

When New Legal Authority Feels Like a Virus, “Wear a Mask” By Learning

BY TIMOTHY M. HOLLY

»» COVID-19 has brought with it waves of often unclear new legal authority coming with greater speed than most can effectively manage. On the horizon, a tsunami of burdensome litigation can be seen building. Much like the virus, this presents uncertain risk for employees. Smart businesses will be vigilant of the maelstrom.

By now, most businesses know there is a virus-related paid “sick” leave law. It contains misnomers that can apply in situations that have nothing to do with an employee’s actual sickness, and refers to “minimum wage,” even though the amount of pay required is not tied to any traditional minimum wage and can be difficult to calculate. Similarly, a new and unclear paid “Family and Medical Leave” law causes risk by ambiguity. It overlaps in part with the “sick” leave law, applies even to very small employers not otherwise covered by FMLA, and is enforced differently than “normal” FMLA. There is also a new posting requirement for employers—even while most employers have been unable to access their buildings to post. New guidance and regulations meant to fill in gaps in these laws have been continuous, sometimes unclear, and not intuitive.

Delaware’s “essential businesses” (as determined under Governor Carney’s Fourth Modification of the Declaration of a State of Emergency) have had to endure additional risk. In order to avoid what was deemed a new “criminal offense,” these businesses had to “exclude individuals” over age 60,

premised on those individuals being “at highest risk of poor outcomes.” Meanwhile, these businesses remained subject to both state and federal age discrimination laws. Consequently, they (arguably) are at risk of civil suits by doing that which they must do to avoid committing a criminal offense.

On May 22, 2020, a nineteenth modification of the Emergency Declaration allowed some “non-essential” businesses to restart non-remote operations. This modification created additional risk by providing often unclear mandates about who was no longer prohibited from restarting non-remote operations and how such businesses must act to avoid committing a “criminal offense.” This includes that businesses must, at their expense, provide employees with hand sanitizer and a face covering to wear while working in areas either open to the general public or in which coming within 6 feet of other staff are likely. This modification replaced the previously-discussed requirement to exclude individuals over 60 with a declaration that all “vulnerable individuals” “should” continue to shelter in place; employers are “encouraged to continue to have staff work from home whenever possible”; and employees who have been working from home “should continue working from home unless there is a substantive change to business operations” (including that a business was closed, but now is open). These types of new edicts require businesses to navigate words like “should,” “encouraged,” “must,” and “shall” in order to

avoid what might be a “criminal act” – including in the nineteenth modification, earlier incorporated modifications, the “Phase 1 Reopen Plan,” and “any subsequent amendments thereto,” all of which do (or likely will) contain additional ambiguities.

Additional risks will likely arise as many employees resist returning to work – some because they make more on Delaware’s \$1,000 per week unemployment (available through at least the end of July 2020) than they would working. Where virus-related issues are experienced or related concerns arise at work, entering the mix will likely be numerous new issues involving workers compensation, personal injury, disability accommodations, and whistleblower laws. Meanwhile, others who are not being invited back might advance various wrongful termination claims.

While it will not cure uncertainty and might not prevent litigation, the best a business can do is to learn about the incoming legal authority and the attendant risks. Acquiring this risk-mitigating knowledge may feel like wearing a mask – it might not feel good, many may resent the need for it, and some may wonder if it is working. But businesses should “wear” it nonetheless, for failing to do so could result in dire consequences.



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