
PrestigePEO

May 13, 2020

COVID-19 – Part VII

We Are Here For You

Today's Presenters



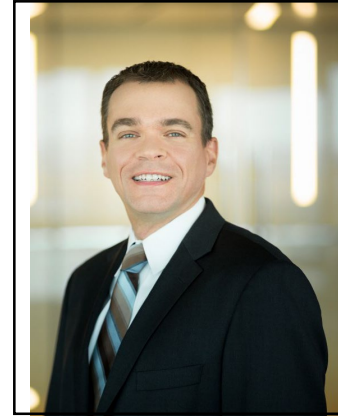
Jason Flinn

Today's Moderator
and Director of
PrestigePEO Client
Services



Andrew Lubash

Founder and
Principal of Prestige
Employee
Administrators



Malcolm C. Slee

Principal
Groom Law Group



Carol Sawyer

Tax Manager at
PrestigePEO

Today's Topics

...

- Introduction by Andrew Lubash, PrestigePEO Founder and Principal
- Legal Update Presented by Malcolm C. Slee, Partner, Groom Law Group
- SBA Paycheck Protection Program Loan Update
- Return to Work

- ❖ Webinar Forum
 - All participants are muted.
 - Please type questions in the side navigation panel and we will try to address most questions.
 - Today's presentation will be posted prestigepeo.com/covid-19.

Welcome Update Presented by Andrew Lubash



- Andrew (Andy) Lubash is Founder and Principal of Prestige Employee Administrators.
- Andy currently holds several positions at the National Association of Professional Employer Organizations (NAPEO);
 - Chairman of the Board of Directors
 - Member of the Federal Government Affairs Committee
 - Member of the Healthcare Committee
- Previously, Andy was Chairman of the State Government Affairs Committee for five years.

Legal Update Presented by Malcolm C. Slee

- Malcolm Slee is Principal at Groom Law Group, Chartered, a Washington, DC law firm that focuses exclusively on benefits matters
- In his role at Groom Law Group, Malcolm advises clients on issues under ERISA, the Internal Revenue Code, and related laws and regulations as they relate to qualified retirement and welfare plans. A specific focus of his practice is benefits issues arising in the PEO arena.
- Malcolm is a graduate of Tufts University and Georgetown University Law Center

Legal Update Presented by Malcolm C. Slee

Today's Discussion - Issues to Consider for Getting Employees Back-to-Work

- Level Setting
- Federal and State OSHA
- Workplace Transmission and Potential Liability Considerations
- Testing Considerations
- Return-to-Work Staffing Considerations
- Hiring Considerations
- Additional Considerations

Legal Update Presented by Malcolm C. Slee

Level Setting - What do we know

- Highly transmissible novel coronavirus
- Most individuals who contract the virus appear to recover without long-term consequences
- But for many who contract the disease, may result in death or lasting negative health effects
- COVID-19 viral and antibody tests remain hard to obtain and mass testing for virus or antibodies appears weeks or months away
- Employer-sponsored plans are required to provide coverage for COVID-19 viral and antibody testing without cost-share

Legal Update Presented by Malcolm C. Slee

Level Setting - What don't we know

- Where are we on the curve
- Whether the presence of antibodies indicates immunity from the virus
- Any seasonal effects
- When and if a vaccine will be available for public use
- If and how employers could be held liable to third parties (such as employees and customers) for failing to take certain actions to maintain a safe workplace or retail establishment

Legal Update

Presented by Malcolm C. Slee

Level Setting - What we don't have

- A clear consensus about when and how businesses should be allowed to re-open
- Clear rules about what employer must or even can do when it comes to establishing a safe place for employees and customers

Legal Update

Presented by Malcolm C. Slee

Federal and State OSHA –

- Workplace Safety Standards Regarding COVID-19



Standards

This section highlights OSHA standards and directives (instructions for compliance officers) and other related information that may apply to worker exposure to the novel coronavirus, SARS-CoV-2, that causes Coronavirus Disease 2019 (COVID-19).

OSHA requirements apply to preventing occupational exposure to SARS-CoV-2. Among the most relevant are:

- OSHA's Personal Protective Equipment (PPE) standards (in general industry, 29 CFR 1910 Subpart I), which require using gloves, eye and face protection, and respiratory protection when job hazards warrant it.
 - When respirators are necessary to protect workers, employers must implement a comprehensive respiratory protection program in accordance with the Respiratory Protection standard (29 CFR 1910.134).
- The General Duty Clause, Section 5(a)(1) of the Occupational Safety and Health (OSH) Act of 1970, 29 USC 654(a)(1), which requires employers to furnish to each worker "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm."

Legal Update Presented by Malcolm C. Slee

Federal and State OSHA –

- Workplace Safety Standards Regarding COVID-19



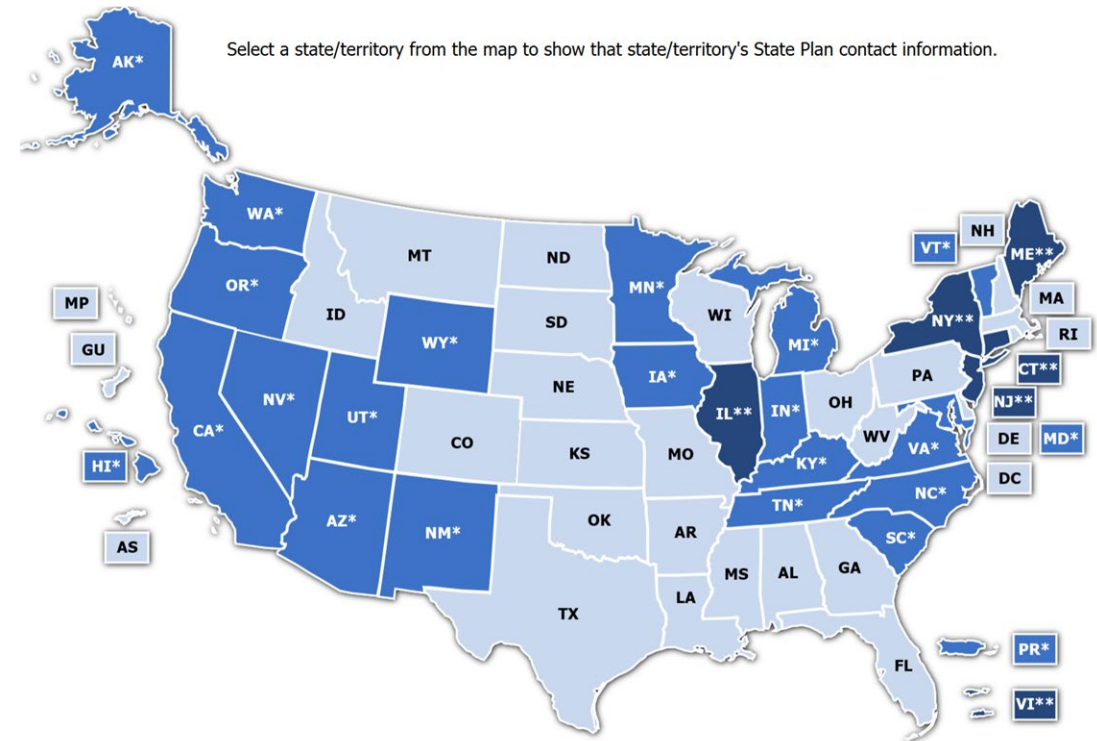
Employers must also protect their workers from exposure to hazardous chemicals used for cleaning and disinfection. Employers should be aware that common sanitizers and sterilizers could contain hazardous chemicals. Where workers are exposed to hazardous chemicals, employers must comply with OSHA's Hazard Communication standard (in general industry, 29 CFR 1910.1200), Personal Protective Equipment standards (in general industry, 29 CFR 1910 Subpart I) and other applicable OSHA chemical standards. OSHA provides information about hazardous chemicals used in hospitals in the Housekeeping section of its Hospital eTool.

Legal Update

Presented by Malcolm C. Slee

Federal and State OSHA –

- State OSHA Requirements
 - State Plans are required to have standards and enforcement programs that are at least as effective as OSHA's and may have different or more stringent requirements
 - 22 states have approved plans for public and private sectors
 - 6 states have state/local governmental plans



Select a state/territory from the map to show that state/territory's State Plan contact information.

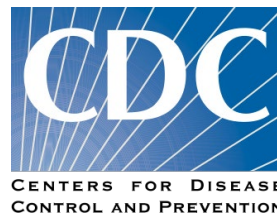
- This state's OSHA-approved State Plan covers private and state/local government workplaces.
- This state's OSHA-approved State Plan covers state/local government workers only.
- This state (with no asterisk *) is a federal OSHA state.



Legal Update Presented by Malcolm C. Slee

CDC Guidelines

- CDC has published “Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19)”
 - Industry-specific guidance for airlines, ships, and healthcare settings
- Three primary focuses of guidelines:
 - Reduce transmission among employees
 - Maintain healthy business operations
 - Maintain a healthy work environment



Legal Update Presented by Malcolm C. Slee

Testing Considerations - Don't forget about ADA & related state laws

- With limited exceptions, the ADA generally prohibits an employer from requiring employees to answer disability-related inquiries or undertake a medical exam
 - Many state laws impose similar restrictions/prohibitions
- Generally asking about symptoms or taking an employee's temperature, or requiring employees to undergo a blood draw or swab to test for a virus or antibody will constitute a medical exam

Legal Update Presented by Malcolm C. Slee

Testing Considerations - Symptom Checks

- The EEOC has made clear that employers may ask employees if they are experiencing COVID-19 symptoms, including symptoms such as fever, chills, shortness of breath
 - Notes:
 - Must maintain all information about any employee illness as a confidential medical record in compliance with the ADA
 - Don't forget about individual state law overlay

Legal Update

Presented by Malcolm C. Slee

Testing Considerations - Temperature Checks

- The EEOC has made clear that employers may engage in temperature checks of employees. However, the EEOC has also noted that individuals who have COVID-19 may be contagious but not, in fact, have a fever
 - Notes:
 - Ensure compliance with ADA confidentiality requirements
 - Don't forget about state law overlay

Legal Update

Presented by Malcolm C. Slee

Testing Considerations - Viral Testing

- The EEOC issued guidance making clear that employers may also test employees for the COVID-19 virus
 - Notes:
 - Ensure compliance with ADA confidentiality requirements
 - Don't forget about state law overlay

Legal Update

Presented by Malcolm C. Slee

Testing Considerations - Antibody testing

- The extent to which an employer can test employees for antibodies for COVID-19 is unclear
- Presumably it is okay under similar analysis used by EEOC to permit viral testing; however, it is interesting that recent guidance did not address antibody testing

Legal Update Presented by Malcolm C. Slee

Testing Related Issues - Confidentiality

- Keeping related information confidential
 - ADA requires that all medical information about a particular employee be stored *separately* from the employee's file
 - Employer should limit access to an employee's medical information
 - May disclose the name of an employee to a public health agency if the employer learns that an employee has COVID-19
 - A temporary staffing agency or contractor that places an employee in an employer's workplace may disclose the name of the employee to such employer

Legal Update Presented by Malcolm C. Slee

Testing Related Issues - Reporting & FLSA

- Reporting
 - Federal OSHA – Not required under OSHA’s 4/10 nonenforcement guidance unless (1) there is objective evidence “that a COVID-19 case may be work-related,” and (2) the evidence of (1) is reasonably available to the employer
 - State OSHA – Individual state law determinations required
 - State and federal public health agencies – Permissible under federal law; likely to be okay under state laws
- Fair Labor Standards Act (FLSA) state employment law considerations (such as whether compensable time)

Legal Update Presented by Malcolm C. Slee

ERISA/ACA Implications Regarding Testing

- Is this an ERISA-governed benefit “plan”?
- Could it be an employee assistance program (EAP) or group health plan (GHP)?

Legal Update Presented by Malcolm C. Slee

Return to Work - Staffing Considerations

Can employers tell an employee with (or suspected of having) COVID-19 to go/stay home?

- Yes. An employer may tell an employee to go/stay home if they test positive for COVID-19 or otherwise have symptoms of COVID-19

Can employers tell older workers not to come to work for their safety?

- No. An employer cannot prohibit older employees from coming to work (consider whether garden leave is permitted)

Can employers tell “higher risk” workers not to come to work for their safety?

- Only if they believe the worker’s medical condition constitutes a “direct threat” to their health

What can/may employers do if an employee is afraid to come back to work?

- It depends. The employer will need to evaluate whether employee has a legal basis for staying home. If none, it becomes an employee relations issue.

Legal Update Presented by Malcolm C. Slee

Return to Work – Hiring Considerations

May an employer screen applicants for COVID-19?

- Yes, as to symptoms or actual COVID-19 viral test; HOWEVER, EEOC guidance indicates this must be done “after making a conditional job offer” and must be done equally for all entering employees in the same type of job

May an employer withdraw a job offer if the individual has COVID-19 or symptoms?

- Yes, if immediate employment is needed. (EEOC answer suggests that you cannot withdraw the offer if immediate employment is not needed)

May an employer postpone the start date or withdraw an offer because the individual is 65 years old or pregnant?

- No. “Being at a greater risk does not justify unilaterally postponing the start date or withdrawing a job offer.” But, an employer may choose to allow telework or discuss whether the employee would like to postpone their start date

Legal Update Presented by Malcolm C. Slee

Paycheck Protection Program (PPP) Update

- More than \$500 billion in loans have been issued to small businesses through the PPP
- The big question for employers that took PPP loans is how to maximize loan forgiveness?
- Loan forgiveness largely based on using the loan proceeds on the following over the eight-week period following the date of the loan:
 - payroll costs
 - payments of interest on mortgage obligations incurred before February 15, 2020
 - rent payments on leases dated before February 15, 2020
 - utility payments under service agreements dated before February 15, 2020, over the eight-week period following the date of the loan
- However, not more than 25% of the loan forgiveness amount may be attributable to non-payroll costs.
 - Is Treasury re-evaluating this rule?

Legal Update

Presented by Malcolm C. Slee

Looking Ahead – Potential “COVID-19 4.0” Legislation

- On the Table:
 - COBRA subsidies
 - More UI
 - Hazard pay
 - Pension funding relief
 - Employer liability relief
 - Cafeteria plan relief
 - Mandated COVID-19 treatment without cost-share

SBA PPP Loan Updates

Federal Updates/Reminders

- Senate bill 3612 introduced May 5, 2020 by John Cornyn (R). Bill would overrule IRS Notice 2020-32 and clarify that ordinary expenses paid for with loan proceeds be deductible by taxpayers.
- Safe harbor provision regarding the required certification on the application form has been extended until May 14, 2020.
- SBA will review all loans greater than \$2 million, in addition to other loans as appropriate.

Prestige Loan Reports

1. FTE Calculation Report

This report is generated for the look back choice periods (2/15/19 - 06/30/2019 or 01/01/2020 - 02/29/2020) and for the loan forgiveness application after completion of the 8 weeks.

2. PPP Loan Forgiveness Report – by pay date

For clients that want to track eligible loan forgiveness expenses by pay date, contact your Payroll Specialist or HRBP to request your custom report.

Prestige Loan Reports

3. **PPP Loan Forgiveness Report** – for 8 week covered period

This report will provide a one page summary of all payroll costs paid in the 8 week covered period for the forgiveness application.

PPP Loan Questions

- How are FTE's calculated?

The FTE calculation is set by IRS in IRC Section 4980H

1. Add all hours worked for the month by PT Employees (IRS defines PT employees as those who work less than 30 hours per week)

Example: 5 PT employees worked 450 hours in Jan.

2. Take the total hours worked for the month and divide by 120

Example: $450/120 = 3.75$

3. Round number down to the nearest whole number 3.75 rounds to 3
4. Add your FT employee count to the calculated PT number to equal FTE

6 FT employees plus 3 FTE's = 9 FTE's

PPP Loan Questions

- At the end of the 8 weeks, there will be one week of wages that will not be paid – can I run another payroll?
- The first pay date after receiving the loan will have wages earned before the 8 week covered period began. Example:

Employees paid every 2 weeks on Friday for w/e previous Friday.

Loan proceeds received Wed, April 29th

Next pay date is Friday, May 1st for pay period ending April 24th

Last pay date in covered period is June 12

4 pay dates – 5/1, 5/15, 5/29, 6/12 – 8 weeks of wages

Return to Work

What Will Reopening Look Like?

- Inconsistent Re-opening's
- Shift in Workplace Priorities
 - Flexibility, Work/Life Balance, Cost Cutting
- Staggering the Workforce
 - Rotating Schedules, Splitting Teams, Staggering Employees
- Re-establishing the Workplace
 - Organize a Task Force, Create Policies and Guidelines



What Are Employers Saying?

- 88% have increased communication on health and safety tips
- 84% have provided tips on working from home
- 49% expect to continue offering flexible work arrangements
- 64% anticipate facing higher levels of stress and anxiety
- 59% expect their WFH policies to continue after the pandemic ends
- 59% have made changes to their onboarding strategy
- 63% say the changes are having a positive effect on their culture

Source: Willis Towers Watson

Return to Work Checklist

- Workplace Safety
- Employee Recall Procedures
- Internal Communication Process
- Compensation – Wage & Hour Considerations
- Policy Changes
- Employee Morale Issues
- Create a Taskforce

COVID-19: Return-to-Work Checklist

There are some key details and issues employers need to take into consideration and prepare for when returning employees to work during and after the COVID-19 pandemic. While this may be different for each employer, it is a good time to begin preparing now. Below are some best practices and items for consideration.

Workplace Safety

Establish and enforce social distancing measures

- ☐ Post signage at points of entry and common areas to remind employees of the new Requirements – [Social Distancing Guidelines Document](#)
- ☐ Stagger shifts and breaks
- ☐ Rotate weeks in the office – consider separating employees into teams to alternate their time in the office
- ☐ Reconfigure workspaces such as alternating every other desk or workstation
- ☐ Remote work - allow remote work where possible. Telecommuting has proven to work well during the pandemic for many employers and employees. Consider this as a long-term option to promote work/life balance and as a cost-saving measure.
- ☐ Create a telecommuting policy if there is no existing policy in place – [Sample Telework Policy](#)

Providing personal protective equipment (PPE)

- ☐ Review state and local requirements to determine if any PPE, such as face masks/coverings, are required to be provided by employers
- ☐ Order masks, gloves, and hand sanitizer if needed

Establish cleaning procedures and procuring supplies

- ☐ Develop protocol for routine cleaning and disinfection procedures using CDC guidelines
- ☐ Frequency of cleaning workstations, common areas, and high traffic areas
- ☐ Order wipes, gloves, sanitizer, and other cleaning products

Dealing with Visitors

- ☐ Develop a protocol for deliveries, vendors, and visitors to ensure adherence to social distancing

Policy & Communication

- Notice of Recall
 - Communication to employees explaining important details regarding their return to work
- Notice of Workplace Exposure to a Communicable Disease
 - Notifies employees of COVID exposure and measures that will be taken
- Work From Home Policy
- Social Distancing Policy
- COVID-19 Sick Leave Policy
- Request for Sick Leave Request Form

COVID-19 Communication



- Daily support from your HRBPs, Payroll, Benefits, Compliance, Workers' Comp & Retirement Specialists
- Weekly webinars and email communications
- [PrestigePEO.com/COVID-19](https://www.prestigepeo.com/COVID-19) resource center
- PrestigeGO mobile app to link directly to your dedicated support team

A man with a beard and glasses, wearing a white shirt and dark pants, is riding a black mountain bike. He has a brown messenger bag slung over his shoulder and is looking off to the side. The background is a modern building with large stone tiles and a blue-tinted overlay.

PrestigePEO

We Are Here For You