COVID-19 *Unmasked!*

Bowles Rice

- Discussion of Challenges Facing Employers in Return to Work

Presented by: Jennifer B. Hagedorn, Esq. and Lindsay Gainer, Esq. | West Virginia Association of Orthopaedic Executives

DISCLAIMER

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Anyone using information contained in this presentation should always research original sources of authority and update this information to ensure accuracy when dealing with a specific matter. No person should act or rely upon the information contained in this presentation without seeking the advice of an attorney.

And so it begins…

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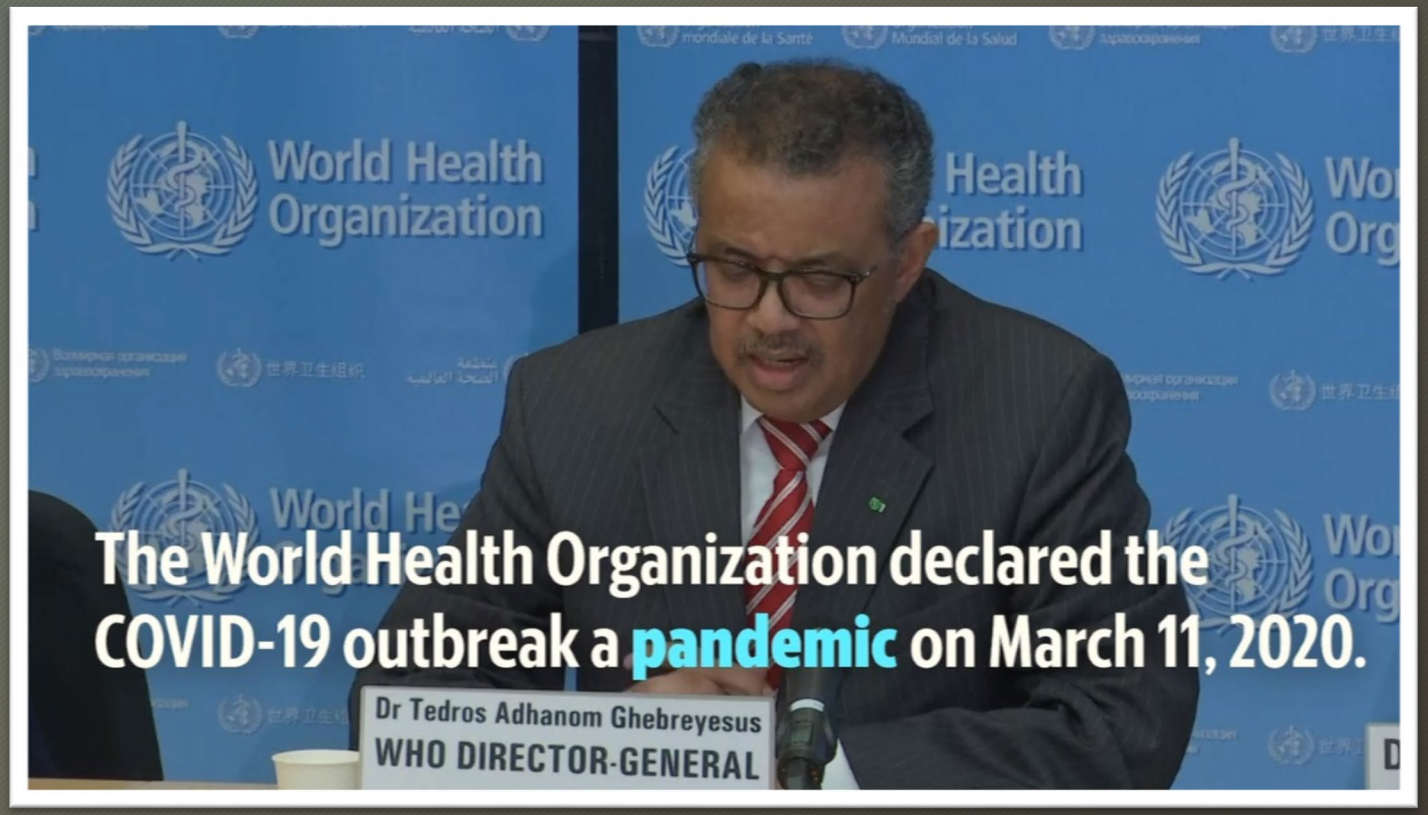


TOTO, I'VE GOT A FEELING WE'RE NOT
IN KANSAS ANYMORE

Families First Coronavirus Response Act

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The FFCRA:
A lesson in building a plane *while flying it…*

Families First Coronavirus Response Act

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- **March 18**: FFCRA Was Enacted
- **March 24**: DOL Issued 1st Set of Q&A
- **March 26**: DOL Issued 2nd Set of Q&A
- **March 28**: DOL Issued 3rd Set of Q&A
- **April 1**: FFCRA Became Effective
- **April 1**: DOL Issued Temporary Regulations
- **April 3**: DOL Issued 4th Set of Q&A

Families First Coronavirus Response Act

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Recapping the Basics

The FFCRA required certain employers to provide their employees with **paid sick leave** (EPSL) or **expanded family and medical leave** (EFMLA) for specified reasons related to COVID-19.

Generally, the Act provided that covered employers must provide to **all employees**…

Families First Coronavirus Response Act

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- *Two weeks (up to 80 hours)* of **paid sick leave** *at the employee's regular rate of pay* where the employee is unable to work or telework because the employee is:
  a. subject to a federal, state, or local **quarantine or isolation order** related to COVID-19;
  b. has been **advised by a health care provider to self-quarantine** related to COVID-19; or
  c. is **experiencing COVID-19 symptoms** and is **seeking a medical diagnosis**.

Families First Coronavirus Response Act

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- *Two weeks (up to 80 hours) of **paid sick leave** at two-thirds the employee's regular rate of pay* because the employee is unable to work because he/she is **caring for an individual** subject to quarantine or isolation (pursuant to federal, state, or local government order or advice of a health care provider), or is **caring for a child** whose school or child care provider is closed or unavailable for reasons related to COVID-19.

Families First Coronavirus Response Act

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A covered employer must provide to **employees that it has employed for at least 30 days**:

- *Up to an additional 10 weeks of* ***paid expanded family and medical leave*** *at two-thirds the employee's regular rate of pay* where an employee is unable to work due to a bona fide need for leave to **care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19**.

FFCRA: The Courts Weigh In

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- On **August 3, 2020**, a New York District Court **invalidated** parts of the DOL's implementing regulations that provided interpretative guidance of the FFCRA.

- The District Court ruled that **four parts** of the regulations were **invalid**:

1) the requirement that paid sick leave and expanded family and medical leave are available only if an employee has work from which to take leave;
2) the requirement that an employee may take FFCRA leave intermittently only with employer approval;
3) the definition of a "health care provider"; and
4) the requirement that employees who take FFCRA leave must provide their employers with certain documentation *before* taking leave.

***New York v. U.S. Dep't of Labor*, No. 20-CV-3020 (JPO), 2020 WL 4462260 (S.D.N.Y. Aug. 3, 2020).**

FFCRA: DOL Revises Regulations

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On **September 11, 2020**, the DOL issued revisions to its FFCRA regulations in response to the NY district court's ruling.

- Two of the revisions **double down** on the DOL's original interpretation—**a win for employers**.
- Two others truly **revise** the rules regarding who may take FFCRA leave and how—**a win for employees**.

The revised regulations took effect on **September 16, 2020**.

1) Reaffirmed Work-Ability Requirement

WIN FOR EMPLOYERS

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- The FFCRA states that an employer must provide an employee with FFCRA leave to the extent that the employee is **unable to work** because of a need for leave "because of" or "due to" a qualifying reason.
- DOL's original rule interpreted "because of" or "due to" a qualifying reason to mean that **FFCRA leave is available *only* if an employee has work from which to take leave. (**Meaning, employees who have been **laid off** or **furloughed** are **ineligible** for FFCRA leave.)
- The NY district court criticized the DOL's interpretation as a "**bare bones explanation**," and required the DOL to provide a more detailed interpretation supported by legal authority.
- In the revised rule, the DOL explained: "***leave is most simply and clearly understood as an authorized absence from work; if an employee is not expected or required to work, he or she is not taking leave***." Therefore, EPSL and EFMLA leave may be taken only if the employer has work available for the employee from which he/she can take leave.
- The central purpose of the FFCRA was to **discourage employees who might have COVID-19 from spreading the virus at work**, and, therefore, **work must be available for that purpose to be effectuated**.

2) Reaffirmed Requirement for Intermittent Leave

WIN FOR EMPLOYERS

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- The DOL also addressed similar concerns from the district court that the original rule failed to explain why **employer consent** is required for **intermittent** leave.
- The DOL **reaffirms** in the new rule that **employer approval** is needed to take FFCRA leave **intermittently** in all situations in which intermittent FFCRA leave is permitted.
- ***However***, a **loophole** exists for employees who take FFCRA leave in **full-day increments to care for children whose schools are operating on an alternate day (or other hybrid-attendance) basis**.
- In these instances, FFCRA leave does **not** require employer consent because the **leave is not technically intermittent**. The school literally closes and opens repeatedly, and **each day of closure** is a **separate reason** for leave.
  - According to the DOL, an "employee might be required to take FFCRA leave on Monday, Wednesday, and Friday of one week and Tuesday and Thursday of the next, provided that leave is needed to actually care for the child during that time and no other suitable person is available to do so."
  - In that scenario, "**each day of school closure constitutes a separate reason for FFCRA leave that ends when the school opens the next day**."

3) Revised Notice & Documentation Requirements

WIN FOR EMPLOYEES

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- The district court also found the original rules' requirement that an employee provide documentation **prior to** taking FFCRA leave inconsistent with the Act's requirement that notice is only required if the need for FFCRA leave was **foreseeable**.
- In response, the DOL **amended** the rule to clarify that **documentation** need not be given **prior to** taking FFCRA leave, but rather, may be given **as soon as practicable**.
- However, **if the need for leave is foreseeable**, that generally means that the employee needs to provide notice **before** taking leave.

4) Revised Definition – Health Care Provider

WIN FOR EMPLOYEES

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- In the original rule, the DOL interpreted the exclusion of "**health care providers**" from some or all forms of FFCRA leave **very broadly**.
- "Health care provider" included virtually ***any*** employee **working at a health care facility**, from food service workers to janitors, as potentially excluded from FFCRA benefits.
- The district court found this definition to be **too broad**.
- In the **new rule**, the DOL defines a "**health care provider**" to include employees who:
  1) are defined as a health care provider under the FMLA (*i.e.*, M.D./D.O., R.N., N.P., P.A., etc.); or
  2) are "employed to provide diagnostic services, preventative services, treatment services or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care."
- The new rule also specifically **excludes** information technology (IT) professionals, building maintenance staff, HR personnel, cooks, food service workers, records managers, consultants, and billers.

FFCRA: Expired on December 31, 2020

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https://www.dol.gov/agencies/whd/pandemic/ffcra-questions

FFCRA Litigation

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- Dusenberry v. Liberty Risk Consulting, LLC
- Jones v. Eastern Airlines
- Constance v. Hollybrook Golf and Tennis Club
- Donohew v. America's Insurance Associates, Inc., et al.
- Milman v. Fieger and Fieger
- Saunders v. Gala North America, Inc.
- Pacitti v. Ricciardi Brothers Old City, Inc.
- McIntyre v. Midwest Geriatrics, Inc.

Medical Inquiries & Examinations

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Body Temperature Checks

- Permissible medical examination
- CDC: 100.4° F (38° C) or greater
- Use a touchless thermometer
- Note: some people with COVID-19 do not have a fever

https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

Medical Inquiries & Examinations

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Health Screenings

- Permissible medical inquiry.
- May ask questions or require self-reporting.
- May ask all employees who will be physically entering the workplace.
  - If they have been diagnosed with COVID-19;
  - If they have been tested for COVID-19;
  - If they have symptoms associated with COVID-19;
  - If they have had contact with anyone who they know has been diagnosed with COVID-19, IS UNDERGOING TESTING, or is exhibiting symptoms of the virus.

https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

Medical Inquiries & Examinations

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COVID-19 Testing

- "[A]n employer may choose **to administer COVID-19 testing** to employees before they enter the workplace to determine if they have the virus." (4/23/2020)
  - Accurate and reliable
  - Review guidance from the FDA about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities, and check for updates. Consider the incidence of false-positives or false-negatives associated with a particular test.
  - Accurate testing only reveals if the virus is currently present; a negative test does not mean the employee will not acquire the virus later.
  - Viral Testing is permitted; Antibody testing is not.

https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

Medical Inquiries & Examinations

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- The EEOC's declaration of direct threat status is based upon the most recent guidance by CDC and state & local public health authorities regarding the spread and severity of COVID-19.
- Direct threat determination is **subject to change** as health authorities revise their assessment of the virus.

https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

The New Normal

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The New Normal

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Telework: The New Normal?

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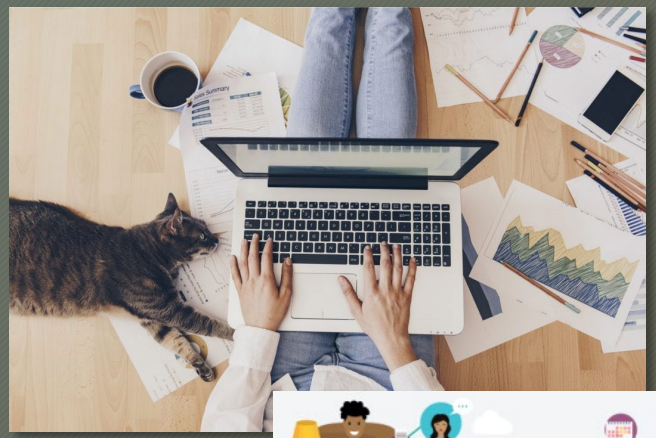

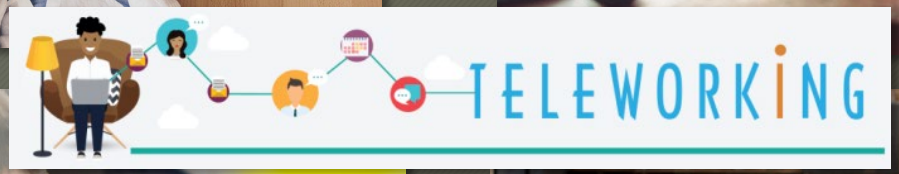

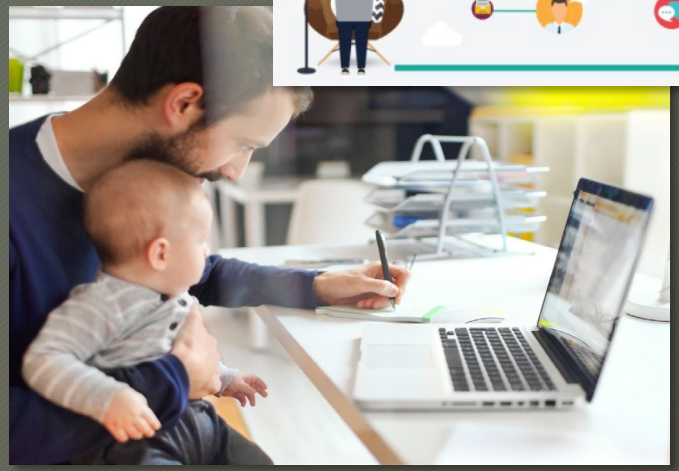

Status of Telework

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"While some companies continue to thumb their noses at The Great Resignation and insist that employees come back into the office, data scientists at Ladders insist that the writing is on the wall. Remote work is here to stay. According to their projections, 25% of all professional jobs in North America will be remote by the end of 2022, and remote opportunities will continue to increase through 2023."

https://www.forbes.com/sites/bryanrobinson/2022/02/01/remote-work-is-here-to-stay-and-will-increase-into-2023-experts-say

The New Normal: Telework

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Telework: Maybe not the New Normal

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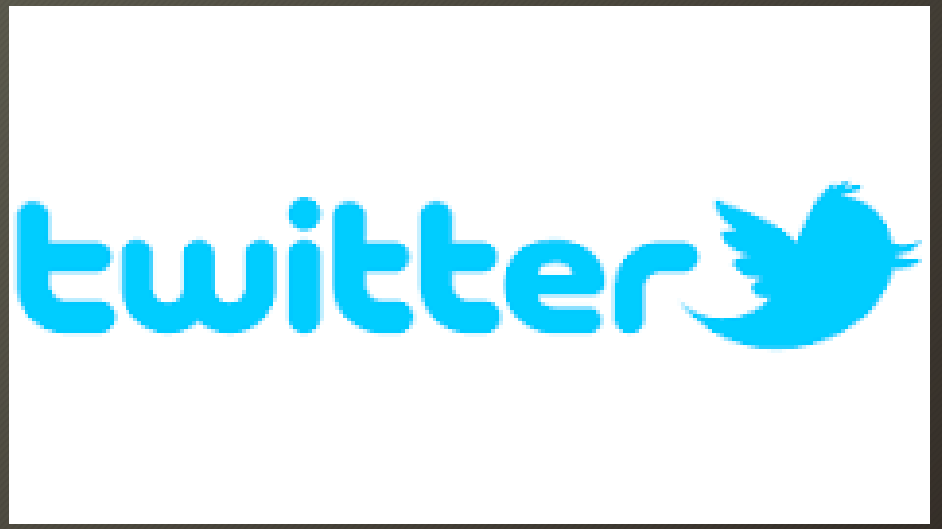

The New Normal: Telework

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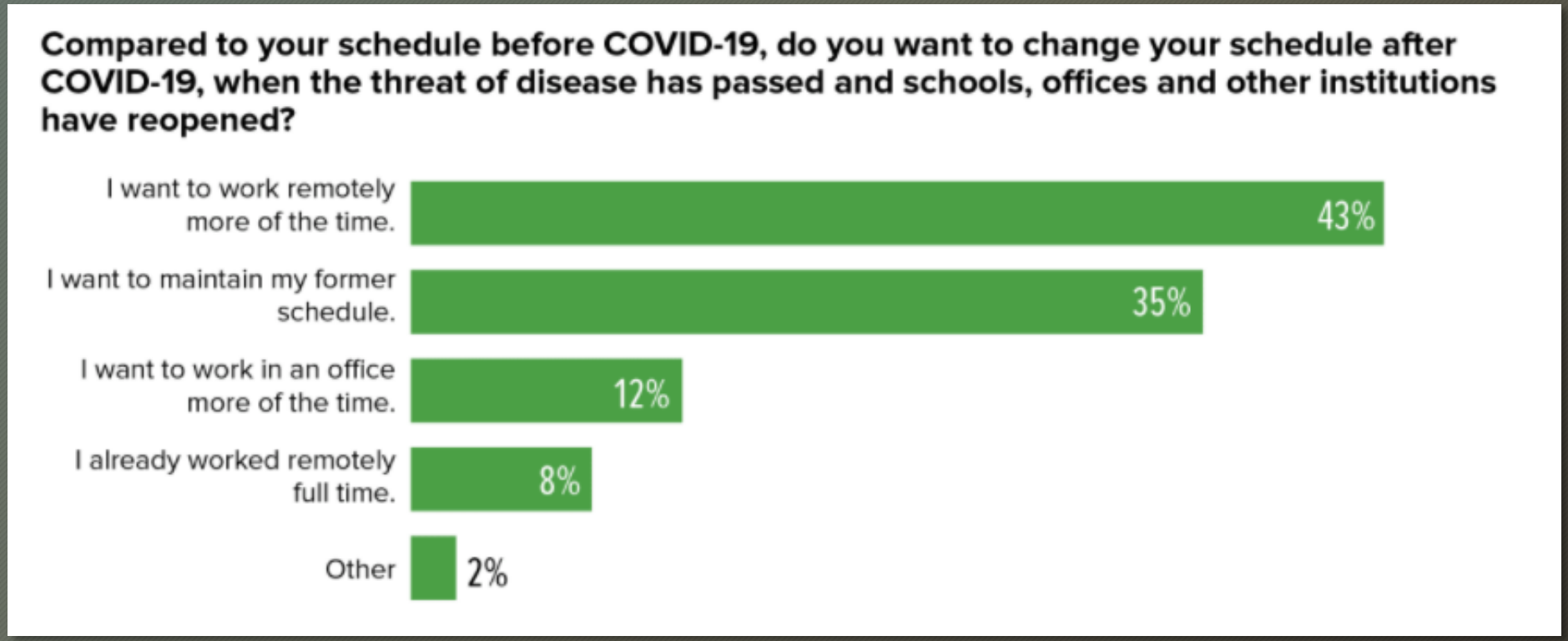

https://www.shrm.org/hr-today/news/hr-news/pages/covid19-is-creating-telework-converts.aspx

The New Normal: Telework

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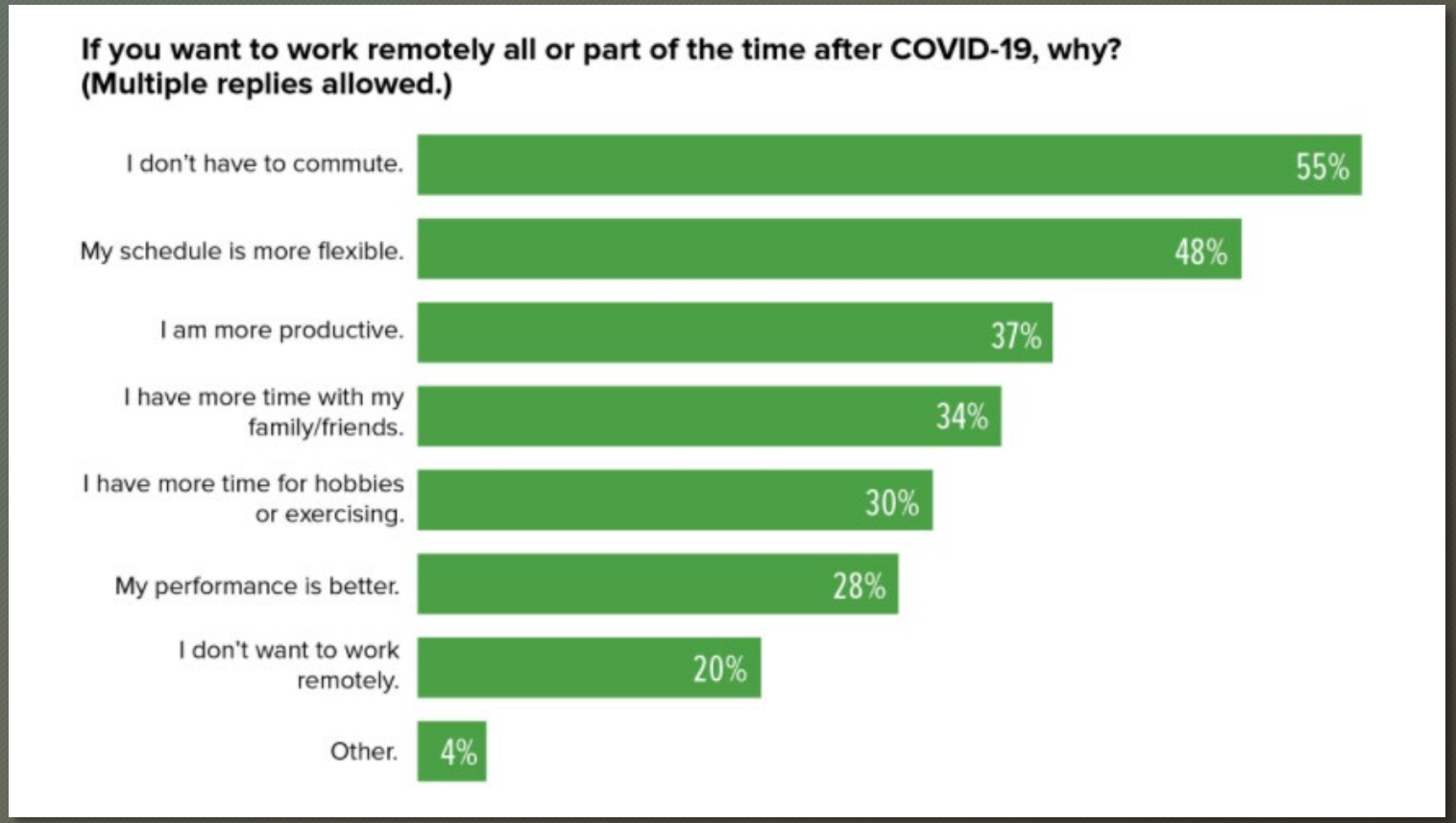

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The New Normal: Telework / Wage & Hour

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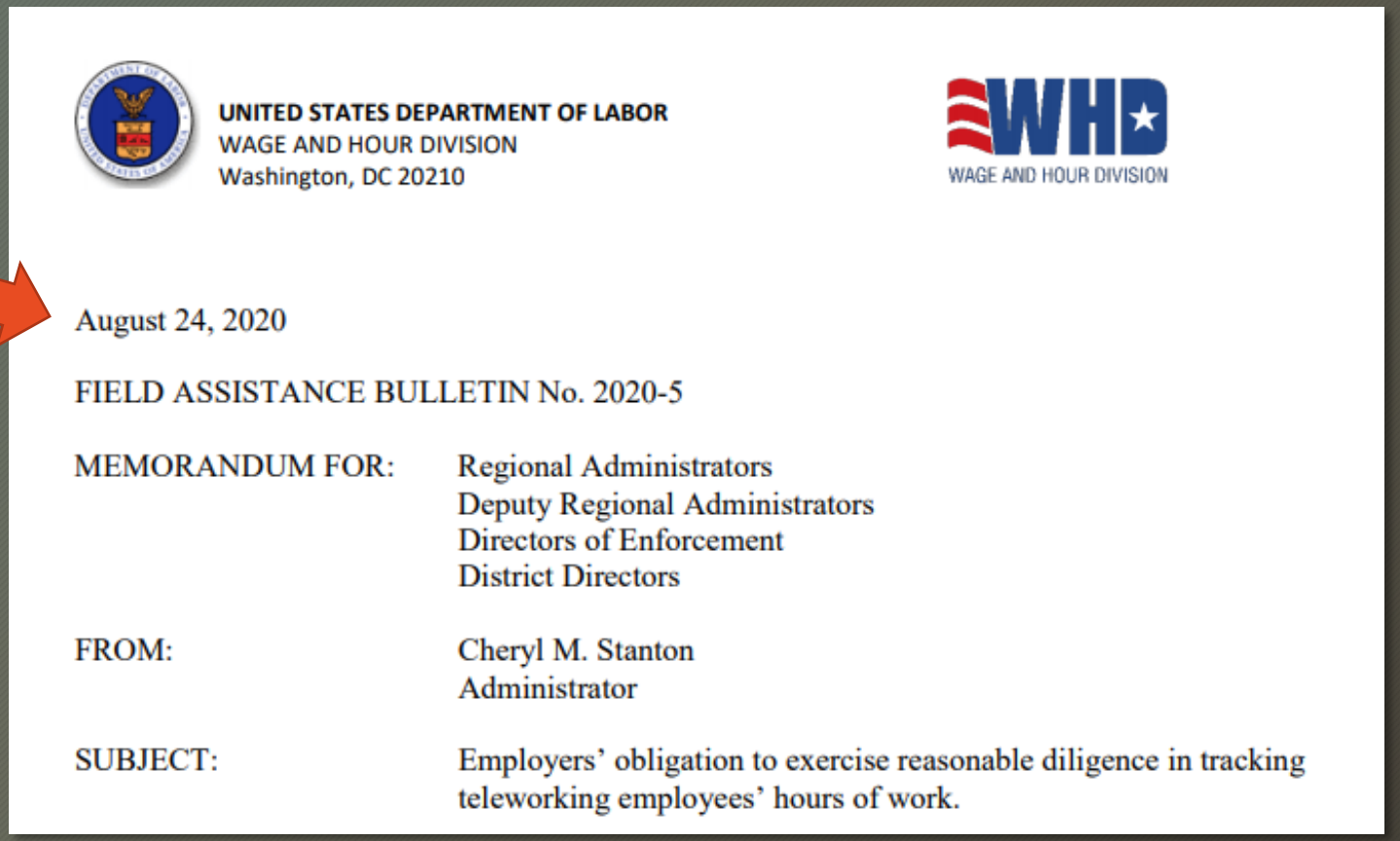

UNITED STATES DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
Washington, DC 20210

WHD
WAGE AND HOUR DIVISION

August 24, 2020

FIELD ASSISTANCE BULLETIN No. 2020-5

MEMORANDUM FOR: Regional Administrators
Deputy Regional Administrators
Directors of Enforcement
District Directors

FROM: Cheryl M. Stanton
Administrator

SUBJECT: Employers' obligation to exercise reasonable diligence in tracking teleworking employees' hours of work.

https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2020_5.pdf

The New Normal: Telework / Wage & Hour

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- An employer is required to pay its employees for **all hours worked**, **including work not requested but suffered or permitted**, including **work performed at home**.
- The FLSA requires an employer to "**exercise its control** and see that the work is not performed if it does not want it to be performed."
- The employer bears the burden of preventing work when it is not desired. "**The mere promulgation of a rule against such work is not enough**. Management has the power to **enforce** the rule and **must make every effort to do so**."
- "Employers must **pay for all work they know about**, *even if they did not ask for the work, even if they did not want the work done, and even if they had a rule against doing the work.*"

https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2020_5.pdf

The New Normal: Telework / Wage & Hour

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- However, the FLSA **stops short** of requiring the employer to pay for work **it did not know about, *and* had no reason to know about**."
- Thus, the employer's obligation to "make every effort" to prevent unwanted work being performed away from the employer's worksite or premises **is not boundless**. This is because an employer cannot make any effort—let alone *every* effort—to prevent unwanted work unless "**the employer knows or has reason to believe the work is being performed**."
- An employer may have **actual** or **constructive knowledge** of additional unscheduled hours worked by their employees.
- Courts consider whether the employer ***should have*** **acquired knowledge** of such hours worked through "**reasonable diligence**."

https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2020_5.pdf

The New Normal: Telework / Wage & Hour

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- One way an employer generally may satisfy its obligation to **exercise** "**reasonable diligence"** to acquire knowledge regarding employees' unscheduled hours of work is by **establishing a reasonable process for an employee to report such work time** and then **compensating employees for all reported hours** of work, even hours not requested by the employer.
- An employer's time reporting process will **not** constitute reasonable diligence where the employer implicitly or overtly **prevents, impedes,** or **discourages** an employee from accurately reporting the time he or she has worked.
- Additionally, if an employer is **otherwise notified** of work performed **through a reasonable method**, or if **employees are not properly instructed on using a reporting system**, then an employer may be liable for those hours worked.

https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2020_5.pdf

The New Normal: Telework / Wage & Hour

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- If an employee **fails to report** unscheduled hours worked through such a procedure, the employer is **not** required to undergo "**impractical efforts" to investigate further** to uncover unreported hours of work and provide compensation for those hours.
- Though an employer may have access to **non-payroll records** of employees' activities, such as **records showing employees accessing their work-issued electronic devices outside of reported hours**, reasonable diligence **generally does not require** the employer to undertake impractical efforts such as sorting through this information to determine whether its employees worked hours beyond what they reported.

https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2020_5.pdf

The New Normal: Telework / Wage & Hour

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- ***HOWEVER…*** this is not to say that consultation of records outside of the employer's timekeeping procedure **may never be relevant**. **Depending on the circumstances it could be practical** for the employer to consult such records. If so, those records would form the basis of **constructive knowledge** of hours worked.

The New Normal: Telework / Wage & Hour

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- ✓ **Use software that can accurately record and submit hours remotely.** Direct teleworkers to use software that allows them to accurately record and submit their hours remotely.
- ✓ **Create a written policy.** Adopt a written policy requiring workers, including teleworkers, to record all hours worked contemporaneously.
- ✓ **Adopt a written policy prohibiting unauthorized overtime.** Adopt a written policy prohibiting unauthorized overtime, strictly monitor for compliance with that policy, and impose discipline for any violations.
- ✓ **Provide training.** Train both employees and supervisors on timekeeping requirements.

Occupational Safety and Health Administration

- COVID-19 Healthcare Emergency Temporary Standard
  - Adopted June 21, 2021
  - Effective until superseded by permanent standard
  - December 27, 2021-OSHA announced intent to issue final standard

Vaccines

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Vaccines

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- Vaccine mandate – Centers for Medicare & Medicaid Services
  - Published November 5, 2021
  - Allowed by decision of the U.S. Supreme Court on January 13, 2022

Vaccines: ADA Considerations

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- Courts have treated a **vaccination** as a "**medical examination**" under the ADA.
- "**Medical examinations**" are permitted for applicants and employees as follows:

    1) the ADA permits "medical examinations" (*e.g.*, vaccinations) **after a conditional offer** if all entering employees in the same job category are subject to the same examinations; and
    2) the ADA prohibits medical examinations during employment "unless they are **job related and consistent with business necessity**.

- Based on the **continued risks posed by COVID-19**, an employer most likely would be able to demonstrate the legal justification for required vaccinations based on the "**direct threat**" standard and the health risks posed by COVID-19.

Vaccines: Disability Accommodation

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- Under the ADA, employees with an **ADA-covered disability** may be entitled to an exemption from a mandatory vaccination requirement if their **disability prevents them from safely taking the vaccine**.
- The issue of reasonable accommodation under the ADA clearly would come into play with regard to a mandatory vaccination policy when an individual thereafter **requested to be excused from a mandatory vaccine** required by their employer, citing their disability as the basis for such request.
- Employer-Mandated Vaccination. The EEOC has clarified that employers generally may require all employees physically entering the workplace to be vaccinated except where an employer must provide a "reasonable accommodation" under Title VII or the ADA.

Vaccines: Religious Accommodation

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- With respect to religion, employers **must reasonably accommodate** an employee's "sincerely held religious beliefs, observances, and practices when requested, unless accommodation would impose an undue hardship on business operations."
- **Undue hardship** under Title VII is a "**more than de minimis cost**" to the employer, which is much a lower burden for the employer to meet than the undue hardship standard under the ADA ("significant difficulty or expense").
- An employee may claim that they cannot comply with an employer-mandated vaccination requirement because **taking a vaccine conflicts with their religious or other personal beliefs**.

Vaccines: Religious Accommodation

Bowles Rice

- When faced with an employee request for an exemption from a mandatory vaccination requirement on the basis of religion or personal belief, employers must assess three questions:

  1) is the belief ***religious***?
  2) is the belief ***sincerely held***? and
  3) would providing a ***reasonable accommodation*** impose an ***undue hardship*** on the employer?

West Virginia Exemption Mandate

- Medical Exemption
  - a notarized certification executed by a licensed physician or advanced practice registered nurse stating that a medical exemption is required due to the individual's **physical condition** or a specific precaution or because the individual has **COVID-19 antibodies** from a previous infection or has recovered from COVID-19
- Religious Exemption
  - a notarized certification executed by the individual stating that he or she holds **religious beliefs** that prevent him or her from taking the COVID-19 vaccination.

Coming Soon to a Courtroom Near You…

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COVID-19 Employment Litigation

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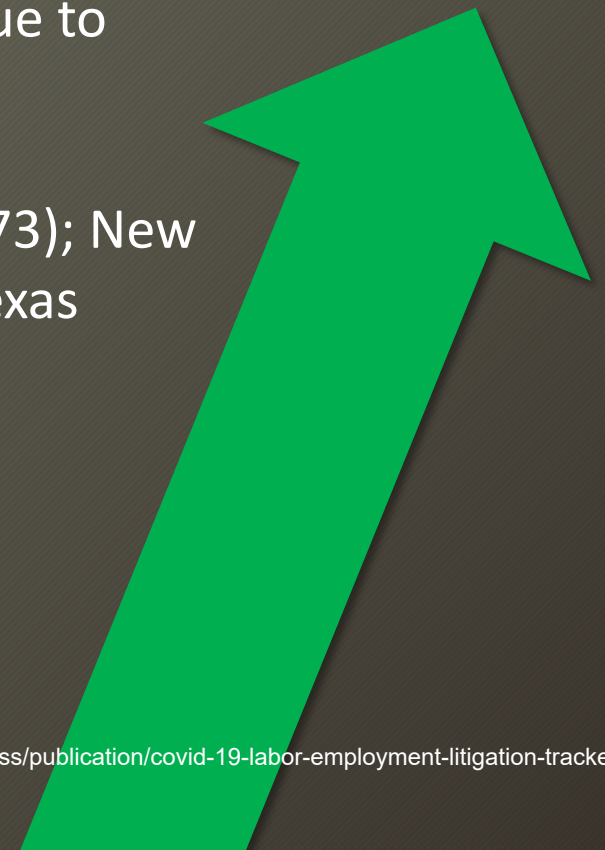
- From March 12, 2020 through March 31, 2022, there have been 5,659 lawsuits (including 646 class actions) filed against employers due to alleged labor and employment violations related to COVID-19.
- States with the most filings -- California (1,791); New Jersey (473); New York (409); Florida (386); Ohio (281); Pennsylvania (257) and Texas (228).
- West Virginia – 5 federal and 4 state cases



https://www.littler.com/publication-press/publication/covid-19-labor-employment-litigation-tracker

COVID-19 Employment Litigation

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- The most common complaints have focused on **retaliation** (556), **leaves of absence** (261), and **discrimination** (231).

- The **healthcare industry** has been hardest hit by COVID-19 related employment litigation with 153 federal cases and 252 state cases against healthcare service providers, 123 federal cases and 177 state case against hospitals, and 111 federal cases and 196 state cases against nursing homes and long-term care facilities.
- The **manufacturing**, **hospitality**, and **retail** industries have also seen their share of complaints.

https://www.littler.com/publication-press/publication/covid-19-labor-employment-litigation-tracker

Thank You!

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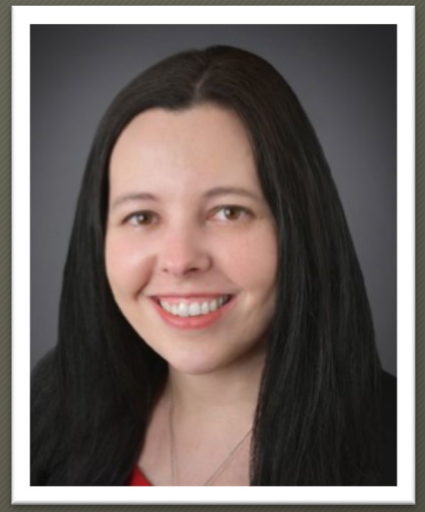

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