

Briefing on COVID-19 Litigation Topics

June 4, 2020



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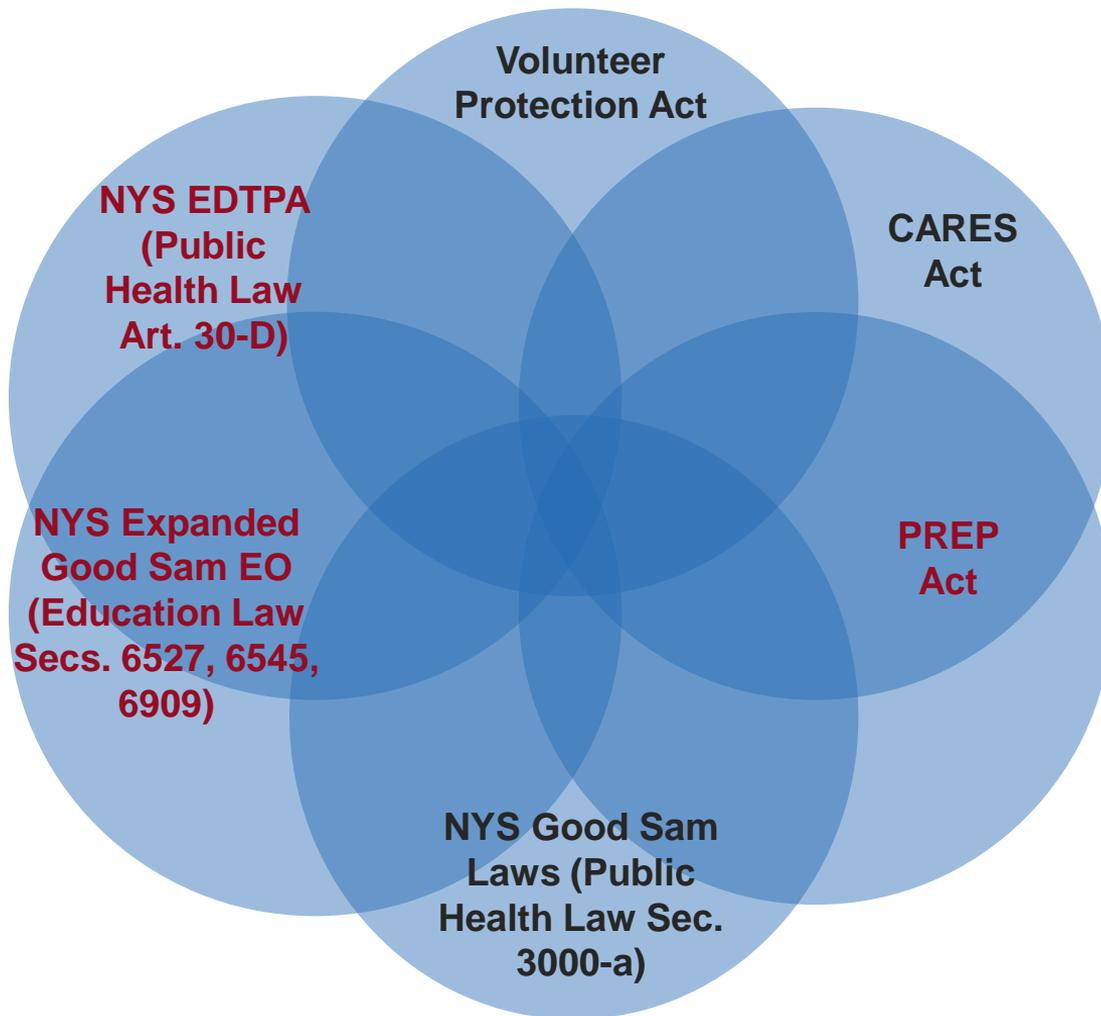
Agenda



- **Environmental Scan on Immunity**
- **Employment Law Issues**
- **Enforcement**
- **Status of NYS Court Proceedings**
- **Member Topics**

Environmental Scan on Immunity

Liability Protections



NYS Immunity Law: Emergency or Disaster Treatment Protection Act



Assembly repealer introduced May 11

Who/What is Covered

- Civil and criminal liability
- Facilities and professionals
- Administrators and board members
- Regardless of location or COVID status

Conditions and Exceptions

- Services must be under *emergency rule or law*
- *In response to outbreak and in support of State directives*
- In good faith
- No intentional bad acts
- No gross negligence

NYS Executive Order on Immunity



In effect from March 23 – May 7

Who/What was Covered

- Civil liability
- MDs, PAs, NPs, RNs, LPNs

Conditions and Exceptions

- Act or omissions in the course of providing medical services *in support of the State's response to the COVID-19 outbreak*
- Gross negligence not covered

<https://www.governor.ny.gov/news/no-20210-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency> (expired May 7)

The Federal Public Readiness and Preparedness (PREP) Act



Copy of Notice of Declaration in Handouts

Who/What is Covered

- Civil liability
- Manufacturers, distributors, program planners and certain qualified persons including HCPs, their officials, agents, and employees [hospitals could be covered depending on facts and circumstances]
- Activities involving *Covered countermeasures*, i.e., drugs and devices used to treat, cure, prevent, or mitigate COVID-19

Conditions and Exceptions

- Covered countermeasures must be approved, cleared or licensed by FDA, as applicable, or subject to investigational use exemption or EUA
- PLUS be authorized in accordance with the public health and medical response of the “authority having jurisdiction”

Employment Law Issues

NYS COVID-19 Sick Leave Law



March 18 Legislation: At least 14 days of paid sick leave, separate from accruals, at the regular rate of pay required for employees of employers that are public or have >100 employees if subject to a mandatory or precautionary order of quarantine or isolation.

DOL guidance and recently introduced legislation seek to include documentation from a health care provider for purposes of establishing a precautionary order of quarantine or isolation.

Use of COVID-19 Sick Leave for Health Care Employers



May 17 DOH/DOL Guidance: Documentation from a licensed medical provider can be used to establish a mandatory order of isolation for health care employees who have tested positive for COVID-19 or is symptomatic for COVID-19.

Health care employees may be returned to work earlier than 14 days in the event of a staffing shortage if certain conditions are met, *e.g.*, isolation for at least 7 days and fever-free for 72 hours.

GNYHA seeking further amendments

OVERVIEW OF EEOC COVID-19-RELATED GUIDANCE



- Pandemic Preparedness in the Workplace and the Americans with Disabilities Act
 - Originally published by the EEOC in 2009 in response to the H1N1 pandemic;
 - Updated on March 19, 2020
 - March 19th update retains the 2009 principles to incorporate current employer questions and to specifically address the COVID-19 pandemic
- The ADA
 - Regulates employers' "disability-related inquiries" and "medical examinations"
 - Prohibits employees from being excluded from the workplace unless they pose a "direct threat"; and,
 - Requires "reasonable accommodation" of disabled employees



DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS

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When Conducted	Permissibility	COVID-19
Pre-conditional offer of employment	No	None
Post-conditional offer of employment but before employee begins work	Yes – provided all entering employees in the same job category are subject to the same	None
After work has begun	No – unless job-related and consistent with business necessity based on a reasonable belief that the employee’s ability to perform essential functions will be impaired or the employee poses a direct threat	“Based on guidance of the CDC and public health authorities as of March 2020, the COVID-19 pandemic meets the direct threat standard.”



FREQUENTLY ASKED QUESTIONS

1. May an employer rescind a job offer made to an applicant based on the results of a post-offer medical examination if it reveals that the applicant has a medical condition that puts her at increased risk of complications from influenza?

“No, unless the applicant would pose a direct threat within the meaning of the ADA... Before concluding that an individual poses a direct threat, the employer must determine whether a reasonable accommodation could reduce the risk below the direct threat level.”

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

“Yes. The CDC states that employees who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace... **Applying this principle to current CDC guidance on COVID-19, this means an employer can send home an employee with COVID-19 or symptoms associated with it.**”

FREQUENTLY ASKED QUESTIONS



3. During a pandemic, how much information may an ADA-covered employer request from employees who report feeling ill at work or who call in sick?

Yes. The COVID-19 pandemic is of sufficient severity that, although the inquiry is disability-related, it is justified by “...a reasonable belief based on objective evidence that the severe form of pandemic influenza poses a direct threat. **Applying this principle to current CDC guidance on COVID-19, employers may ask employees who report feeling ill at work, or who call in sick, questions about their symptoms to determine if they have or may have COVID-19.**”

Results of disability-related inquiries and/or medical examinations must be maintained “confidentially” – separate forms, separate medical files and treated as a confidential medical record.⁷



FREQUENTLY ASKED QUESTIONS

4. During a pandemic, may an ADA-covered employer take its employees' temperatures to determine whether they have a fever?

Yes. Again, the COVID-19 pandemic is of sufficient severity and because it is widespread in the community a medical examination is justified by a reasonable belief based on objective evidence that the severe form of pandemic influenza poses a direct threat. The EEOC stresses that the results of these examinations must be maintained confidentially

Results of disability-related inquiries and/or medical examinations must be maintained "confidentially" – separate forms, separate medical files and treated as a confidential medical record.

FREQUENTLY ASKED QUESTIONS



5. During a pandemic, may an ADA-covered employer ask employees *who do not have influenza symptoms* to disclose whether they have a medical condition that the CDC says could make them especially vulnerable to influenza complications?

No. If pandemic influenza is like seasonal influenza or the H1N1 virus in the spring/summer of 2009, making disability-related inquiries or requiring medical examinations of employees *without* symptoms is prohibited by the ADA.

Yes. If an influenza pandemic becomes more severe or serious according to the assessment of public health officials, ADA-covered employers may have sufficient objective information to reasonably conclude that employees will face a direct threat if they contract pandemic influenza. Only in this circumstance may ADA covered employers make disability-related inquiries or require medical examinations of asymptomatic employees to identify those at higher risk of influenza complications.



FREQUENTLY ASKED QUESTIONS

6. May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it?

“Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace...[E]mployers should continue to follow the most current information on maintaining workplace safety. To repeat: the ADA does not interfere with employers following recommendations of the CDC or public health authorities, and employers should feel free to do so.”

7. May an employer withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it?

Yes. “Based on current CDC guidance, this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer.”

OVERVIEW OF NYS DIVISION OF HUMAN RIGHTS & NYC COMMISSION ON HUMAN RIGHTS GUIDANCE RE COVID-19



- NYSDHR
 - Regulates disability-related discrimination in the workplace;
 - https://dhr.ny.gov/sites/default/files/pdf/postings/DHR_COVID19_DiscriminationHandout_032420.pdf
- NYCCHR
 - Regulates disability-related discrimination in the workplace;
 - Adopted the EEOC's guidance, but
 - NYCHHR requires a “cooperative dialogue” even without a request for a reasonable accommodation
 - <https://www1.nyc.gov/site/cchr/media/covid19.page>

Workplace Safety Suits



New York State Nurses Association v. New York State Department of Health (NYS SUPREME) DISMISSED

New York State Nurses Association v. Montefiore (SDNY) DISMISSED

New York State Nurses Association v. Westchester Medical Center (NYS Supreme) PENDING

Occupational Safety and Health Administration (OSHA)



OSHA Reporting Requirements

- 29 CFR § 1904.5 still applies: An injury or illness is work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness, unless exception applies.

Recent Guidance

- Affirms COVID-19 is a recordable illness
- “Given the nature of the disease and ubiquity of community spread . . . in many instances it remains difficult to determine whether a COVID-19 illness is work-related, especially when an employee has experienced potential exposure both in and out of the workplace.”
- Employers must make reasonable effort to investigate how the employee contracted the illness, rather than just dismissing it as work-related.
- <https://www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19>

Workers Compensation



- Injury or illness “arising out of and in the course of” employment**
- Accidental (specific time/place)**
- Occupational (old TB case law, pending bill)**
- No reported COVID-19 decisions, yet**

Recent NYS Workers' Compensation Activity



April Memo from WCB Chair Rodriguez

- [Urges](#) carriers and payors to be mindful and helpful to employees, although not binding
- Aligns current situation to 9/11, potentially signaling a similar model

May 1 New York Compensation Insurance Rating Board Bulletin

- New [classification code](#) for temporary change in duties for telecommuter reassigned employees
- Claims with a diagnosis of COVID-19 and an accident date on or after December 1, 2019 are excluded from the experience rating calculations of individual employers.

Pending Legislation

- S8266/A10401 – Includes exposure to CV-19 as an occupational disease for which compensation shall be payable for disabilities sustained or death incurred by an employee

Anecdotal observations from The Doctors' Company (formally FOJP)

- Currently only about 500 claims out of about 100,000 covered lives
- Many clinical workers acknowledge that acquiring the infection may be due to community spread

ENFORCEMENT

OIG Strategic Plan: Oversight of COVID-19 Response and Recovery May 2020



Four Goals:

1. Protect people
2. Protect funds
3. Protect infrastructure
4. Promote effectiveness of HHS programs—now and into the future

https://oig.hhs.gov/about-oig/strategic-plan/covid-strategicplan.asp?utm_source=web&utm_medium=web&utm_campaign=covid-stratplan-05-26-2020

FAQs -Application of OIG's Administrative Enforcement Authorities to Arrangements Directly Connected to the Coronavirus Disease 2019 (COVID-19) Public Health Emergency



- May 14, 2020
- Ordinarily the factual scenarios would implicate the Antikickback statute and the civil monetary penalty against inducements to beneficiaries (e.g. hospitals providing free or low-cost personal protective equipment to a nursing home that it contracts with)
- OIG has indicated that in light of the public health emergency, these scenarios present "...a low risk of fraud and abuse", *provided* certain conditions are met
 - Conditions vary depending on the scenario addressed
- Running theme is that this flexibility may not be extended beyond the period of the COVID-19 public health emergency declaration

Status of New York State Court Proceedings

Filing Extensions and Accommodations



Authority	Date of Issue	Effect
Administrative Order 87-20	May 1, 2020	Ordered: <ul style="list-style-type: none"> (a) acceptance of all electronically filed documents in pending matters (essential and non-essential); (b) EDDS filed documents to be served electronically (c) Encouraged use of ADR (d) Barred courts from requesting working copies
A.O. 88-20	May 2, 2020	Courts may not order nor compel the personal attendance of any physician, other medical personnel or administrative personnel who perform services at any hospital or facility that is “active in the treatment of COVID-19” Temporary and subject to review at conclusion of the COVID-19 emergency
A.O. 114-20	May 20, 2020	E-filing and electronic prosecution of cases in all NYC counties, Nassau, Suffolk, Dutchess, Westchester and others (ECF) – Judge DiFiore’s 5/25/20 message described this as the new normal

Statute of Limitations



Authority	Date of Issue	Effect
Executive Order 202.8	March 20, 2020	Extended time limits for filing, commencement, service, motion practice, other proceedings to April 19, 2020
E.O. 202.14	April 7, 2020	Extended the above time limits to May 7, 2020
E.O. 202.29	May 8, 2020	Extended the above time limits to June 7, 2020

Child Victims' Act



On May 8, 2020 Governor Cuomo extended the statute of limitations for time-barred child abuse cases revived by the CVA to January 14, 2021

Mental Hygiene Legal Proceedings



- **MHLS proceedings were deemed essential, but hearings held remotely via Skype**
- **Response from hospitals has been overwhelmingly positive**
- **Deep-dive webinar tentatively scheduled for June 18th**
- **Exploring how to make this permanent**

Questions