

Bringing Back Your Workforce: Who Says It's Safe, and Other Return-to-Work Barriers

Presented by:
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Agenda

- Brief overview of the alphabet soup of legal regulations potentially implicated when an employee refuses / is unable to return to work.
- Discussion of the most common reasons employees are articulating for being unable to return to work
 - Applying regulatory framework
 - Identifying practical considerations that counsel in favor of (or against) providing flexibility

FFCRA

- Emergency paid sick leave if prevented from working / teleworking because:
 - Subject to governmental isolation / quarantine order;
 - Advised by HCP to quarantine / isolate;
 - Caring for someone subject to the above;
 - To care for a child whose care is impacted by a COVID-19-related closing.
- Extended FMLA for child care related inability to work.

Traditional FMLA

- Triggered where employee is incapacitated from working due to a serious health condition or the need to care for certain family members with a serious health condition.
- If FMLA applies, employer must continue making health insurance contributions and must restore employee to their job (or an equivalent one) at the conclusion of leave.

ADA / State Anti-Discrimination Law

- Require employees to provide reasonable accommodations to a qualified individual with a disability, unless employer can show that the accommodation would pose an undue hardship / undue burden.
- Reasonable accommodations might include an unpaid leave of absence or reassignment.

OSHA

- Employee may refuse to work only if:
 - They ask employer to eliminate a hazard in the workplace and employer fails or refuses;
 - They have a “good faith” belief that an imminent danger exists;
 - A reasonable person would agree there’s a real danger of death or serious injury; and
 - There’s no time to get the hazard corrected through appropriate channels (e.g. OSHA inspection.)

WPA

- Employee may not be retaliated against for refusing to work if working would be a violation of law, or would

"expose the employee or any individual to a condition that would result in serious injury or death, after having sought and been unable to obtain a correction of the illegal activity or dangerous condition from the employer"

NLRA

- Prohibits retaliation against an employee who engages in protected concerted activity.
- *Maine Coast Regional Health Facilities* (Mar. 30, 2020).
 - Employee terminated after letter to newspaper, complaining of staff shortages and expressing support for union efforts.
 - NLRB finds media policy restricted employee's right to publicly complain about workplace issues of common concern to all employees.

State Orders – e.g. Maine's

- D. WORK FROM HOME Until further notice, **all businesses and operations shall to the extent practicable continue to have their employees work remotely** consistent with Executive Order 19 §II(B). If a business or operation determines that remote work is not or is no longer practicable, such business or operation shall comply at the worksite with the pertinent COVID-19 Prevention Checklist or other State of Maine Guidance.
- E. STAY SAFER AT HOME The directives in Executive Order 28 §I(A) and Executive Order 49 §III that people "Stay Safer at Home" unless engaging in a service or activity authorized by Executive Order 19 or Executive Order 28 are eased to the extent that people may access the increased business and personal activities that are being reopened. **Until further notice, persons who are over age 60 or who have a medically compromised condition are strongly urged to limit their movement and activities that expose them to persons other than immediate household members**, and to avoid large gatherings, especially those occurring indoors or in otherwise confined settings.
- F. VEHICLE TRAVEL Until further notice, and in lieu of the restrictions set forth in Executive Order 28 §II, **no one shall use public transportation unless necessary for an essential purpose**; persons traveling in private vehicles shall limit passengers to their immediate household members; and commercial transportation must adhere to the pertinent COVID-19 Prevention Checklist.



Barrier – Employee Medical Condition

Possible Medical Condition Impacts

- Employee at higher risk should they contract COVID-19;
- Condition interferes with employee's ability to wear a mask;
- Condition interferes with employee's ability to understand others who are wearing masks;
- Condition renders employee unable to cope with uncertainty and stress attendant to the pandemic.

Scenario #1: Transitioning Back to the Office

- Employee over 65, with an underlying medical condition (maybe a disability, maybe not) that renders them vulnerable.
- Employee has been working from home.
- Productivity as a whole is down among those working at home; and Zoom meetings proving less effective.
- Your business is permitted to be open -- can you require this individual to come in to the office?
- What if they are fine to work in the office, but need public transportation to get there?

Scenario #1: FFCRA

- Has health care provider advised employee to self quarantine because they have COVID-19, may have COVID-19, or are particularly vulnerable to COVID-19?
- Does prohibition on public transportation except for essential business constitute a local quarantine order if it causes the employee to be unable to work?
- If answer to either question is yes, would you prefer to extend the employee emergency paid sick leave under FFCRA (and then confront continued inability to work) or simply allow employee to continue working from home?

Scenario #1: Traditional FMLA

- Is the employee incapacitated from working due to a serious health condition (SHC)?
 - On the one hand, can't work in the office and could work in the office but for the SHC.
 - On the other hand, it isn't the SHC that's incapacitating, but risk due to exposure.
- Permitting remote work obviates the need to undertake this analysis.
- If work can't be done at home and appropriate certification provided, risk of not designating under FMLA probably outweighs risk of designating, and leaves employer's options open.

Scenario #1: ADA

- Is the underlying medical condition a disability under the ADA or state law?
- If so, is remote work a reasonable accommodation, or is it rendered unreasonable / an undue hardship simply because of the moderate productivity loss?
 - Fact that employee has been working from home for some time makes it difficult to argue WAH isn't a reasonable accommodation.
- If remote work not an option in this job, is there a vacant position that can be done from home?
- If not, is a leave of absence a reasonable accommodation?
 - Is the inability to work indefinite (i.e. employee cannot work until there's a vaccine available) or is it defined (i.e. employee cannot work until their asthma is better under control)?
 - How easy or difficult is it to hold the employee's position open?

Scenario #1: Impact of State Orders

- Order requires employers to continue to have employees work from home “to the extent practicable” (in MA “feasible”; in NH “as much as practical”)
 - Does modest impact on productivity render at home work impracticable such that employer can require in-person attendance consistent with the Order?
- Order’s prohibition on public transport is directed at individuals, not employers; but does it trigger entitlement to leave or continued at home work?

Scenario #2: Inability to Mask

- Employee works in healthcare, performing patient care (i.e. work is essential, and cannot be done from home).
- Employer requires all employees to wear masks at all times when not in private office.
- Due to a medical condition, e.g. asthma or anxiety, employee cannot wear a mask.

Scenario #2: FFCRA / FMLA

- FFCRA – per temporary rule, advice of healthcare provider triggers FFCRA only if employee has, is suspected to have, or is vulnerable to COVID-19.
- FMLA – just as with compromised individual, unclear if traditional FMLA applies where serious health condition isn't causing incapacity, but employee cannot comply with safety-related requirement.
- Assume for now this employee isn't seeking unpaid leave but an accommodation that will enable them to keep working.

Scenario #2 - ADA

- Is forgoing face covering a reasonable accommodation?
- Is there another kind of face covering (e.g. clear shield) that will be as effective?
- If not, is there a vacant position that does not require face covering, to which employee can be reassigned?
- If not, is leave a reasonable accommodation?

Scenario #2 – Back to Traditional FMLA

- If employee is seeking unpaid leave or if unpaid leave is the only available option, employer should proceed as if FMLA may apply.
- If employee submits a health care provider certification that supports leave, risks counsel in favor of designating the leave under FMLA.
- Inability to mask likely to last longer than 12 weeks, such that restoration rights may well expire before employee can return.

Other Possible Accommodation Issues

- If others' masks interfere with employee's ability to understand / communicate:
 - Clear masks?
 - ASL interpreter?
 - Video interpreting?
 - Reassignment to position where others aren't masked?
 - Leave?

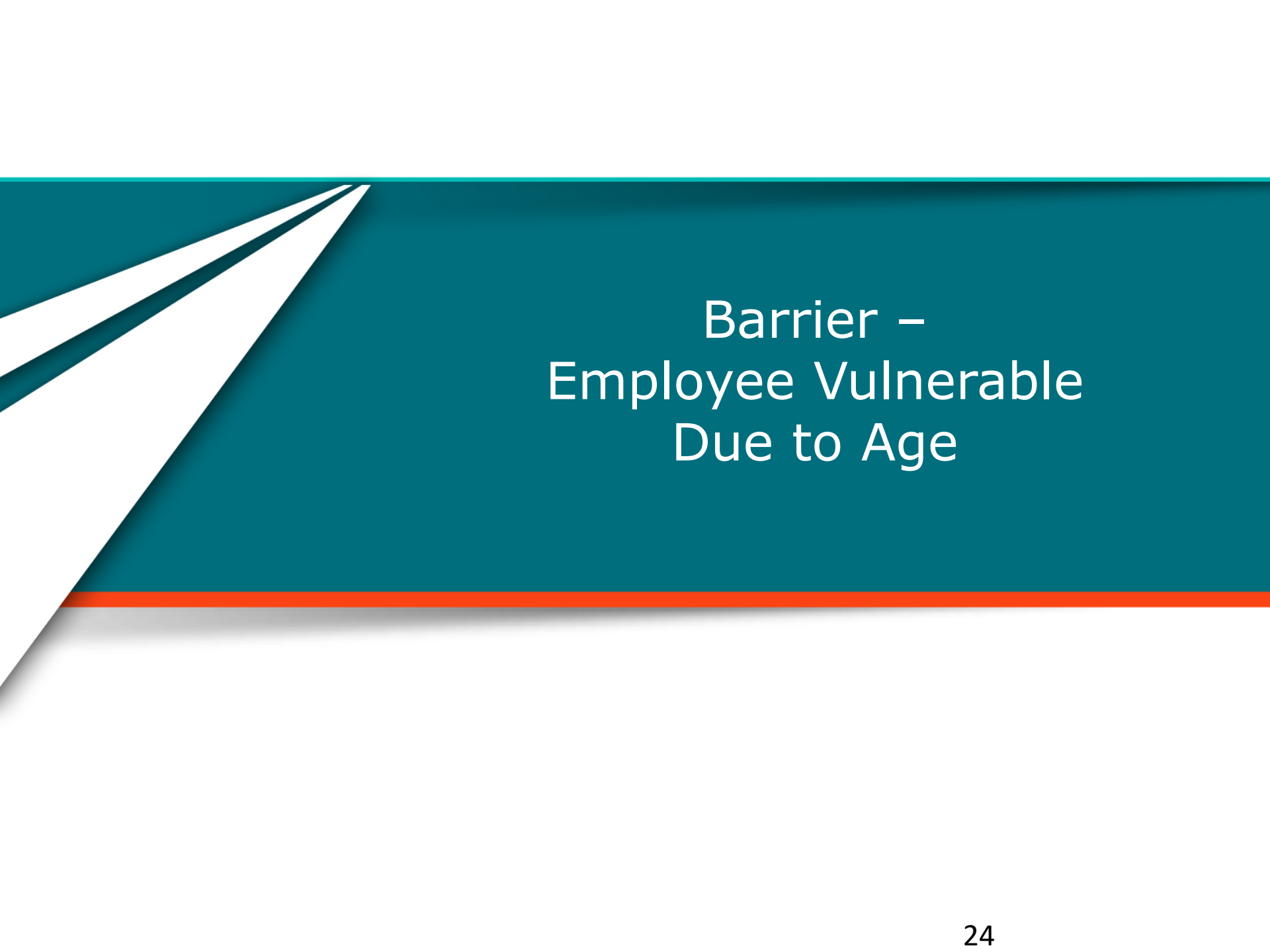
Do's and Do Not's

Do Not

- Ask employees whether they have medical conditions in order to ascertain whether they require accommodation.
- Assume employees need something they haven't asked for, unless their need is apparent / obvious.

Do

- Consider publishing a broad statement, detailing the reasonable accommodation process and identifying to whom requests should be made.
- Try different things and understand that the duty to accommodate is not exhausted with one effort.



Barrier – Employee Vulnerable Due to Age

Scenario 1: Older Worker (no underlying medical)

- FFCRA – if HCP provider advises quarantine due to vulnerability, 10 days of emergency sick leave available.
- Assuming no underlying medical, ADA does not apply.

Scenario 1: Impact of State Order

- Maine's and other orders advise older individuals to stay home to the extent possible.
- To what extent do these orders contain an implicit obligation to accommodate older workers with work from home or unpaid leave?

Scenario 1: Other good reasons to accommodate older workers

- If / because you reasonably can, without incurring undue hardship
- Employee retention, good will, morale
- To avoid negative publicity
- EEOC has opined that accommodating workers age 65 and above will not give rise to age claims by younger workers denied similar flexibility / accommodation.

Scenario 2: Your 70 year old employee is eager to return, but *you're* concerned for their health.

- Involuntarily excluding this worker from returning based on their age = age discrimination, even if done for benevolent reasons.
- Protect this employee in the same way you protect the rest of the workforce, in accordance with Infectious Disease Preparedness Plan.



Barrier – At Risk Member of Employee's Household

FFCRA – Caring for Another

- FFCRA covers leave to care for a self-quarantining individual if the individual has been advised by a HCP or is required by order to quarantine.
- Relationship between employee and individual required.
- According to DOL, concerns about infecting household member not covered by FFCRA, even if employee's health care provider advises employee remain out of work to protect family member.

FMLA

- Similar to FFCRA – is employee needed to provide care to a covered family member with a serious health condition?
- If yes, traditional FMLA may apply.

ADA

- ADA is not implicated when employee is requesting accommodation to care for a family member with a disability.

State Orders

- Express a public policy that individuals should take steps to limit exposure.
- Consistent with that policy, employer should consider whether job can be done from home and, if not, extending unpaid leave.
- Terminating an employee who is unable to work because unwilling to risk the health of a family member could be viewed as tortious and/or lead to negative publicity / employee relations issues.



Barrier – Child Care

FFCRA – Child care

- Given school closures, extended FMLA may be exhausted.
- But some employees may have pieced together the school year and find themselves without care over the summer due to camp / program closures.

FFCRA – What is “child care” and what can I ask for from the employee?

- Any physical location where care is provided.
- Any individual who provides care, even if a family member.
- May require a statement from the employee:
 - With name / age of child(ren)
 - Name of place of care that is unavailable
 - Representation that no other person will be providing care during time when employee is taking leave.



Barrier –
Employee Feels that Workplace
is Unsafe

Scenario 1

- Employee works in an office environment.
- Employer has implemented all prevention strategies identified in applicable checklist.
- Employee refuses to return, citing generalized fear of coming into contact with others.
- Employee cites employer's failure to enforce social distancing among employees.
- Assume retail: Employee cites employer's failure to deny service to customers who refuse to mask.

Scenario 2

- Employee works at hotel, in housekeeping.
- Employee sees that hotel is starting to service individuals from out of state / hot spots and refuses to come to work, citing risk of exposure.
- Employer is in compliance with relevant checklist and is following required certification procedure for out of state guests.
- Now, assume employee asserts that not all guests are being asked required questions concerning exposure.

What To Do When Employee Articulates Safety-Related Concerns

Nail down employee's concern

- Is it specific and reasonable?
- Or is it generalized and out of employer's control?

If concern is specific and reasonable

- Make the change to alleviate the employee's concern.
- Doing so will not only protect you against a retaliation claim, but serve you well in the case of an inspection.

Close the loop with the employee and document the communication

- If a change has been made, tell the employee.
- If no change has been made, explain why.

Where Employee's concern is unfounded, unreasonable, or outside Employer's control

- Choices include termination or unpaid leave of absence.
- In vast majority of circumstances, unpaid leave will be the better, less risky, alternative.
- According to the MDOL, an employee citing vague, unreasonable or unspecified concerns will not qualify for unemployment.

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