



The title card features a dark red background with a large, detailed illustration of a coronavirus particle in the center. The particle is spherical with a textured surface and numerous red, spike-like protrusions. In the top left corner, the ARC logo is displayed, consisting of horizontal lines and the text 'ARC EXCESS & SURPLUS, LLC'. In the top right corner, the Gordon & Rees logo is shown, including the text 'GORDON&REES SCULLY MANSUKHANI YOUR 50 STATE PARTNER®'. The main text is centered and reads 'COVID-19 Webinar Series May 6 & 13, 2020' followed by 'Pitfalls in the Emerging Workforce Post-COVID-19 Isolation' and 'May 6, 2020' in the bottom right corner.

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COVID-19 Webinar Series
May 6 & 13, 2020

Pitfalls in the Emerging Workforce
Post-COVID-19 Isolation

May 6, 2020



This slide contains the logos for Gordon & Rees and ARC Excess & Surplus, LLC at the top. The Gordon & Rees logo is on the left, and the ARC logo is on the right. Below the logos is a horizontal yellow line. The main title is centered and reads 'Pitfalls in the Emerging Workforce Post-COVID-19 Isolation'. Below the title, the word 'Presenters:' is followed by three lines of text listing the speakers and their roles.

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Pitfalls in the Emerging Workforce
Post-COVID-19 Isolation

Presenters:

Michael Cavallaro, Chief Executive Officer, ARC Excess & Surplus

Robert Crocitto, Principal Director and Chief Sales Officer, ARC Excess & Surplus

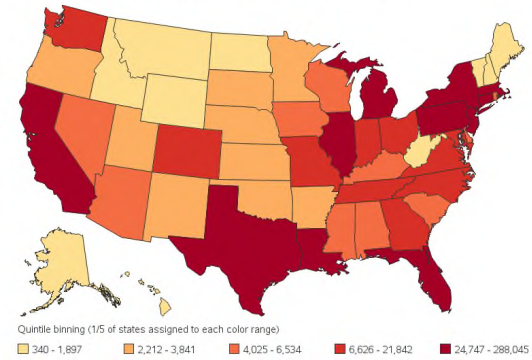
Mercedes Colwin, Founding Partner, GRSM New York Office

A Return to the Workforce

- **State of Affairs regarding Federal government response to COVID-19**

- The Trump administration released “Guidelines for Opening Up America Again,” a three-phased approach allowing Governor’s in states that show a downward trend of COVID-19 cases within a 14-day period to reopen restaurants, bars, theaters, workplaces, sporting centers and gyms as soon as May 1 and without the need for testing.

955,832 Confirmed Coronavirus (COVID-19) Cases in US States
Data source: Johns Hopkins CSSE (April 26, 2020 snapshot)



While Southeastern states (GA, SC, TN) have pushed to re-open, states such as those in the “COVID Corridor” (NY/NJ/CT) are currently hesitant, in light of the sheer volume of cases.

Overview of Returning to the Workplace


- **Who to return?**
 1. All at once vs. phasing in
 2. Discrimination concerns
- **How to return?**
 1. OSHA hazard-free workplace regulations and guidance
 2. EEOC testing / screening guidelines
- **Administering workplace policies in COVID landscape**
 1. Modify telework policies
 2. Consider whether reasonable accommodations may be necessary
 3. Review and amend leave policies to comply with existing and new laws
 4. Ensure anti-harassment policies are properly enforced
 5. Do not interfere with employees’ protected concerted activity
 6. Don’t make pay reductions that violate wage and hour laws or have a disparate impact on protected classes

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Who to Return?

- Immediate challenge for employers -- to rehire or reintegrate most or all of their labor force after furloughs and Reductions in Force.
- How to bring employees back from furlough
 - notification
 - phased re-hirings
 - new hires




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Pitfalls in Who to Return



- The White House Guidelines recommend the workforce return to work “in phases”
 - Possibility that workers are brought back in a discriminatory way
 - When choosing which employees to bring back from furlough/teleworking and making new hires, employers cannot base decision upon age, pregnancy, disability (including immunocompromised status) -- even though these categories are classified as “vulnerable” persons for COVID purposes
 - » Exceptions: if an employee in one of these categories *requests* leave, continued telework or delayed start date as an accommodation
 - If implementing a “phase in” approach, employers should determine which employees are “site essential” vs. those who may telework
- Employers should take a uniform approach to “fitness for duty” certifications
- Giving priority to new hires over furloughed or part-time employees may also give rise to discrimination claim under Title VII, ADA, ADEA, or state or local law

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How to Return: Safety in the Workplace

- The Occupational Safety and Health Act requires employers to comply with safety and health standards issued by OSHA.
- While OSHA has not yet promulgated any COVID regulations, existing requirements include:
 - The Personal Protective Equipment Standards
 - The “General Duty Clause”, which requires employers to provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm



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OSHA Guidance

- OSHA has also issued Guidance on preparing workplaces for COVID-19
- The Guidance divides workers into four categories of exposure risk:
 - Very High: e.g., healthcare workers performing aerosol-generating procedures on known or suspected COVID patients
 - High: e.g., healthcare workers who are exposed to known or suspected COVID patients other than those performing aerosol-generating procedures; medical transport workers transporting known or suspected COVID patients
 - Medium: includes those that require frequent and/or close contact with people who may be infected with coronavirus but are not known/suspected COVID patients. In areas with ongoing transmission, this may include workers in contact with general public (in schools, high volume retail, etc.)
 - Lower: workers do not require contact with people known or suspected of being infected with coronavirus and have minimal occupational contact with the general public and other coworkers

Depending on level of exposure risk, OSHA recommends various engineering and administrative controls and forms of PPE

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OSHA Guidance (cont.)

- **Administrative Controls**
 - Reduce number of employees in the workplace
 - » Establishing satellite offices (run search of employees' zip codes based upon employee records) to reduce density in main office
 - » Stagger shifts
 - » Assign employees to teams that alternate days working in-office and remotely
 - » Continued telework for certain positions
 - Reducing in-person meetings in favor of video/telephone conferences
 - Training employees who need to use PPE how to wear it, take on/off
 - Increasing frequency of cleaning
 - Posting signs (wash hands frequently; avoid touching other employees' equipment; etc.)
- **Engineering Controls (for medium, high and very high risk)**
 - Installing high-efficiency air filters
 - Increasing ventilation
 - Installing physical barriers, such as plastic guards around cubicles
 - Separating desks/work stations or making only certain ones available

OSHA Guidance: PPE

- Employers are obligated to provide workers with appropriate Personal Protective Equipment ("PPE") if it is needed to keep them safe while performing their jobs during COVID outbreak
- PPE recommended for all jobs *other than* "lower risk exposure" jobs
- OSHA warns that PPE should not *replace* other prevention strategies
- Necessity of PPE may vary based upon
 - geographic location
 - updated information on PPE effectiveness
 - How occupation or job task may lead to exposure– select appropriate types of PPE
 - » (e.g., gloves for bank tellers and grocery store cashiers exchanging money with customers)
- ensure proper removal, cleaning, storage, & disposal



Whistleblower/Retaliation Claims

- OSHA prohibits retaliation against employees who complain about unsafe work conditions or exercise other rights under the Act
- New York Labor Law 740: prohibits employers from retaliating against an employee for disclosing or threatening to disclose an employer's policy or practice that violates a law, rule or regulation, where it presents a substantial and specific danger to the public health or safety
- New Jersey Conscientious Employee Protection Act: protects employees who disclose, or threaten to disclose, to a supervisor or a public body an employer's activity, policy, or practice that the employee reasonably believes violates the law
- California Labor Code 6310 prohibits retaliation against employees for complaining about safety or health conditions or practices



EEOC Screening / Testing Guidance

- On April 24, the EEOC stated that employers may choose to administer COVID-19 testing to employees before they enter a work site without running afoul of the ADA
 - For example, employers can take employees' temperature and may ask employees if they are experiencing COVID symptoms, including fever, chills, cough, shortness of breath, or sore throat.
- The EEOC warns, however, that employers have to "ensure" that any tests are "accurate and reliable," suggesting that businesses review guidance from public health agencies such as the Food and Drug Administration about what constitutes safe and accurate testing and keep in mind that certain types of tests could yield false positives or false negatives.
- The EEOC noted that any medical test that businesses require workers to take must be "job related and consistent with business necessity" under the ADA, a framework that allows businesses to legally screen workers for COVID-19, since those who are carriers will "pose a direct threat to the health of others."

Screening Measures Continued

- Part of the White House's three-phased approach places the burden on employers to monitor employees for symptoms of COVID-19.
- Employers should not allow symptomatic people to physically return to work until cleared by a medical provider
- Employers should develop and implement policies and procedures for **workforce contact tracing** when an employee tests positive for COVID

Best Practices for Testing

- Employers intending to implement COVID-19 testing should consider
 - what type of test they will run,
 - who will conduct the tests,
 - how these personnel will be trained,
 - whether the test must be performed in a clinical lab or by a licensed healthcare professional,
 - whether a physician order is required for testing,
 - who will be tested,
 - how often tests will be done, and
 - how test results will be maintained



Screening Measures: Special Privacy Concerns

- Given the new responsibility to monitor its employees for symptoms of COVID-19, employers are grappling with how to find the ideal balance between personal privacy and public safety.
- Compliance with regulations for collecting and disseminating personal data, and consistent application of these laws is key to avoiding litigation.
 - While privacy law “carve-outs” for public health and safety may give some cover to employers, particularly when it comes to sharing information with public health officials, companies still need to put reasonable limits on these activities.
- **Takeaway:** Act according to a written company policy that complies with existing regulations and be mindful of maintaining a sense of proportionality with regard to the information that must necessarily be obtained/released.



Pitfalls as Some Employees Continue to Work Remotely: Updating Telework Policies

- Harassment:
 - Employees may feel emboldened to make questionable comments with a computer screen separating them from others.
 - Employers should inform their employees that company anti-harassment and anti-discrimination policies apply to the virtual workplace.
- Discrimination/ Reasonable Accommodations
 - Under the ADA, Pregnancy Discrimination Act, and state disability and pregnancy discrimination laws, employer may be required to permit employees with disability (immunocompromised/preexisting conditions) or who are pregnant to continue to WFH even as you transition workforce back to the office as an accommodation.
 - Employers should review policies and ensure they are prepared to respond to requests to telework/flexible work arrangement as an accommodation.
- Wage and Hour
 - Tracking hours of non-exempt employees – when employees take lunch breaks, etc.

Duty to Provide Reasonable Accommodations

- Individual with a disability (including immunocompromised) or pregnant may be entitled to accommodations
- EEOC Guidance states that a preexisting mental illness or disorder exacerbated by pandemic may also be a "disability" requiring accommodation
- Examples of Reasonable Accommodation under ADA, PDA or State or Local Laws
 - Special PPE (e.g., non-latex gloves, or gowns designed for individuals who use wheelchairs).
 - continued teleworking even when the rest of the workforce has returned to the worksite
 - Changing hours to avoid peak commute times
 - Unpaid leave
- Example of Religious Accommodation under ADA
 - Modified PPE due to religious garb.

IN ANY CASE, the employer should discuss the request and provide the modification or an alternative if feasible and not an undue hardship on the operation of the employer's business under the ADA or Title VII.

Frequently Asked Questions

- If Business ABC selected a group of employees with comorbidities for continued furlough when the national and state wide restrictions are lifted, for their own safety, will the employer be subjected to liability?
- What about an employee who is exhibiting COVID symptoms?
- If an employee tests positive for COVID, should an employer keep this information private?

Other Concerns with Returning to Workplace – Absenteeism & Leave Entitlement

- Employees will be absent more frequently due to:
 - illness from COVID-19 requiring them to isolate
 - exposure to COVID-19 requiring them to quarantine
 - their status as caregivers for children if schools or day care centers remain closed or close again,
 - living with people who are vulnerable (*i.e.*, elderly or immunocompromised family members)
 - Fear of coming to work because of possible exposure

Leave Entitlement Considerations

- Employers may be required to provide paid or unpaid leave for employees home and unable to work remotely to ensure compliance with previously existing and recently enacted sick leave laws.
- Employers may consider monitoring employees' vacation and travel plans
- Do not run afoul of laws prohibiting discrimination against employees who engage in certain recreational activities outside of work (*e.g.*, NYLL Section 201-d)



Families First Coronavirus Response Act

- Signed by President Trump on March 18, 2020
- Provides certain benefits to eligible employees of covered employers (<500 employees), including:
 - Up to 80 hours of paid sick leave to employees for specified COVID-related reasons, such as when the employee is experiencing COVID-19 symptoms and seeking medical attention, or has been advised by a health care provider to self-quarantine
 - temporarily expands FMLA by requiring employers to provide up to 10 weeks of paid, and 2 weeks of unpaid, job-protected leave when an employee needs to care for children because of school closures (until Dec. 2020)
- Beware the anti-retaliation provision: employers are prohibited from discharging, disciplining, or otherwise discriminating or retaliating in any manner against an employee who:
 - takes paid sick leave or expanded FMLA leave;
 - files a complaint or institutes a proceeding under the FFCRA; or
 - testifies in such a proceeding

State Laws Related to Leave

- New Jersey recently enacted Assembly Bill No. 3848:
 - prohibits employers from penalizing an employee for requesting or taking time off, based on the recommendation of a licensed medical professional, because he or she has, or is likely to have, COVID-19.
 - Cannot refuse to reinstate employee upon return
- New York
 - Paid Family Leave Act - leave can be used to care for a family member who has a "serious health condition" which includes contracting COVID-19
 - Paid Sick Leave - if an employee or their minor dependent child are under a mandatory or precautionary order of quarantine or isolation due to COVID-19, employer must provide the employee with job protected-leave for the duration of the order of quarantine or isolation (and depending upon employer size, leave must be paid for up to 14 days);



Liability for Harassment Under Title VII, State and Local Laws

- There are early signs of reports of people harassing and (wrongly) blaming Asians and Asian-Americans for originating and spreading COVID-19.
- Such mistreatment has already caught the attention of Janet Dhillon, Chair of the U.S. Equal Employment Opportunity Commission, who issued a statement in March, directly urging employers and employees alike "to be mindful of instances of harassment, intimidation, or discrimination in the workplace" related to the present
- So how exactly can employers be proactive to identify and mitigate the potential for controversial remarks which could form the basis of a workplace bias or harassment claim remotely and/or in the physical workplace?



Preventing Harassment Against Protected Groups

Lean Hard on Anti-Harassment and Anti-Discrimination Policies

- When employees return to the office once the threat of COVID-19 is controlled, monitor for employees making racially-charged jokes or exchanging xenophobic memes.
- If an employee asks you not to work with someone because of their national origin (whatever it may be), employers must respond "no."
- Accommodating such a request is tantamount to condoning racist sentiments and very likely will qualify as an actionable ground for a workplace discrimination claim.



Claims Under the National Labor Relations Act (“NLRA”)

- Workers are protected under Section 502 of the NLRA from abnormally dangerous working conditions
- NLRA also prohibits employers (even non-union employers) from retaliating against workers who engage in “protected concerted activity” (concerted activities for the purpose of mutual aid or protection)
- Employers may face work stoppages, compensation demands, demands for improved working conditions, and public protests (including public outcry on social media)



Pitfalls In Pay Reductions

• Wage & Hour –

- Generally, reductions to weekly salary of exempt employees are not permissible. These employees must be paid the same weekly salary for any workweek in which they perform work, regardless of the number of hours they work
- A limited exception exists based on a bona fide reduction in the amount of work related to long-term business needs
- But may still lose exemptions by falling below federal and state minimum salary levels. If employers fail to change classification to non-exempt, they face liability for overtime claims



• Discrimination –

- Disparate impact claims could be asserted if salary reductions are made for only a subset of employees and such reductions disproportionately affect protected classes on a statistical basis

Several State Laws impose **advance notice requirements** for pay reductions

Resurgence and Future Layoffs/Furloughs

- We may experience a resurgence of the COVID outbreak
- Federal WARN Act requires covered employers to provide 60 days' advance notice (or pay in lieu of notice) to workers impacted prior to a plant closing or mass layoff.
- Exception applies where plant closings and mass layoffs were caused by business circumstances that were **not reasonably foreseeable** at the time the 60-day notice would have been required
- A resurgence is likely to be considered "reasonably foreseeable", even though the Spring shutdowns may not have been
- Several states have enacted their own "Mini-WARN" Acts, some which do not have exceptions for temporary layoffs – so the notice requirement would potentially be triggered even in the event of a temporary furlough

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