and infection at the plant, giving the company seven days to respond. Smithfield said intends to cooperate fully with OSHA. The district court held an emergency hearing April 30; on May 5, the court would dismiss the complaint, noting that “the issue of Smithfield’s compliance with OSHA’s guidelines and regulations falls squarely within OSHA/USDA’s jurisdiction,” and urging the plaintiffs to “seek relief through the appropriate administrative and regulatory framework.”
**EEOC NEWS**

**Right-to-sue letters on hold.** The EEOC has temporarily suspended the issuance of charge closure documents unless a charging party requests them. This means that charging parties will not be faced with the statutory time limit for filing litigation after the EEOC’s closure of a charge investigation—an obvious concern given the COVID-19 pandemic. “The EEOC appreciates that some people whose charges are currently before the EEOC may be worried that they might have to choose between jeopardizing their safety and protecting their rights,” EEOC spokesperson Kimberly Smith-Brown told *Labor and Employment Law Daily*. In the federal sector, the EEOC has provided guidance and instructions for both complainants and agency officials to provide similarly needed flexibility.

**Still on the case.** The public can continue to use the EEOC’s digital public portal and talk to the EEOC through its toll-free number. The agency is continuing to accept discrimination claims submitted online and over the phone, and is working to educate the public on the use of these systems. Smith-Brown stressed that "that, notwithstanding the unprecedented circumstances we are now facing, the laws the EEOC enforces remain in full force and effect.”

**Updated technical assistance.** The EEOC continues to update and expand its technical assistance guidance on issues under federal antidiscrimination laws related to the COVID-19 pandemic. [*What you should know about the ADA, the Rehab Act, and COVID-19,* updated most recently on May 5, addresses COVID-19-related workplace issues such as disability-related inquiries and medical exams; confidentiality of medical information; return to work; accommodations; and harassment.

**Testing gets green light.** In a recent update to the technical assistance guidance, the EEOC said that employers can test workers for coronavirus infection before they enter (or re-enter) the workplace, explaining that an employee with COVID-19 would pose a direct threat to the health of others. Therefore, an employer may choose to administer COVID-19 testing to employees before they enter the workplace. However, the Commission noted the ADA requires that any mandatory medical test of employees be job-related and consistent with business necessity. Employers also should ensure the tests are accurate and reliable, and consider the incidence of false-positives or false-negatives associated with a particular test. Further, the EEOC reminded employers that accurate testing only indicates whether the coronavirus is currently present, and a negative test does not mean that the employee will not acquire COVID-19 later.

**Resources.** The EEOC has [*provided resources on its website*](https://www.eeoc.gov) related to the pandemic in an employment context.

**NLRB UPDATE**

**Elections are back on.** In March, the NLRB [*suspended*](https://www.dol.gov/esa/esa/dol Publication/2020/nlrb/20200305) Board-conducted elections—even mail ballot elections—in light of pandemic. At the time, several regional offices had been closed and other locations were operating with limited staff, leaving the Board doubtful of its bandwidth to effectively conduct elections. (The move received pushback from House Education and Labor Committee Chairman Bobby Scott (D-Va.), who called on the Board to reverse the suspension in a [*March 31 letter*](https://www.congress.gov) to NLRB Chairman John Ring.)
On April 6, the agency announced that elections would resume, having been advised by the general counsel that “appropriate measures are available to permit elections to resume in a safe and effective manner, which will be determined by the Regional Directors.” Regional directors, as always, have discretion as to when, where, and if an election can be conducted, in accordance with Board precedent, and presently will factor in “the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state, and local laws and guidance.” Regional directors may also opt to schedule hearings via teleconference or videoconference.

**Rule implementation delayed.** On April 1, the NLRB formally published a final rule amending several NLRB policies governing the filing and processing of petitions for a Board-conducted representation election (none of which had been previously set forth as formal regulatory provisions), including changes to its “blocking charge” policy, the voluntary recognition bar, and Section 9(a) provisions regarding proof of majority support in construction-industry bargaining relationships.

Originally, the Board slated a June 1 effective date; on April 10, it published a notice that the final rule will now take effect July 31, citing the national emergency prompted by the public health crisis. A delay is necessary to allow NLRB employees and stakeholders to focus on the continuity of operations during the pandemic for the next several months. (In March, the Board had announced it would postpone from April 16 to May 31 the effective date of its more sweeping representation election rule changes, enacted as a direct final rule in December 2019.)

**Offices up and running.** On April 17, the Board gave a status update on its operations, noting that it has continued to function throughout the pandemic with only some modifications to its practices and procedures: Regional offices are open, with agency operations being carried out mostly by teleworking staff via email or teleconference. In-person public access is by appointment only. Unfair labor practice charges continue to be accepted and investigated, complaints continue to issue where appropriate. No in-person hearings will be scheduled through May 31 (except for matters that the presiding judge determines can be held via videoconference) and hearings that had been scheduled for this timeframe have been postponed.

The Board itself continues to process cases, including exceptions to ALJ decisions, requests for review of regional actions, motions, briefs, and other filings, as usual. Parties are required to E-File documents with the Board.

**Board won’t postpone election at hospital.** Rejecting an acute-care hospital’s contention that the COVID-19 pandemic constitutes an extraordinary circumstance justifying a stay of a union election, the NLRB denied the hospital’s request for review of an acting regional director’s decision allowing an election to continue as scheduled. The hospital had argued that it could expect a huge influx of patients in the coming weeks, and that it should not be focused on a union campaign in the middle of a public health emergency. However, the Board, in an unpublished decision, observed that the acting regional director carefully considered the circumstances and found that postponement wasn’t warranted. It acknowledged that the pandemic raises significant challenges for the employees, the union, and the hospital, as well as for NLRB regional staff. Nevertheless, the Board said, it is obligated to maintain operations to the extent it is safe and feasible to do so. The regional director mailed ballots to employees on April 21; ballots will be opened June 15.
SUPREME COURT

The Supreme Court building remains closed to the public, and oral arguments scheduled for the April session were postponed, in keeping with COVID-19 public health guidance, the Court said. (The Court had also postponed calendared oral arguments in March.) On April 13, the Court announced that it will hold oral arguments by telephone in May on a limited number of previously postponed cases. And on May 4, in a historic first, the Court live-streamed oral argument.

The Court also continues to hold regularly scheduled conferences, to issue order lists, and to decide cases argued earlier this term. (In our separate non-COVID installment of April in review, we discuss the Court’s recent ADEA opinion.)

STATES RESPOND TO PANDEMIC

State governors, as well as local municipalities, also continue to take steps to control the pandemic and minimize the disruption to workers and local economies, offering expanded economic relief and leave benefits for impacted workers, imposing mandatory safety measures, and adopting additional employment protections, and taking on enforcement. Here are a few noteworthy examples:

California: On April 16, Governor Gavin Newsom issued an executive order to support food-industry workers employed by large employers—with more than 500 workers—who would not see paid leave benefits under the FFCRA if they are impacted by the pandemic. Executive Order N-51-20 fills the gap left by the federal provision by granting these workers two weeks of supplemental paid sick leave—benefits similar to those afforded to employees of entities with fewer than 500 workers. The measure also provides safety standards to increase worker and customer protection by permitting workers at food facilities to wash their hands every 30 minutes, or as needed, to increase proper sanitation measures.

The administration has taken several actions to ensure food worker protections, including recently issued guidance by Cal/OSHA for the grocery industry on best practices on physical distancing, disinfecting, and the use of reusable bags. Earlier in April, the governor released $100 million to support child care for essential infrastructure workers, including grocery workers, and vulnerable populations. Food-sector workers, including farmworkers, agricultural workers, grocery store and fast-food chain employees, and delivery drivers are part of the state’s essential infrastructure workforce, Newsom noted.

On April 21, San Francisco’s Board of Supervisors approved a temporary emergency ordinance that requires certain employers that remained open during the pandemic to provide employees and other workers with PPE, cleaning supplies (hand sanitizer, soap and water, or disinfectant), and paid time for cleaning and sanitizing. The measure applies to grocery stores, pharmacies, restaurants, and on-demand delivery service companies. Delivery services such as Instacart and GrubHub must reimburse workers for the costs of purchasing cleaning supplies and PPE.
**Delaware:** Governor John Carney on April 25 issued another modification to his State of Emergency declaration in response to COVID-19, requiring the state’s businesses to take certain steps to keep employees and customers safe. Delaware employers must require employees to wear a face covering while working in areas open to the public and in areas where coming within 6 feet of other staff is likely; provide, at the business’ expense, face coverings and hand sanitizer for employees; and deny entry to individuals who do not have a face covering or if one is not available for them. Violations of the emergency order constitute a criminal offense.

**Massachusetts:** Attorney General Maura Healey on April 27 issued guidance to ensure that the rights of individuals with disabilities are protected during the public health crisis. The unprecedented pandemic has created new barriers for people with disabilities. The guidance lays out the types of accommodations they may be entitled to under the law. Individuals with underlying conditions that may increase their risk of infection or illness can seek reasonable accommodations. Essential workplaces that remain open should make accommodations for these employees, including allowing them to work from home or transferring them to another shift or role that minimizes their interaction with the public.

**[E]mployers in Seattle may not require a doctor’s note or healthcare provider verification for use of paid sick time during the public health emergency.**

**Michigan:** On April 3, Governor Gretchen Whitmer signed Executive Order 2020-36, which prohibits employers from discharging, disciplining, or otherwise retaliating against employees for staying home from work if they or one of their close contacts tests positive for COVID-19 or has symptoms of the disease. The measure also declares it the public policy of the state that all Michiganders who test positive for COVID-19 or show symptoms, or who live with someone who tests positive or shows symptoms, should not leave their homes unless absolutely necessary. The prohibition will remain in place until the end of the governor’s declared emergency or until otherwise rescinded.

**New Jersey:** Governor Phil Murphy on April 14 signed S. 2374, which expands state Family Leave Act protections to allow employees forced to take time off to care for a family member during the COVID-19 outbreak with up to 12 weeks of unpaid family leave in a 24-month period without losing their jobs.

**New York:** Governor Andrew Cuomo on April 12 issued a temporary executive order mandating that employers must provide essential workers with cloth or surgical masks free of charge to wear when directly interacting with the public. The governor also said he will issue an executive order expanding the eligibility of workers who may conduct antibody tests, to help ensure that as many state residents as possible have access to antibody testing.

**Washington:** Effective April 8, employers in Seattle may not require a doctor’s note or healthcare provider verification for use of paid sick time during the public health emergency, under a temporary emergency rule adopted by the city’s Office of Labor Standards.
CORONAVIRUS LITIGATION

As the pandemic persists, the inevitable wave of COVID-19 litigation has begun. Some courts have already weighed in. In April, federal courts ruled in cases brought by workers seeking protective gear, or (protective) employee status:

Lyft drivers denied emergency employee status. A federal court denied an emergency motion by California Lyft drivers to compel the rideshare company to immediately reclassify them as employees. If Lyft were forced to reclassify them, they could qualify for sick pay under California law, and sick leave policies generally decrease the chance that people will go to work sick. Especially during this coronavirus crisis, the plaintiffs reasoned, the public interest favors more access to paid sick leave so that people will avoid going to work sick and exposing others. The court sympathized with the drivers’ frustration over Lyft’s refusal to comply with A.B. 5, California’s onerous new worker classification standard. Yet it saw their motion for a “public injunction” as a hurried attempt to capitalize on the pandemic.

At any rate, the request was less urgent than it might seem, the court noted. Even if they were reclassified, it would mean a few Lyft drivers would qualify for three days of sick pay per year under California’s benefit. Most would receive a half day of sick pay or less. About 40 percent of the drivers hadn’t accrued enough hours to qualify for any sick pay. But the drivers could also stand to lose thousands of dollars in emergency assistance under the FFCRA (or the chance to apply for a forgivable small business loan through the Paycheck Protection Program). And the small amounts of paid sick leave that would be available to them under Labor Code § 246 pales in comparison to the assistance they could get from the federal emergency legislation, including 39 weeks of unemployment for independent contractors who can’t work or lost their job due to the pandemic (Rogers v. Lyft, Inc., April 7, 2020, Chhabria, V.).

No PPE for detainees. Civil immigration detainees held at detention facilities operated by GEO Group, Inc., were unable to compel the company to undertake COVID-19 prevention measures, including providing them with PPE. According to the detainees, GEO imposes Housing Unit Sanitation Policies (HUSPs) that impermissibly expand the scope of “required personal housekeeping” allowable by U.S. Immigration and Customs Enforcement. They contend that GEO makes them clean common areas of the facility without pay, under threat of solitary or disciplinary confinement, loss of privileges, housing transfer, referral to ICE, or criminal prosecution if they refuse. These policies expose them to unsanitary spaces—and possible COVID-19 infection. The detainees had sued alleging forced labor under the Federal Trafficking Victims Protection Act, among other claims, and a federal court previously certified their class action.

In April, the detainees sought a TRO. They argued that the HUSPs are unreasonable during the pandemic and said that GEO should provide them with PPE to prevent the spread of the virus. The court found the detainees had standing. They asserted concrete harm, which was likely caused by GEO, its sanitation policies, and its reliance on detainee labor to do cleaning duties. And the harm was redressable by a court order stating that detainees could not be used to provide sanitation services in common areas of the facility. Moreover, they detainees were likely to succeed on the merits of their TVPA claim based on their contention that GEO secured their uncompensated labor by threat. In addition, the court found the detainees likely face a heightened
risk of COVID-19 infection due to the inexorable spread of the virus; indeed, several GEO facilities already had confirmed detainee or staff cases. And detainees with cleaning duties face an increased likelihood of infection that flows from those duties.

However, their filings did not make it clear how much the greater risk of infection flows from their compelled cleaning duties and lack of PPE specifically, or from the fact of their detention generally, or the various other activities in which they engage at the facility, the court observed. In the end, the marginal risk of infection posed by the lack of PPE or increased work duties was difficult to extricate from the more generalized risk of harm posed by being detained, it said.

The detainees also argued that GEO should have to hire staff to clean the facility, so that detainees are not forced to do so. But the court didn’t see how introducing more outsiders to the facility would reduce the risk of infection to the detainees. Granting the requested injunctive relief could force GEO to increase staffing, which would increase the ingress and egress of asymptomatic individuals from outside the facility, thereby increasing the risk of a facility outbreak. As for an order requiring GEO to provide the class members with PPE, the court was hesitant to force a reallocation of limited PPE resources to favor the class members over other detainees or staff working elsewhere in the facility, particularly without sufficient evidence as to the availability of PPE to GEO (Novoa v. GEO Group, Inc., April 22, 2020, Bernal, J.).

New complaints. Finally, new complaint filings in April brought an inkling of the scope and type of lawsuits that employers will likely face in the months to come.

- A Trader Joe’s employee created a private Facebook group for employees to discuss concerns about the grocer’s lack of safety measures for employees. When a manager confronted him about the group, the employee requested that the store provide additional sanitizers, cleaning products, gloves, and masks. The manager fired him, and he filed suit alleging wrongful discharge in violation of public policy (King v. Trader Joe’s East, Inc).
- The president of a funeral home in Kentucky alleged that after the governor’s March 11 order limiting social gatherings to less than 50 people, she called a staff meeting to develop a strategy to comply with the directive and other measures to slow the spread of COVID-19, such as more frequent cleaning. The owner of the funeral home did not want to implement any such measures and, instead, fired the president, she alleged. She filed suit seeking reinstatement and backpay (Norris v. Schoppenhorst-Underwood Brooks Funeral Home, LLC).
- The estate of a former Walmart employee who died from complications of COVID-19 has sued the retail giant in an Illinois state court alleging that management knew that several employees at the Evergreen Park, Illinois, store were symptomatic but failed to take appropriate action to keep workers and customers safe. Before the employee died on March 25, several workers had symptoms, and another worker purportedly died four days later due to COVID-19 complications. The complaint contends that both workers contracted the deadly virus at work (Estate of Evans v. Walmart, Inc., and J2M-Evergreen, LLC).
- The former general counsel of a real estate investment firm has sued the company alleging that it fired her for refusing to violate mandatory shelter-in-place orders in her Texas county—one of the hardest hit by the pandemic—to travel to her worksite in another county. The plaintiff alleges she told the company president that she was able to perform all her duties from home and that she did not want to violate the law or lose her
job, but that apparently didn’t matter. She is asking for more than $1 million for her alleged wrongful discharge against public policy (Reggio v. Tekin & Associates, LLC).

- Although it’s not a covered employer under the FFCRA, a Kroger distribution center worker argues that the grocery chain was estopped from denying paid leave for her COVID-19 self-isolation because the company had represented that it amended its own emergency leave policy to align with the protections afforded under the FFCRA. Kroger also purportedly revised its attendance policy so that points assessed due to COVID-19 symptoms would be removed once medical documentation was provided. Yet the worker claims she was fired due to attendance points she accumulated during her 14-day quarantine (in keeping with her physician’s instructions to self-isolate). Her suit alleges that Kroger never initiated a discussion with her about taking leave under the statute, and interfered with her protected rights under the FMLA and FFCRA (Robtoy v. The Kroger Co. dba Peyton’s Northern Distribution Center).

- A former director of revenue management for a small airline conveyed to her supervisors, to HR, and to other company officials that she had to care for her 11-year-old son whose school was closed due to COVID-19. She discussed her need for two hours of flextime each day, her continued need to work from home, and her request for leave under the FFCRA. Her leave requests were denied and she was fired, allegedly in retaliation for requesting FFCRA leave. The employee filed claims for interference with FFCRA rights and retaliation. (However, from her complaint allegations, it appears the alleged violations occurred before the FFCRA took effect, so her claims may not stand on solid ground (Jones v. Eastern Airlines, LLC).

OTHER APRIL DEVELOPMENTS

The courts ruled on non-coronavirus-related matters in April as well, of course. Watch for opinions of interest to the labor and employment community in Top labor and employment developments for April 2020, part two.