



# OFCCP and EEOC Issues in COVID-ville

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Presented by

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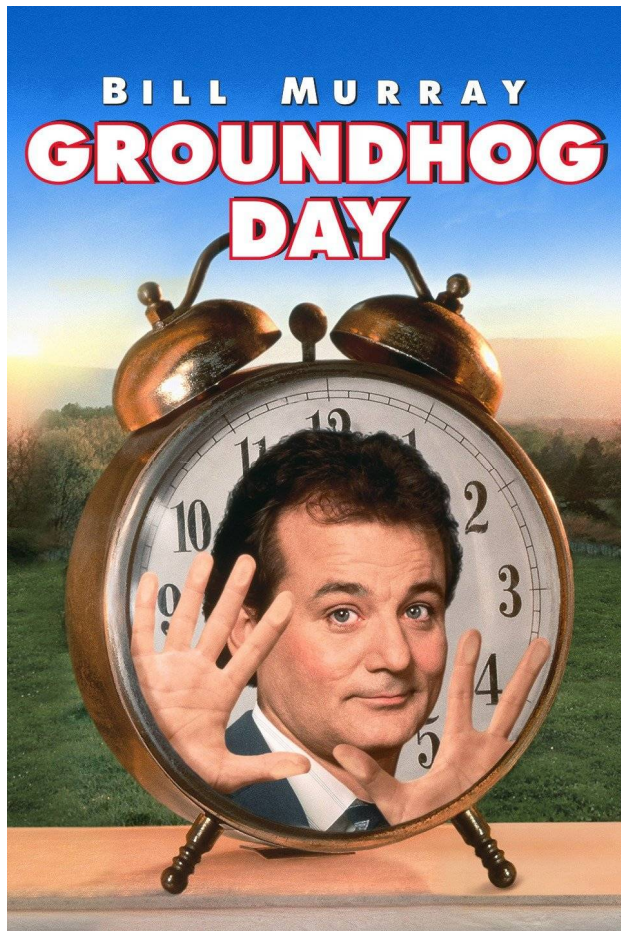
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## Presenter – Brian Barger

- Partner, McGuireWoods LLP, Charlotte, NC
- 30+ years experience, with a practice focused on:
  - Federal contractor affirmative action audit defense
  - Corporate employment law counseling / risk management
  - Federal and state law compliance
- University of Virginia (Phi Beta Kappa, Order of the Coif, Earl K. Shaw Labor & Employment Award)
- Born in the Blue Ridge mountains in Roanoke, VA; roots for the Carolina Panthers; loves NC BBQ; hates Duke basketball (Go Hoos! – now thanks to COVID-19, 2019 *and* 2020 “reigning NCAA Men’s Basketball National Champs”)
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# Every Day Now Feels Like Groundhog Day....



## Topics for This Morning

1. How OFCCP and EEOC are operating during COVID
2. ADA COVID confidentiality and medical screening limits
3. FMLA, ADA and ADEA COVID return to work and high risk exposure issues
4. Likely increased claims on the road ahead
5. Questions

## What's Up With OFCCP During COVID-19?

- COVID-19 landing page
  - <https://www.dol.gov/agencies/ofccp/coronavirus>
- Scheduling letters not on hiatus (we've seen a new wave)
- Field agents have been granting significant response extensions
- Office of Administrative Law Judges (OALJ) has been issuing orders imposing temporary delays / stays
- But. . .OFCCP has refused to administratively close active audits, even at “ground zero” in Manhattan
- But. . .some on-sites continue via video conference

# What's Up With OFCCP During COVID-19?

- National Interest Exemption Memorandum
  - 3 mos. exemption / waiver – only contracts providing COVID relief (*see* OFCCP FAQs)
- April 2020 directives
  - Efficiency in Compliance Evaluations
    - <https://www.dol.gov/agencies/ofccp/directives/2020-02>
  - Pre-Referral Mediation Program
    - <https://www.dol.gov/agencies/ofccp/directives/2020-03>
  - Ombuds Service
    - <https://www.dol.gov/agencies/ofccp/directives/2020-04>
- May 2020 revised disability self-ID form (effective Aug. 4)
  - <https://www.dol.gov/agencies/ofccp/self-id-forms>

## What's Up With EEOC During COVID-19?

- COVID-19 landing page
  - <https://www.eeoc.gov/coronavirus>
  - <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- “Live” fact finding conferences postponed
- Several field offices have suspended mediation – even when Charging Parties agree – pushing into investigation
- Several field offices have delayed conciliation and/or offered sessions to be held virtually
- Rumored outright suspension of conciliation at some field offices, despite statutory directive
- Rumored not issuing / slow-walking notice of rights to sue

## ADA and Testing / Medical Questions

- ADA covers, among other things, rules re:
  - Employee medical tests
  - Employee medical questions
- Tests and questions during COVID-19:
  - **OK** to screen for temperature
  - **OK** to ask about positive tests, symptoms + individuals who are in the home with symptoms or who have tested positive
  - **OK** to record responses (and a good idea; may be required by state COVID RTW E.O.)



## ADA and Confidentiality

- But still must keep medical info. confidential, except for certain need to know exceptions:
  - *Applicable* supervisors and managers
  - First aid and safety personnel
  - Certain government officials
- But still must limit disclosure
  - General disclosure of positive test: **OK**
  - Name of individual: **Not OK**
  - Consider using authorization form
  - Practical issue: pick your lawsuit. . . .



## RTW Attendance / High Risk Categories

- Q: How do we generally deal with employee return to work attendance issues in light of COVID-19?
  - *I cannot come back to work because I have a health condition and am in a high risk category (e.g., Type 2 diabetes, asthma, etc.)*
  - *I am over 65 and my doctor says I can't come back to work given that I am in a high risk category*
  - *I cannot come back to work due to my inability to secure child care*

## RTW Attendance Analysis – FFCRA?

1. Is the employee eligible for FFCRA leave (and do they still have remaining time to use)?
  - Emergency Paid Sick Leave (EPSL) – 80 hrs. / 2 wks. or equivalent for PT (all paid), 6 triggering events
  - Emergency Paid Family and Medical Leave (EFLMA) – 12 wks. (1st 2 wks. unpaid – usually 10 days, remaining 10 wks. paid), 1 triggering event (child care)
  - Pay amounts vary depending on the triggering event (i.e. full pay or 2/3)
  - *EPSL Reason No. 2 (self-quarantine) includes health care provider's belief that the employee "is particularly vulnerable" to COVID-19*

## RTW Attendance Analysis – EFMLA / FMLA?

2. Is the employee eligible for EFMLA or regular FMLA leave (and do they still have remaining time to use)?
  - Child care – EPSL + EFMLA
  - Infected, has symptoms and is awaiting diagnosis, or is caring for family who has COVID – EPSL + FMLA
  - Risk of exposure / high risk condition profile alone
    - No FMLA?  
(<https://www.dol.gov/agencies/whd/fmla/pandemic>)
    - Yes FMLA?
    - Yes FMLA, but only for severe immune suppressed conditions?

## RTW Attendance Analysis – ADA?

3. Is the employee disabled under the ADA such that a reasonable accommodation must be considered via the interactive process?
  - E.g., excuse from work with or without pay
  - E.g., move temporarily to jobs or work stations where there is limited contact with other employees, guests, etc.
  - E.g., provide PPE, erect special shields, socially distance desks / work stations, turn off ventilation systems into designated offices, allow continued work from home, allow continued meetings via Zoom, etc.
  - *Key is (a) essential functions, (b) duration, and (c) what you do or do not do for others*

## RTW Attendance Analysis – ADEA?

4. Is the employee over 65 standing alone (i.e., not otherwise covered by FFCRA, EFMLA, FMLA or ADA)
  - There is no obligation to accommodate someone over 65 just because of his or her age under the ADA
  - The ADEA, in turn, has no accommodation requirement whatsoever
  - You can, however, certainly do so as a matter of policy
    - For example, you could give first priority for reassignment to low contact jobs to disabled individuals in Group No. 3 above; individuals over 65 could then get next priority

## RTW Attendance Analysis – General Fear

5. Is the employee simply fearful of returning to work (but otherwise not in any protected category)?
  - RTW – or be fired (consistent with policy)
  - *But be careful:* pseudo-disability claims (depression, anxiety)
  - *But be careful:* need for consistency in approach between similarly situated employees / positions

## Likely Increased Claims on the Road Ahead

- FFCRA retaliation
- ADA failure to accommodate – e.g., no mask
  - *Keep in mind – ADA direct threat exception*
  - *FYI, new EEOC RTW FAQ re: this is unhelpful – only references undue hardship*
- OSHA compliance / general duties obligation
- FLSA / state wage and hour exempt salaried deductions
- FLSA / state wage and hour “hours worked”
- WARN and state mini-WARN
- Title VII / ADEA and layoffs



# Questions / Comments / Help

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## MW COVID-19 Response Team

- <https://www.mcguirewoods.com/coronavirus-impact#team>

## MW COVID-19 Resources

- <https://www.mcguirewoods.com/coronavirus-impact>

