

3rd Quarter Compliance Webinar: Leaves Due to, and in Spite of, COVID-19

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Our Speakers



James Venable, JD, SPHR

Vice President,
Absence and Accommodation Compliance

720.440.6984

james.venable@reedgroup.com



Sue Woods, JD

Senior Compliance Counsel,
Absence and Accommodation Compliance

303.464.2445

susan.woods@reedgroup.com

Legal Disclaimer

Not Legal Advice

This presentation is designed to provide accurate information in regard to the subject matter covered. It is provided with the understanding that ReedGroup is not engaged in rendering legal or other professional services. If legal advice or other expert assistance is required, the services of a competent attorney or other professional person should be sought. Due to the numerous factual issues which arise in any human resource, leave of absence, or employment question, each specific matter should be discussed with your attorney.

AGENDA

COVID-19 Developments and Practical
Guidance for Tricky Questions

FFCRA Lawsuits

COVID-19 Updates: New Guidance on Federal Laws and Rules

ADA: Inquiries and Testing

New EEOC Guidance

Allowed

- Ask if diagnosed, tested or have symptoms
- Screening/testing for COVID-19
- Contact tracing without revealing employee identity
- Ask about travel

Not Allowed

- Ask if family member has COVID-19 or symptoms
- Single out an employee for testing, absent objective evidence
- Reveal or confirm employee identity for positive tests or symptoms



ADA: Reasonable Accommodations

New EEOC Guidance: Teleworking

Setting a precedent for teleworking: When an employer reopens the workplace for in-person work, previously allowing workers to work-from-home need not continue.

- If employee has no disability, no accommodation needed
- If employee has a disability, engage in interactive process to determine reasonable accommodations

Temporarily excusing performance of one or more essential job functions when an employer closed its workplace or instituted remote work does not mean the employer has made permanent changes to the job



ADA: Reasonable Accommodations

New EEOC Guidance: Protective Equipment, Fear of Contracting COVID

Protective gear and masks: If an employee with a disability requests not to wear required protective gear, such as masks or gloves, engage in the interactive process to determine if any modifications or alternatives are available, absent undue hardship.

Fear of contracting COVID: If employee is disabled with a condition that might place him/her at higher risk of severe illness due to COVID-19, employee may request a reasonable accommodation; engage in interactive process. Note: fear of exposing a family member who may be at higher risk due to COVID-19 does NOT trigger ADA reasonable accommodation process as the employee is not disabled.

Family and Medical Leave Act (FMLA)

Temporary change regarding in-person medical visits: DOL Guidance

A telemedicine visit should be considered an in-person treatment visit for purposes of determining whether an employee has a serious health condition under the FMLA, provided the telemedicine visit:

- includes an examination, evaluation, or treatment by a health care provider;
- is performed by video conference; and
- is permitted and accepted by state licensing authorities.

New DOL guidance: during the same timeframe, electronic signatures are acceptable on documentation used to establish a serious health condition.

Change effective until December 31, 2020 (unless extended).



Polling Question

FMLA and Furloughs

A group of your production workers were furloughed for approximately twelve weeks due to COVID-19. As you recall them to work in small numbers, one of the recalled workers, Kate, requests to use FMLA leave to care for her parent who has been diagnosed with cancer. Kate is a long-time employee, but she has worked only 1,180 hours in the last 12 months due to the furlough. What should you do?

- A. Deny her FMLA leave – she does not meet the 1,250-hour requirement
- B. Approve her FMLA leave if she would have met the 1,250-hour requirement prior to the furlough

FMLA and Furloughs

DOL Guidance

Time on furlough does NOT count as FMLA (or FFCRA) leave

Employer may not extend furlough because employee may need leave

Employees do not accrue time towards 1,250 hours-worked requirement while on furlough

FFCRA - Overview

Effective April 1, 2020 through December 31, 2020
Private employers with 499 or fewer employees and public employers

	FFCRA (EPSLA) SICK LEAVE	FFCRA (EFMLA) EXPANDED PAID FAMILY LEAVE
Eligible employees	<ul style="list-style-type: none"> FT & PT employees, no minimum hours 	<ul style="list-style-type: none"> FT & PT employees, 30 calendar days
Total leave available	<ul style="list-style-type: none"> Full Time: 80 hours Part Time: # of hours employee works avg over 2-week period 	<ul style="list-style-type: none"> First two weeks: unpaid Weeks 3-12: paid
Benefit amount	<ul style="list-style-type: none"> \$511 cap per day/\$5,110 aggregate \$200 per day/\$2,000 aggregate depending on leave reason 	<ul style="list-style-type: none"> 2/3 of employee's regular rate of pay capped at \$200 per day and \$10,000 in aggregate


Quick BENEFITS TIPS FROM DOL

How much paid leave can employees take?

In general, applies to you if you are an employee of either a private employer with fewer than 500 employees or a covered public sector employer





You are following a federal, state, or local quarantine or stay-at-home order or are quarantined by a health care provider

OR

You have COVID-19 symptoms and are seeking a diagnosis

TIME OFF
Up to two weeks or 80 hours of paid sick leave at higher of regular rate or minimum wage*



You must care for someone under a federal, state, or local quarantine or stay-at-home order or are quarantined by a health care provider

OR

You must care for your child whose school, child care provider, or place of care is unavailable due to COVID-19

TIME OFF
Up to two weeks or 80 hours of paid sick leave at higher of 2/3 regular rate or minimum wage*



You must care for your child whose school, child care provider, or place of care is unavailable due to COVID-19

AND

You've been employed at least 30 calendar days

TIME OFF
Up to 10 additional weeks of family leave paid at 2/3 regular rate*

*Paid leave is capped at specific maximum amounts per worker

Learn more at dol.gov/FFCRA



FFCRA – Rule Update

August 3, 2020: S.D.N.Y. ruling invalidated portions of the DOL's FFCRA rules

DOL Revised Its Rule - Effective September 16, 2020

Reaffirmed that employees may take FFCRA leave only if work would otherwise be available to them

Reaffirm and clarify requirement that an employee have employer approval for intermittent FFCRA leave

Revise and narrow definition of "healthcare provider" who may be exempt from the FFCRA leave

Clarify that employees must provide required documentation as soon as practicable

Correct an inconsistency regarding employee notice of need to take EFMLA

FFCRA School Closure Leaves

New DOL Guidance

Key questions: Is the child permitted to attend school in person?

- If school is closed and all learning is remote (i.e., from home), FFCRA applies
- Hybrid school schedules –only eligible for FFCRA on the days the child is not permitted to attend school in person
- If school is open but parent chooses not to send child to school, FFCRA does not apply

Reminders:

- If a co-parent or someone else is available to provide care when a child's school is closed, the FFCRA does not apply
- This leave reason is available only to care for the employee's own son or daughter, not extended family members

COVID-19 Updates: New State Laws, Rules, and Developments

California Supplemental Paid Sick Leave

Effective September 19, 2020 (within 10 days of enactment)

- Effective through December 31, 2020 or until the expiration of the FFCRA's emergency paid sick leave, whichever is later
- Fills the gap left by FFCRA – applies to employers with 500 or more employees nationwide and covers healthcare providers and emergency responders exempt from the FFCRA
- Mandates up to 80 hours of supplemental paid sick leave (full-time employees) or pro-rated for part-time employees
- Leave reasons:
 1. Employee is subject to quarantine or isolation order related to COVID-19
 2. Healthcare provider advised employee to self-quarantine due to COVID-19 concerns
 3. Employer prohibits the employee from working because of health concerns related to COVID-19's potential transmission

Note: This law does NOT provide leave to care for children whose school is closed due to COVID-19

- No collective bargaining exemption
- Special provisions for food sector workers
- Notice requirement – one for non-food sector and one for food sector

Colorado Healthy Families and Workplaces Act (CO HFWA)

Two provisions – COVID and non-COVID

COVID-19-related Paid Sick Leave:

- Between July 15 and December 31, 2020, all CO employers must provide up to 80 hours of paid sick leave for COVID-19-related reasons
 - Having COVID-19 symptoms and seeking a diagnosis
 - Being subject to a quarantine or isolation order
 - Caring for someone subject to a quarantine or isolation order
 - Caring for a child during a COVID-19-related school closure

Non-COVID-19 Paid Sick Leave:

- Beginning January 1, 2021 , CO employers with 16 or more employees must provide accrued paid sick leave
- Beginning January 1, 2022, paid sick leave must be provided by ALL employers, regardless of size

Oregon Family Leave Act (OFLA) School/Place of Care Closure Leave

Effective September 14, 2020

- Oregon BOLI adopted permanent rule making available the OFLA sick child leave to care for a child during a public health emergency-related closure of a child's school or place of care
- Defines childcare providers to include unpaid caregivers, such as family members and neighbors
- Specifies the documentation that may be required to support this type of leave



Puerto Rico – Paid Leave for COVID-19 Illness or Exposure

Effective April 9, 2020

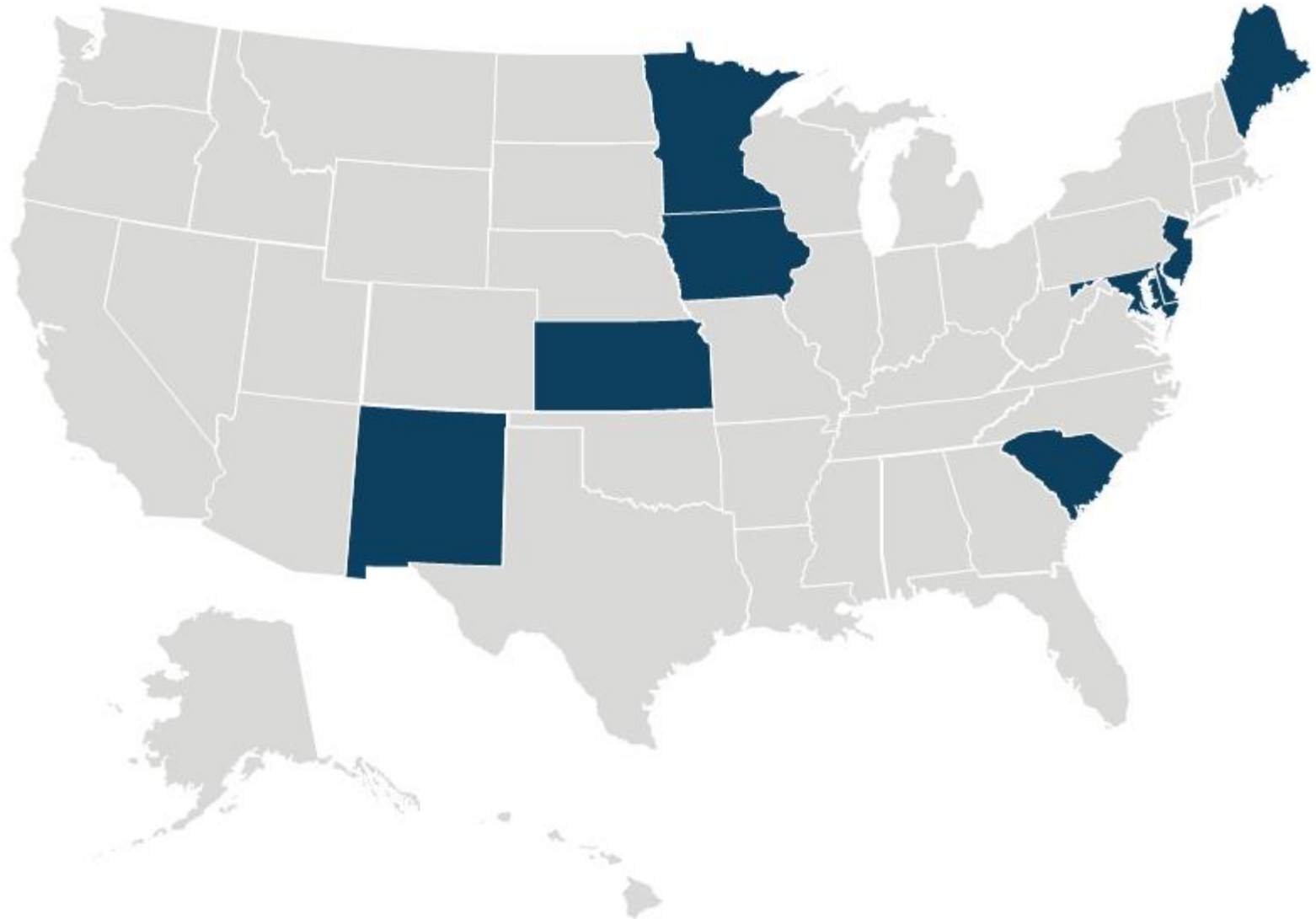
- Mandates up to five (5) working days of paid leave if employee becomes infected or is suspected of being infected with COVID-19
- Applies to non-exempt employees only
- Eligible employees must exhaust all available accrued leaves first (e.g., sick leave, vacation leave, etc.)



State Laws Protecting Absences Related to Public Health Emergency

Job Protection – May not terminate employees because quarantined or under isolation order

- Delaware
- Iowa
- Kansas
- Maine
- Maryland
- Minnesota
- New Jersey
- New Mexico
- South Carolina





States Requiring Accommodations for Vulnerable Persons

Executive Orders, etc.

- **Idaho:** Employees in a vulnerable population must be permitted to remain quarantined and must be provided special accommodations in the workplace if they cannot work from home
- **Kentucky:** employers must, to the greatest extent practicable, make special accommodations for employees and customers at higher risk for severe illness
- **Minnesota:** Disabled employees at higher risk of severe illness due to COVID-19 have the right to request a reasonable accommodation from their employers
- **Montana:** Special accommodations should be made for members of a vulnerable population or those with vulnerable household members
- **Washington state:** Employers must provide accommodation to high-risk workers, as defined by the CDC

Numerous other states strongly advise or encourage employers to provide accommodations to vulnerable populations.

FFCRA Litigation Update

Polling Question

Leave Administration

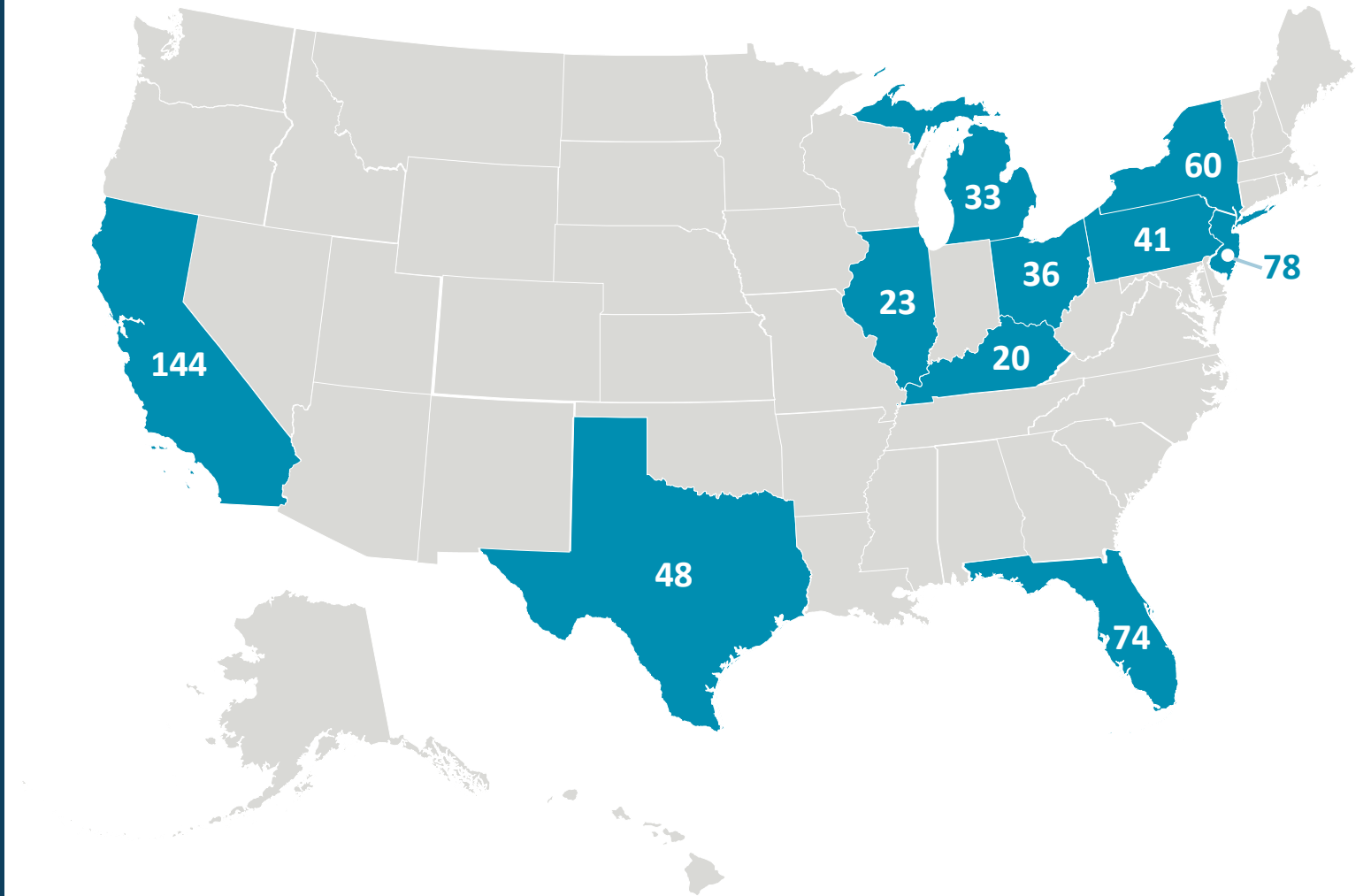
Which leave reason are you having the most difficulty administering?

- A. Quarantine without diagnosis
- B. Caring for someone else who is quarantined
- C. Caring for a child because of school or daycare closing due to public health
- D. Sheltering in place orders

COVID-19 Litigation Tracker

By Top 10 States

California – 144
New Jersey – 78
Florida – 74
New York – 60
Texas – 48
Pennsylvania – 41
Ohio – 36
Michigan – 33
Illinois – 23
Kentucky - 20



The data reported here is collected, reviewed, and categorized from state and federal litigation filings generally.

Donohew v. America's Insurance Associates Inc,

US District Court (Middle District of Florida)



School closure-plaintiff alleges FFCRA violation after denial of leave request.

Ingster v. NYC Health and Hospitals

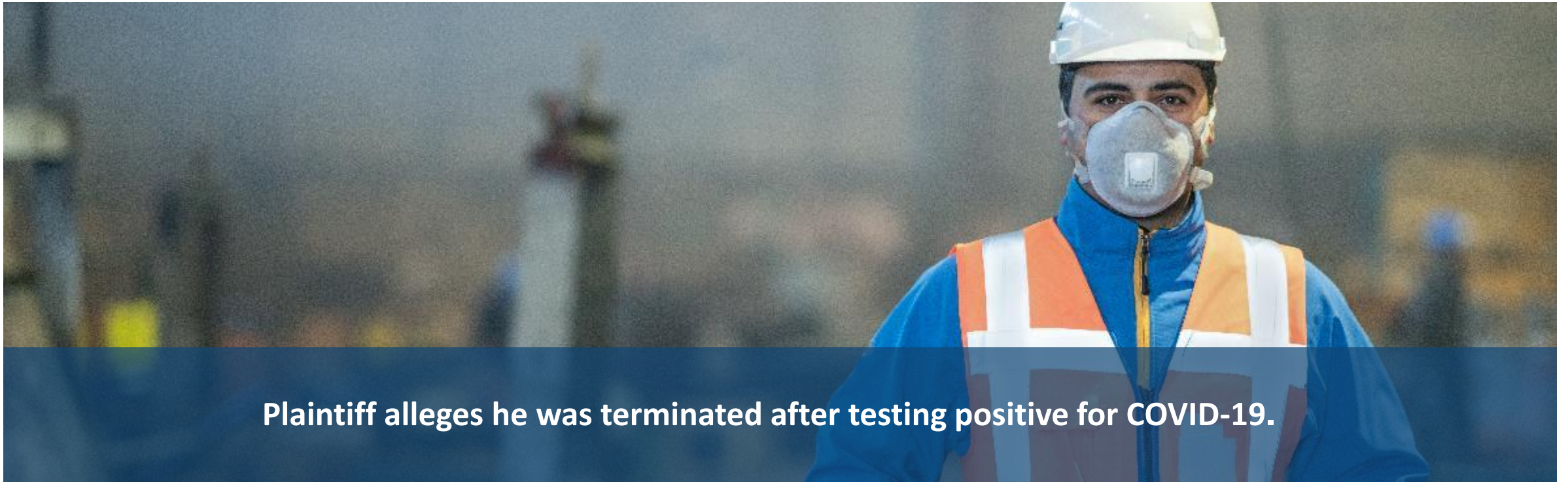
New York County, New York



Plaintiff with pre-existing condition alleges disability discrimination and retaliation.

Pacheco v. Yorkshire Building Services

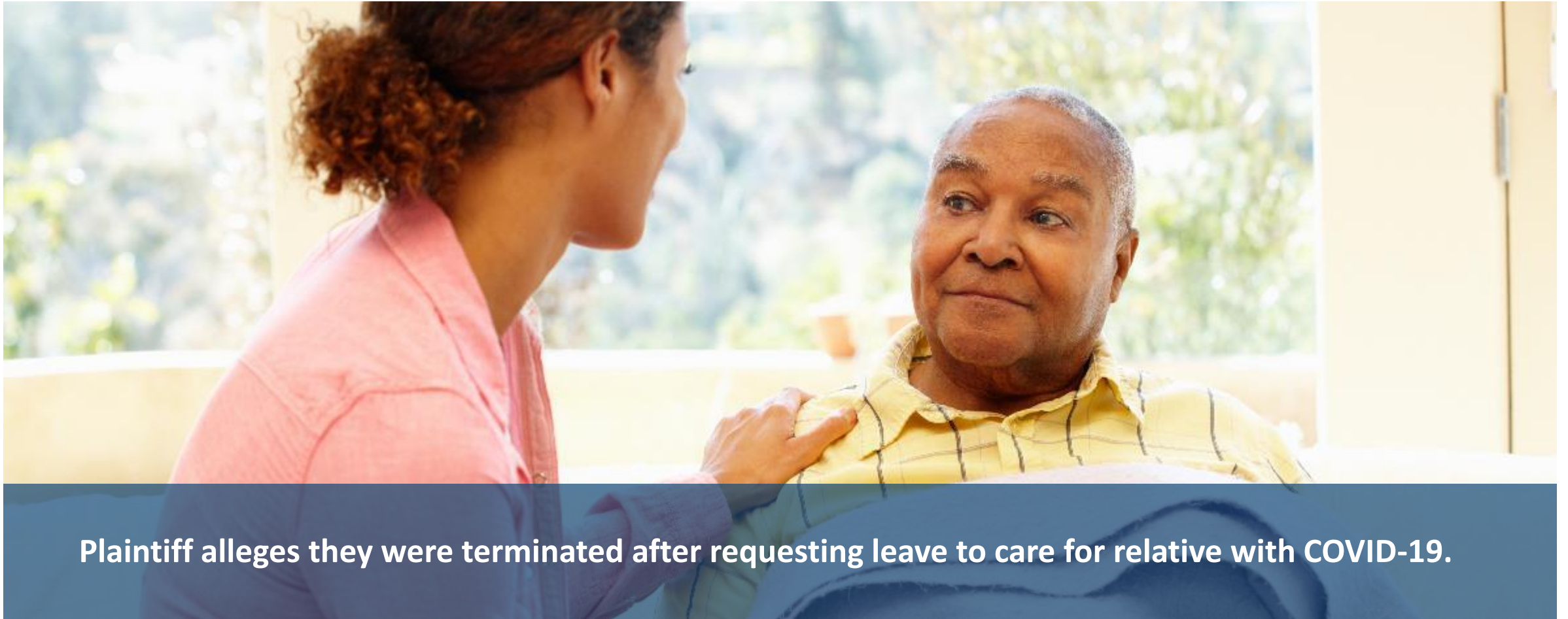
Southern District of Florida



Plaintiff alleges he was terminated after testing positive for COVID-19.

McPhee v. Nations Client Resolution

Southern District of Florida



Plaintiff alleges they were terminated after requesting leave to care for relative with COVID-19.

Lange v. 24 Hour Medical Staffing Services

Orange County California



Plaintiff alleges employer failed to provide employees with appropriate safety PPE.

Kristy v. Costco Wholesale Corporation

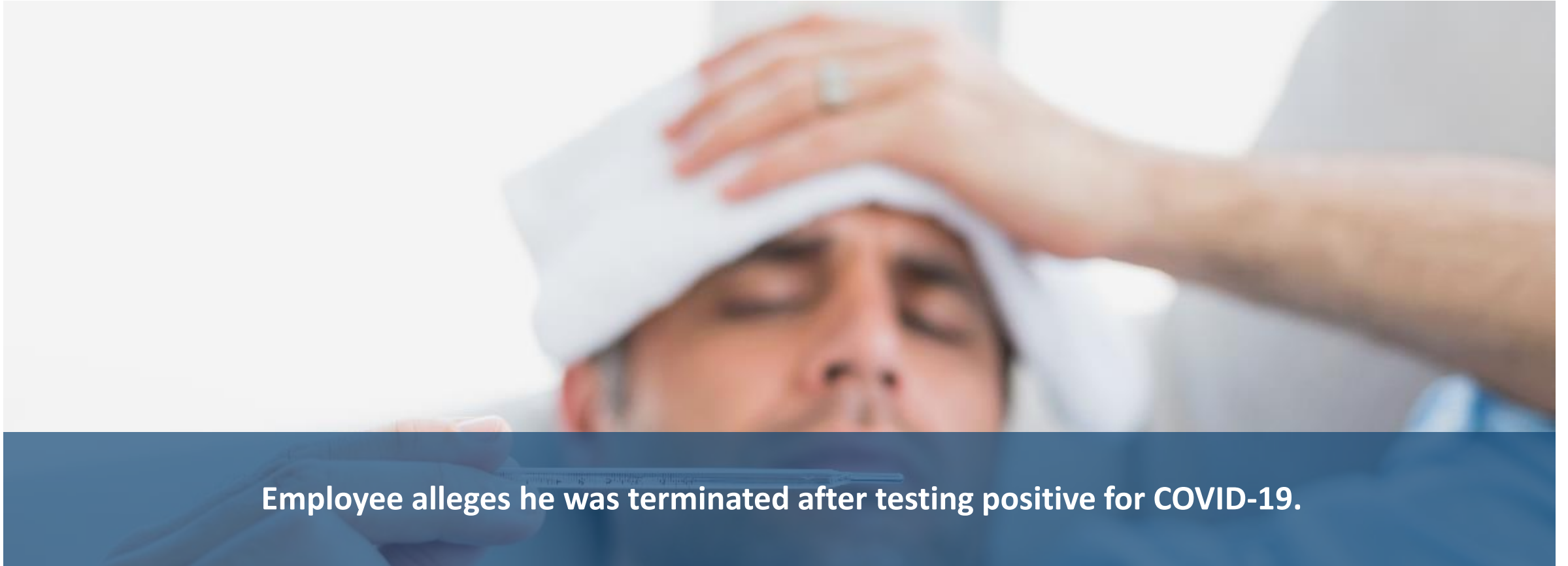
Santa Clara County, CA



Employee alleges he was constructively discharged after falsely being accused of having COVID-19.

Hardy v. Stemco Products, Inc,

Eastern District of Tennessee



Employee alleges he was terminated after testing positive for COVID-19.

Idahor v. Arbor East Cobb, LLC

Northern District of Georgia



Nursing home employee claims she was fired after testing positive for COVID-19

Pamela Smoot v. Three-C Body Shops, Inc.

Southern District of Ohio



Plaintiff with preexisting condition (COPD) alleges ADA and FMLA discrimination.

Guevara v. Gargiulo, Inc.

Middle District of Florida



Plaintiff employer terminated her after child's school closed due to COVID.

FFCRA Litigation

Agency Action

DOL/OSHA–COVID-19 Enforcement

- COVID-19 complaints are being filed with administrative agencies like the DOL and OSHA.
- Between February 2020 and May 2020, there were 1600 COVID-19 related whistleblower complaints.
- The claims consist of retaliation allegations, non-payment of wages, and workplace safety violations.



Despite the COVID-19 outbreak these agencies are staffed and still processing complaints, so employers need to be prepared.

DOL v. Risk & Insurance Consultants Inc.

Employee Awarded Back Pay



Employer denied paid sick leave to employee who was ordered to self- quarantine.

DOL v. Mundo De Colores Inc.

Employee Awarded Back Pay



Employer failed to provide paid leave under FFCRA.

DOL v. Church's Chicken Franchise

Employee Awarded \$1,060



Additional Resources

Coronavirus Resource Center

 Solutions ▾ Resources ▾ Who We Are Careers Contact Blog

Managing Employees' Leave of Absence During the Coronavirus Pandemic

The Coronavirus pandemic has created new, urgent challenges for employers. Below, we've documented some of the current leave of absence practices that our clients are using to help manage during this pandemic, as well as an FAQ based on our work with our clients.

UPDATED: ACOEM® COVID-19 Guidance for Employers and Businesses

Quarantined or Virus Exposed Employee FAQs

Commonly Asked Questions by Employees

Policy & Regulation Impacts

Latest Statutory Guideline Changes

Miscellaneous Leave of Absence Questions

UPDATED: ACOEM® COVID-19 Guidance for Employers and Businesses


Additional Coronavirus Leave of Absence Resources

Quarantined or Virus Exposed Employee FAQs

Compliance Webinars & Podcasts
ReedGroup Blog


<https://www.reedgroup.com/managing-employees-during-the-coronavirus-pandemic/>

Blog




Hawaii Allows Eligible Employees to Care for Grandchildren Under the State's Family Leave Act

On September 15, 2020, Hawaii Governor David Ige signed into law a bill that extends Hawaii family leave to include care of an employee's grandchild with a serious health condition. Although just enacted, the law has an effective date of July 1, 2020. Hawaii's Family Leave Act The legislative bill cited statistics regarding the large ... Continued




The Department of Labor Reaffirms and Clarifies Provisions of its FFCRA Rule Invalidated by Federal District Court in New York

When the U.S. District Court for the Southern District of New York invalidated several provisions of the Department of Labor's...




COVID-19 Update: DOL's New Guidance on FFCRA School Closure Leaves

New DOL Guidance for FFCRA Leaves On Re-Opening Schools With schools reopening across the country, the U.S. Department of Labor...




2021 New York PFL Benefit and Contribution Rates - Up From 2020


On September 1, 2020, the New York Department of Financial Services (NY DFS) published the 2021 New York Paid Family...




Are You Ready for Massachusetts Paid Family and Medical Leave? ReedGroup Is!




As Businesses Reopen, the DOL Continues to Update FFCRA Q&As



Colorado Governor Jared Polis Signed



Puerto Rico Extends Paid Leave to Moms Who Adopt School-Age Children



COVID-19: A Pandemic of Teachable Moments

COVID-19 has taken us all on a crash course in infection

<https://www.reedgroup.com/blog/>

Our Compliance Team Bios



James Venable, JD, SPHR

VP, Absence and Accommodation Compliance

James Venable provides expertise in the areas of absence management compliance and employee relations counseling. Mr. Venable has more than 20 years of experience across senior roles in Legal, Human Resources, and Compliance from several Fortune 500 companies. Mr. Venable joined ReedGroup in April 2018 after serving as Vice President of Human Resources, Employee Relations, Labor Relations, Compliance and Environmental Health and Safety for Comcast, where he was responsible for engagement and labor relations activities for the company's West Division Business Unit.



Sue Woods, JD

Senior Compliance Counsel

Sue Woods, JD, is Senior Compliance Counsel at ReedGroup where she focuses on product and operational compliance in leave and absence management solutions. Sue brings years of experience practicing labor and employment law, including advising employers on the intricacies of the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), Title VII, and state and local leave laws. By writing timely articles and speaking at seminars and events, Sue strives to break down tricky leave compliance issues into actionable, practical employment solutions.



Sarah Wisor, JD

Senior Compliance Counsel

Sarah Wisor, Senior Compliance Counsel, provides legal advice and business support related to leave of absence administration, accommodation management, legislative tracking and analysis, and compliance risk management. Ms. Wisor joined ReedGroup in March 2020, following a decade as a labor and employment defense litigator representing employers before federal and state courts and administrative tribunals. Ms. Wisor is licensed to practice law in Colorado and has been recognized as a Colorado Super Lawyers® Rising Star, Employment & Labor, from 2014-2019.

Thank you.