

WEBINAR

## COVID-19 Business Resources Webinar

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# Employer Resources: Navigating the Post-COVID-19 Reality for the “Great Return” for the Workforce and Legal Considerations

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## Bobby LaCour

PARTNER, ALDRICH CPAs + ADVISORS

Bobby has over fifteen years of experience in public accounting while serving his clients in the government, nonprofit, and private middle-market sectors.

He specializes in providing consulting, attest and accounting services, in addition to an extensive background in internal control and operations analysis.



### Tracey Davis

PARTNER, ALDRICH BENEFITS

Tracey is a leading Employee Benefits Consultant specializing in large and mid-market employers with particular expertise in self-funding. She builds a strong reputation in the market as someone who is knowledgeable, engaged, and creative.

Her in-depth knowledge of the market and strong carrier relationships provides creative solutions for funding, medical management, and cost containment with an eye on the future direction of healthcare.



### Evan Cole

EMPLOYEE BENEFITS CONSULTANT, ALDRICH BENEFITS

Evan partners with his clients to advise and assist them with their employee benefit plans, specializing in group and association plans. He was a top producing employee benefits representative for one of the nation's largest life, disability, and dental carriers prior to joining the firm.

He holds licenses for life and health in the states of Oregon, Washington, and California. Evan is also an active member of the Oregon Association of Health Underwriters and supporter of the ACE Mentor Program of Oregon.



## Marjory Robertson

AVP & SENIOR COUNSEL, SUN LIFE

Marjory advises Sun Life on employment law issues, including legal issues related to absence and disability management for its employees. She also supports and provides legal oversight for Sun Life's Absence and ADA administration products.

Marjory presents frequently on legal and compliance absence management issues at conferences and at Sun Life broker meetings. Marjory is a graduate from Dartmouth College and Boston College Law School.

- **Benefit Plan Considerations**
  - Premium Credits or Refunds
  - EBSA Disaster Relief Notice 2020-01
  - DOL Final Rule Extensions
  - IRS Notices 2020-29 & 2020-33
  
- **Preparing for the Great Return – Legal Considerations**
  - Compliance considerations
  - Practical strategy & considerations

*The information provided herein does not, and is not intended to, constitute legal advice; instead, all information, content, and materials available are for general informational purposes only. Readers of this presentation should contact their attorney to obtain advice with respect to any particular legal matter. The information was updated as of May 27, 2020 and we recognize it may change. Please contact your Aldrich Advisor for the most up to date information for your situation.*

- Some insurance Carriers (mostly dental carriers, to date) are providing premium credits to Employers
- In general, it is advised to treat them like ACA Medical Loss Ratio (MLR) rebates
  - 100% Employee paid – Employer must use funds in a way that complies with ERISA's exclusive benefit rule (i.e. refund or premium holiday)
  - Employer and Employee paid – Review terms of the plan

- Employee Benefits Security Administration (EBSA) Disaster Relief Notice 2020-01 – focus on extension of certain time frames
  - Extends deadlines so plan participants, beneficiaries and employers have additional time to make critical health coverage and decisions affecting benefits
  - Also provides additional time to comply with deadlines affecting COBRA continuation coverage, special enrollment periods, claims for benefits, appeals of denied claims and external review of certain claims
  - For disability, retirement and other plans, there is additional time for participants and beneficiaries to make claims for benefits and appealed denied claims
  - Adoption of temporary policy of relaxed enforcement by Department of Health and Human Services (HHS)

- DOL Final Rule Extension – issued jointly by the Departments of Labor (DOL) and Treasury imposes mandatory timeframe extensions for several employee benefit requirements
- Outbreak period – March 1<sup>st</sup>, 2020 until 60 days after announcement of end of national emergency period



- DOL Final Rule Extension
  - HIPAA Special Enrollment Period
- COBRA Election Period
- COBRA Premium Payment Period
- COBRA notices
- Benefit Claim Filing Deadline
- ERISA Adverse Benefit Determination Appeal Deadline
- ERISA External Review Request Deadline

- IRS Notices 2020-29 and 2020-33
  - Increases flexibility for mid-year changes by removing the need for a Qualifying Event
  - Allows employees to add, drop, and change elections on Section 125 plans
  - Increases FSA carryover limit for 2020 plan years and beyond
  - Access to 2019 plan year FSA funds
  - Amend HSA plans to allow telehealth pre-deductible back to 1/1/20
- Employers can choose which, if any, of these changes they want to adopt
  - Gives employers authority to place parameters around whatever options they implement

# Overview of Key Legal Issues, Re-entry Requirements & Recommendations, Accommodations and Workplace Safety

- OSHA imposes a general duty of care that requires employers (ERs) to provide a safe and healthy working environment
- OSHA can require
  - Cleaning and sanitation
  - Screening of employees (EEs) and on-site visitors
  - Social distancing
  - Appropriate personal protective equipment (PPE)
  - Safety measures if someone at work displays COVID-19 symptoms

- ADA permits some medical inquiries because COVID-19 has been declared a pandemic
  - EEOC permits ERs to follow guidance from the CDC and other reputable medical sources in responding to this direct threat to safety
  - Must focus on exposure and symptoms
- Medical information obtained from EEs must be kept confidential
- EEs with disabilities may be entitled to reasonable accommodations
  - Including: leave, remote work, reassignment of duties, job transfers and more
  - Duty to accommodate applies to EEs who are working on-site and EEs who are telecommuting because of COVID-19

- Many states, counties and cities are issuing orders pertaining to COVID-19 workplace safety requirements
- Before you start to bring EEs back into the workplace, make sure you are fully aware of Federal, state and local orders and requirements that may impact your work location and/or industry
  - Are you allowed to reopen?
  - If so, what are the rules?

## TEMPARTURE CHECKS ARE PERMITTED

- EEOC Pandemic Guidance permits temperature checks
- Communicate the process in writing
  - Be aware of local legal requirements
  - California law requires advanced written notice advising EE that you will collect body temperature and purposes for which information will be used
- Establish threshold temperature which an EE or other person will not be admitted entrance
  - CDC: 100.4 degrees Fahrenheit, or higher



- You may ask EEs and visitors
  - Symptoms
  - Diagnosis
  - Exposure
- You must keep medical information confidential
  - Medical information must be stored separately from other personnel information
- What type of question are okay?
- What questions are not okay?



- OSHA and PPE
  - When a hazard exists
    - ERs can mandate that EEs use PPE and
    - EEs have the right to demand PPE
  - Examples: face masks, gloves, goggles, face shields, respiratory protection
  - What rules govern PPE? ER must
    - Perform a hazard assessment
    - Consider other alternative options to protect EEs
    - Identify and provide appropriate PPE
    - Train EEs in use, care, cleaning and replacement of PPE
    - Prepare a plan that is periodically reviewed

- Originally, CDC was only recommending the use of PPE for healthcare workers who have greater exposure
- But, there is more and more evidence of asymptomatic spread
- CDC revised its guidance
  - CDC now recommends that even non-health care personnel should wear a cloth face covering, which can be home-made from household items
  - These cloth coverings must be kept clean through washing
  - Main purpose of cloth face coverings is to prevent spread of COVID-19 from wearer to others

- States and local governments have adopted orders regarding face coverings
- Variations
  - Some are mandatory and some are recommendations
  - Some apply to all individuals in public/outside of residence
  - Some apply to only “essential” businesses
  - Some apply to only public-facing businesses, e.g., retail stores, pharmacies, food service enterprises, public transit, etc.
  - Some require ERs to pay for the face coverings
  - Some also require that EEs be provided with disposable gloves
  - Some contain other requirements (e.g., mandatory breaks to wash hands)

- Limit occupancy
- One-way aisles
- Plexiglass
- Placement of tables or other physical barriers to create distance
- Contactless delivery options
- Place floor tape to mark 6-feet distances
- Limitations on elevator usage

- Create distance between desks & workstations
- Modify open floorplans with partitions
- Make only certain workstations available (e.g. every other)
- Closer or modify common areas and conference rooms
- Create touchless entries and devices
- Improve air flow and ventilation
- Improve signage to remind EEs of considerations

- Hold fewer in-person meetings and use video conferencing
- Limit size of in-person gatherings
- Instruct EEs to not to use other EEs workspaces or equipment
- Develop a crowd control plan
- Establish restrictions regarding travel
- Set staggered or spaced meal and break schedules
- Set staggered shifts, alternating teams, continued telework
- Prohibit non-essential visitors



- Require infection control practices, such as regular hand washing, coughing and sneezing etiquette and proper tissue disposal
- Have ample supplies of face coverings, gloves and sanitation materials, including wipes and sanitizers in all common areas and work areas
- Frequent sanitization of high-touch areas including restrooms, countertops or door knobs
- Frequent breaks for EEs for hand washing

- Non-latex gloves for EEs with latex allergies
- Alternatives to cloth face coverings for those with respiratory conditions
- Sign language assistance and/or clear face masks for hearing impaired who rely on lip reading
- Some state/local orders say you cannot ask for documentation of medical condition
- Can you send someone home who cannot wear a face covering because of a medical condition?
  - Not if there is an alternative accommodation such as social distancing and/or clear face masks



- Under ADA if EE has a disability, ER needs to evaluate reasonable accommodations and engage in the interactive process
- In some states, ERs must also make accommodations for pregnant EEs
- Accommodations must be granted unless accommodation would
  - Create an undue burden
  - Relieve an EE from performing an essential job function
  - Create a direct threat to safety of EE or others
- WA State: ERs must make special efforts to accommodate high-risk EEs

- No legal duty to accommodate generalized fear that is not based on evidence of hazards in the workplace
- However, if EE has underlying disability that contributes to fear, you may have to accommodate under ADA
  - It is possible that psychological impairment may qualify as a disability that needs accommodations
- Be mindful of OSHA issues
  - Are you taking appropriate steps to keep your workplace safe?

- If EE becomes sick during the day
  - EE should be isolated and sent home immediately
  - Surfaces in their workspace needs to be cleaned and disinfected
- ER should compile information on persons who had contact with ill EE during the time the employee had symptoms and 2 days prior to that and notify those individuals of exposure (but maintain confidentiality)

- CDC guidance on entry to work for critical infrastructure workers exposed to COVID-19
  - Permits EEs to continue to work on-site even if exposed to COVID-19 if asymptomatic and ER takes additional precautions to protect them and the community at large
  - Potential exposure is: household contact or close contact within 6 feet of any individual with confirmed or suspected COVID-19
  - The period of time includes the 48-hour period before individual became symptomatic

- Additional requirements to permit EEs who have had exposure but remain asymptomatic to work on-site
  - ER must screen EEs by measuring temperature and assessing symptoms
  - EE should self-monitor under supervision of ER's occupational health program
  - EE must wear face covering at all times for 14 days after last exposure
  - EE should maintain social distance of at least 6 feet
  - ER should clean and disinfect frequently and routinely

- At least 3 days (72 hours) have passed since recovery which includes
  - Resolution of fever without fever-reducing medications and
  - Improvement of respiratory symptoms (e.g. cough, shortness of breath) and
  - At least 7 days have passed since symptoms first appeared
- Test-based approach
  - Resolution of fever without fever-reducing medications and
  - Improvement of respiratory symptoms (e.g. cough, shortness of breath) and
  - Negative results of an FDA Emergency Use Authorized Molecular Assay for COVID-19 from at least 2 consecutive nasopharyngeal swab specimens collected  $\geq 24$  hours apart\*\*\* (total of 2 negative specimens)

\*\*\* All test results should be final before isolation is ended. Testing guidance is based upon limited information and is subject to change as more information becomes available.

- Under OSHA, ERs can be held liable:
  - If they do not properly and promptly address and alleviate dangerous conditions
  - If they retaliate against an EE for raising a concern about workplace safety
- The National Labor Relations Act (NLRA) protects concerted activity to address workplace safety
  - ER can be held liable for retaliating against an EE engaged in protected concerted activity
  - Union activity is also protected
- State Whistleblower laws
- Federal and state Discrimination laws

- EEs may refuse to do work if all of the following conditions are met
  - Where possible, EE asked ER to eliminate danger and ER failed to do so; and
  - EE refused to work in “good faith” (i.e., EE genuinely believed that an imminent danger exists); and
  - A reasonable person would agree that there is a real danger of death or serious injury; and
  - There isn’t enough time due to urgency of hazard to get corrected through regular enforcement channels such as an OSHA inspection



## Contact Us!

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