

GIBSON DUNN

**Returning to Work:
COVID-19 Litigation and Strategies for
Firms to Reduce Risk**



AMERICAN COUNCIL OF ENGINEERING COMPANIES

Presented By:
Jessica Brown & Karl G. Nelson
Gibson, Dunn & Crutcher LLP
July 8, 2020

“ACEC has met the standards and requirements of the Registered Continuing Education Program. Credit earned on completion of this program will be reported to RCEP at RCEP.net. A certificate of completion will be issued to each participant. As such, it does not include content that may be deemed or construed to be an approval or endorsement by the RCEP.”



COPYRIGHT MATERIALS

This educational activity is protected by U.S. and International copyright laws. Reproduction, distribution, display and use of the educational activity without written permission of the presenter is prohibited.

**Jessica Brown, and
Karl Nelson,
Gibson Dunn & Crutcher
LLP**

COVID-19 Litigation Is on the Rise

Types of Litigation Employers Are Likely to See Due to COVID-19

Failure to accommodate, discrimination, co-worker harassment

Alleged safety violations under OSHA, negligence claims for personal injury

Unfair labor practice charges, violations of Section 7 of the NLRA

Violation of lawful, off-duty conduct statutes in states that have them

Retaliation, whistleblower claims under various state laws

Types of Litigation Employers Are Likely to See Due to COVID-19

Wage and hour claims under FLSA, state law

Leave of absence claims, including under the FMLA and FFCRA

Data privacy breach claims

WARN Act violations

Workers compensation claims

Terminating Employees Who Fail to Follow COVID-19 Protocols

Terminating Employees Who Fail to Follow COVID-19 Protocols: Potential Bases for Liability

Failure to accommodate

Discrimination

Violation of Section 7 - NLRA

Violation of lawful, off duty conduct statutes

Retaliation

Evolving Theories of Liability Based on Employer Responses to COVID-19

Evolving Theories of Liability Based on Workplace Responses to COVID-19

Workplace safety and health precautions

Compensation practices

EEO claims

Privacy-related challenges

Employer Strategies for Mitigating Workplace COVID-19 Claims

Employer Strategies for Mitigating Workplace COVID-19 Claims

Develop a return to work protocol that incorporates OSHA and CDC guidance, executive orders, and other local laws

Educate and train managers on their responsibilities and employee rights

Implement a reasonable accommodation process and appointing an Ombudsman

Handle recall, rehire, and job offers in a manner that is nondiscriminatory

Employer Strategies for Mitigating Workplace COVID-19 Claims

Investigate and respond to internal employee complaints

Review termination decisions and reductions-in-force with counsel

Preserve confidentiality of all medical information provided by employees

Ensure compliance with state and federal leave laws, wage and hour laws, and WARN

Workers Compensation Laws

- Provides cash payments to those who can't work due to job-related injuries and illnesses
- No-fault system; but may be difficult to establish
- Easier for frontline workers
- Easier in states with presumptions
- Some states have the opposite
- Can be a defense to claims – but doesn't block gross negligence or intentional torts

Liability Waivers?

- Bad idea for employers
- Likely to hurt morale
- May support an argument employers are shirking their duties to keep employees safe
- Unlikely to be enforced anyway – may even be forbidden
- Wrongful termination claims possible

Evolving Standards for Appropriate Workplace Screening, Testing, and Safety Practices

Evolving Standards for Employer Screening, Testing, and Other Workplace Practices

OSHA standards and guidance

CDC and state/local health authorities

EEOC guidance and technical assistance

U.S. Department of Labor policies and guidance

NLRB and state labor laws

Evolving Standards for Employer Screening, Testing, and Other Workplace Practices

CDC

- CDC, *Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)*, <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.
- CDC, *Coronavirus Disease 2019 (COVID-19) Guidance for Businesses & Employers*, <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.
- CDC, *General Business Frequently Asked Questions*, <https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html#Reducing-the-Spread-of-COVID-19-in-Workplaces>.

Evolving Standards for Employer Screening, Testing, and Other Workplace Practices

OSHA

- OSHA, *Guidance on Preparing Workplaces for COVID-19* (2020), <https://www.osha.gov/Publications/OSHA3990.pdf> (providing overview of existing OSHA standards).
- OSHA, *COVID-19 Guidance for the Manufacturing Industry Workforce*, <https://www.osha.gov/Publications/OSHA4002.pdf>.
- OSHA, *COVID-19 Guidance for the Package Delivery Workforce*, <https://www.osha.gov/Publications/OSHA3998.pdf>.
- OSHA, *Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19)* (Apr. 13, 2020), <https://www.osha.gov/memos/2020-04-13/interim-enforcement-response-plan-coronavirus-disease-2019-covid-19>.
- OSHA, *Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19)* (Apr. 10, 2020), <https://www.osha.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19>.

Evolving Standards for Employer Screening, Testing, and Other Workplace Practices

U.S. DOL

- DOL, *U.S. Department Of Labor Adopts Revised Enforcement Policies For Coronavirus* (May 19, 2020), <https://www.dol.gov/newsroom/releases/osha/osha20200519-0>.
- DOL, *Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA)*, <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs22.pdf>.
- DOL, *FLSA Hours Worked Advisor*, [https://webapps.dol.gov/elaws/whd/flsa/hoursworked/screenee29.asp#:~:text=In%20recording%20working%20time%20under,are%20de%20minimis%20\(insignificant\)](https://webapps.dol.gov/elaws/whd/flsa/hoursworked/screenee29.asp#:~:text=In%20recording%20working%20time%20under,are%20de%20minimis%20(insignificant)).
- DOL, *COVID-19 or Other Public Health Emergencies and the Fair Labor Standards Act Questions and Answers*, <https://www.dol.gov/agencies/whd/flsa/pandemic>.
- DOL, *Frequently Asked Questions Regarding the Genetic Information Nondiscrimination Act*, <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/gina.pdf>.

Evolving Standards for Employer Screening, Testing, and Other Workplace Practices

EEOC

- EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitation_act_coronavirus.cfm (updated June 17, 2020).
- EEOC, *EEOC Issues Updated COVID-19 Technical Assistance Publication Addressing Antibody Testing* (June 17, 2020), <https://www.eeoc.gov/newsroom/eeoc-issues-updated-covid-19-technical-assistance-publication-addressing-antibody-testing>.

Presenters

Jessica Brown



Jessica Brown, a partner in Gibson Dunn's Denver Office, specializes in employment law, including workplace investigations, as well as white collar government investigations. She has been ranked by Chambers USA for sixteen consecutive years as one of "America's Leading Lawyers for Labor & Employment." Contact at jbrown@gibsondunn.com

Karl G. Nelson



Karl Nelson is a partner in the Dallas, TX office and represents employers across the country in connection with employment law compliance and litigation, including with respect to fair employment practices, benefits issues, worker health and safety, whistle-blower claims, and collective bargaining rights and obligations. Contact at knelson@gibsondunn.com

Thank you for your time!

QUESTIONS?

This concludes the educational content of this activity