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FMLA, the ADA, and a New Year: Key Developments for Employers

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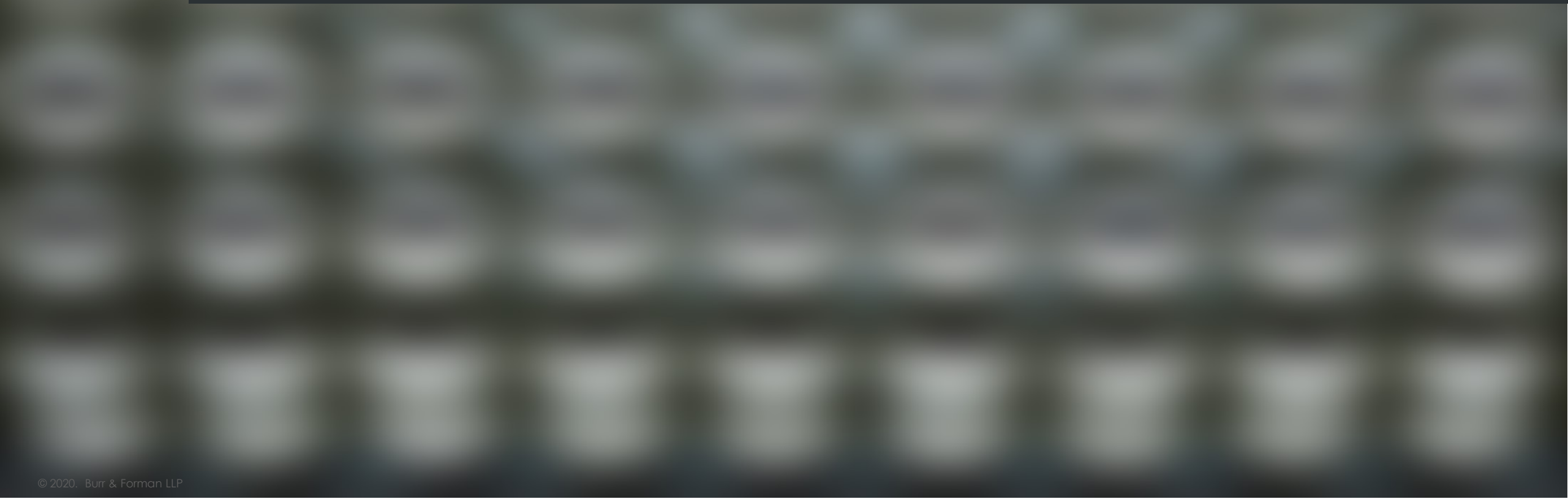
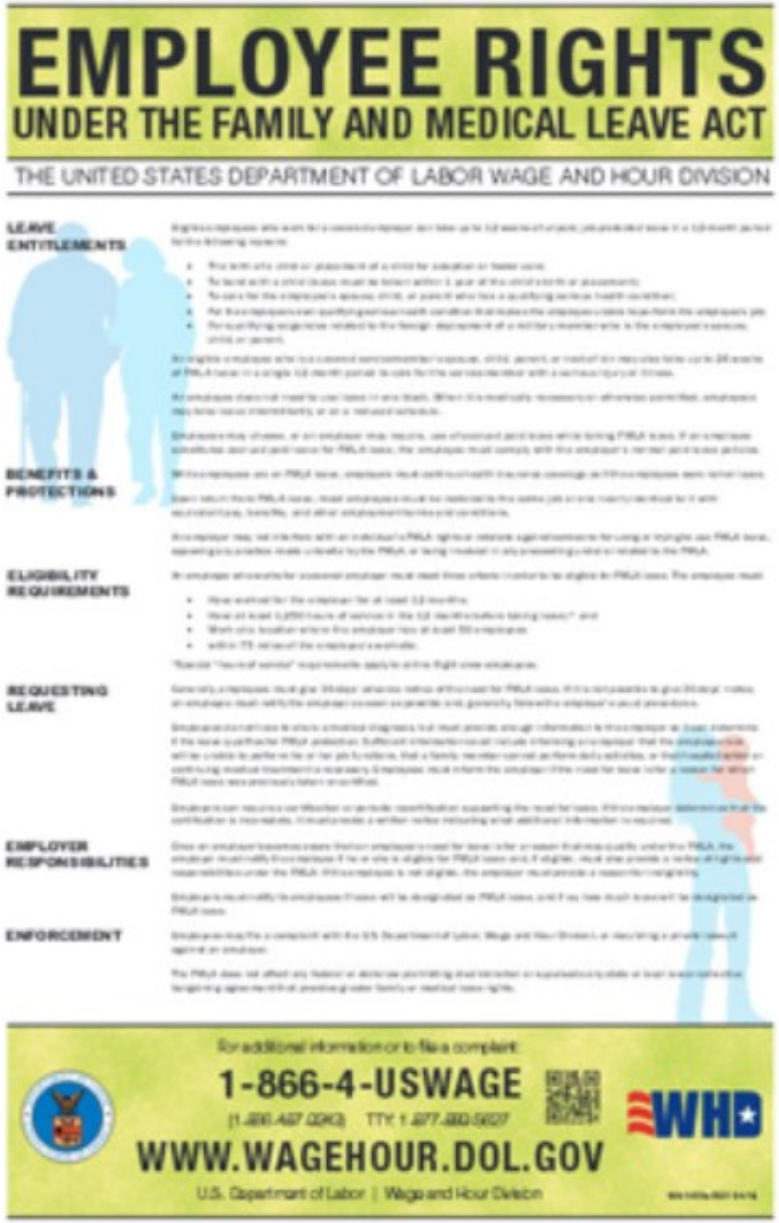
Family Medical Leave Act (FMLA) Developments



New DOL Guidance on Electronic Notices

- 29 CFR § 825.300 Employer Notice Requirements:
- (a) General notice.
  - (1) Every employer covered by the FMLA is required to **post and keep posted** on its premises, in **conspicuous places where employees are employed**, a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act with the Wage and Hour Division. The notice must be posted prominently where it can be **readily seen by employees and applicants for employment**.
- Penalties for willful non-compliance $176 for each separate offense.



New DOL Guidance on Electronic Notices

Field Assistance Bulletin No. 2020-7:

- Issued December 29, 2020.
- Electronic posting is an acceptable substitute for "continuous posting" requirements if:
  1. All of the employer's employees exclusively work remotely;
  2. All employees customarily receive information from the employer via electronic means; **and**
  3. All employees have **readily available access** to the electronic posting at all times.
     - Electronic postings are not an effective means of providing notice if the employer does not take steps to inform impacted individuals of where and how to access notices.

***Note** – Where an employer has employees on-site and other employees working remotely, both methods of posting must be utilized.

Practical Considerations for Employers

- Consider designing an easily accessible space in your company intranet or website for federal and state notices.
- Update handbook to provide notice to employees of how and where to access virtual postings.
- If hiring is conducted remotely, incorporate all required notices in the applicant portal system.

New DOL Guidance Regarding Telemedicine

- Field Assistance Bulletin No. 2020-8:
  - Issued December 29, 2020.
  - Provides guidance regarding the use of telemedicine in establishing a serious health condition under the FMLA.
    - *Serious health condition*: an "illness, injury impairment, or physical or mental condition that involves" either (1) inpatient care or (2) "continuing treatment by a health care provider."
      - The DOL's regulations provide that "[t]reatment by a health care provider means an ***in-person visit*** to a health care provider." See 29 CFR § 825.115(a)(3).

New DOL Guidance Regarding Telemedicine, Cont.

WHD will consider a telemedicine visit with a healthcare provider as an "in-person" visit if it:

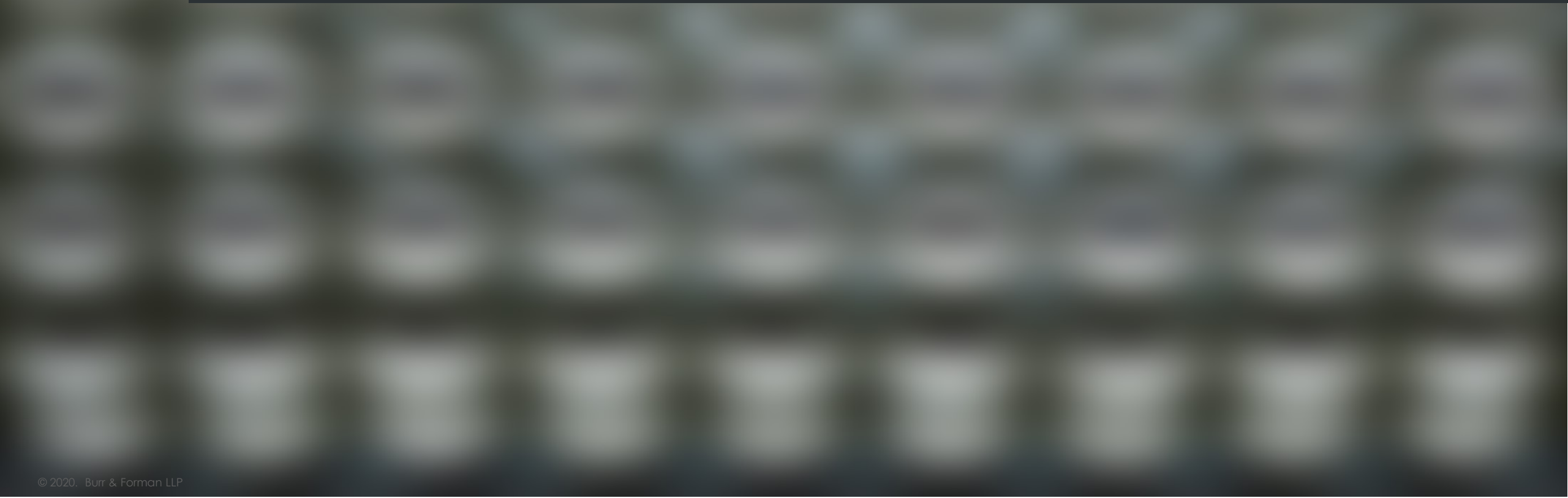
1. Includes an examination, evaluation, or treatment by a health care provider;
2. Is performed by video conference; **and**
3. Is permitted and accepted by state licensing authorities

*Note - Communication methods that do not meet these criteria (i.e., a simple telephone call, letter, email, or text message) are insufficient, by themselves, to satisfy the regulatory requirement of an "in-person" visit.

Updates to FMLA Forms

- Published on July 16, 2020.
- New forms are fillable PDFs and include significant revisions.
  - H-381, Notice of Eligibility & Rights and Responsibilities (https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/WH-381.pdf);
  - WH-382, Designation Notice (https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/WH-382.pdf) ;
  - WH-380-E, medical certification of an employee's serious health condition (https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/WH-380-E.pdf); and
  - WH-380-F, medical certification of a family member's serious health condition (https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/WH-380-F.pdf).

Notable FMLA Decisions in 2020



Mindy Thornberry v. Powell Detention Center (E.D. Ky. Sept. 22, 2020)

- **FACTS:**
  - Plaintiff was employed as a substance abuse counselor.
  - Plaintiff and her colleagues were asked to stay home between March 18 until March 30, 2020 due to COVID-19.
  - Plaintiff returned to work for one day after the stay home order expired, but then stayed home on April 1, 2020, citing concerns that lack of COIVD-19 precautions could put her or her family at risk. She was dismissed on April 1.
  - Plaintiff filed suit alleging interference and retaliation in violation of the FMLA, as well as claims under the FFCRA.

Mindy Thornberry v. Powell Detention Center (E.D. Ky. Sept. 22, 2020)

- **Holding:** Lawsuit dismissed for failure to state a claim.
- **Reasoning:**
  - Plaintiff failed to allege that she actually sought leave under the EFMLA.
  - Instead, her allegations focused on two concerns: (1) the health of family members living under her roof; and (2) the alleged lack of precautions taken by Defendants.
  - Although having a child may have entitled Plaintiff to leave under the EFMLA, the Amended Complaint failed to allege that she ever informed the Defendants that she needed to stay home to care for her child.
  - To the contrary, Plaintiff stated multiple times that she was "only asking for precautions and steps to be taken not to just not work."
  - Plaintiff improperly equated demanding increased precautions before returning to work—thus protecting her school-aged child—with requiring leave to care for a child.

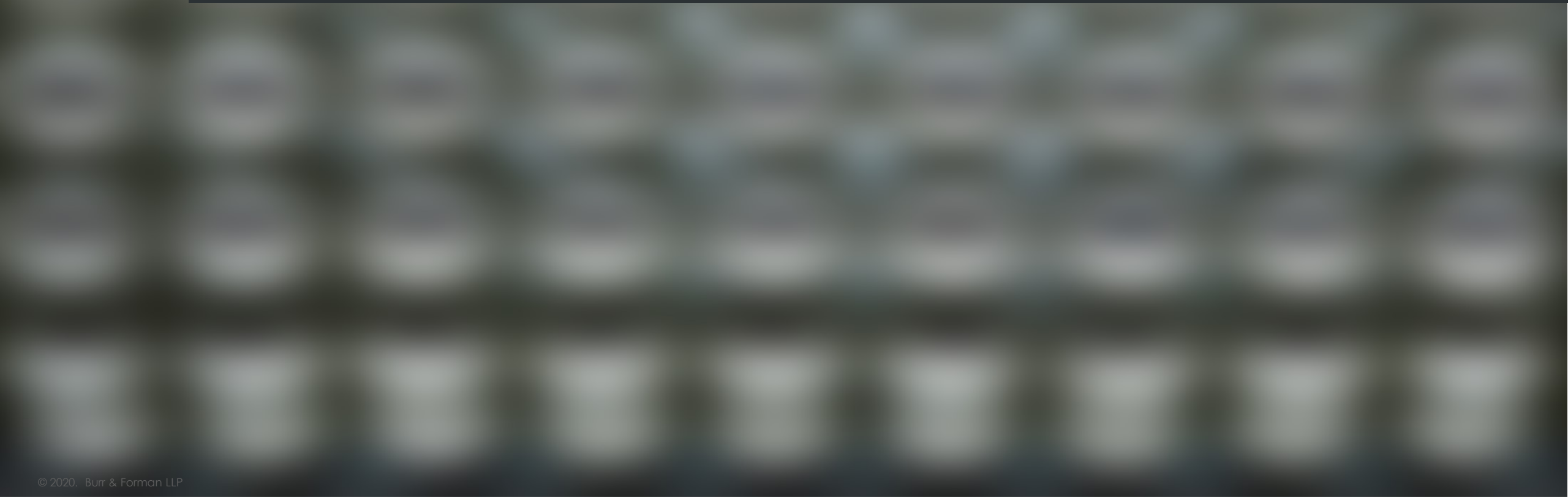
Gomes v. Steere House (D.R.I. Nov. 2, 2020)

- **FACTS:**
  - Plaintiff was employed as an LPN for a nursing and rehabilitation center.
  - During the months of April and May of 2020, Plaintiff was exposed to COVID-19 on the job and eventually contracted the virus. As a result, Plaintiff was unable to work for a "period of time."
  - At some point after contracting the virus, Plaintiff sought paid leave under the FMLA.
  - On May 22, 2020, Plaintiff was terminated from her employment because Steere House determined she was not eligible for FMLA leave.
  - Plaintiff filed suit alleging that she was terminated from her employment in retaliation for invoking her rights under the FMLA, specifically the paid sick leave requirements under the EPSLA.
  - Employer moved to dismiss the Complaint arguing that Plaintiff was not eligible for leave under the FMLA, and it had no obligation to provide her leave under the FFCRA because it she was an exempt "health care provider."

Gomes v. Steere House (D.R.I. Nov. 2, 2020)

- **Holding**: Plaintiff stated a claim for retaliation under the FMLA.
- **Reasoning**:
  - Plaintiff did not allege that she had a right to leave under the EFMLA (which only applies to leave for child-care related reasons); instead she asserted that she was entitled to FMLA leave under the rules set forth in the EPSLA. Court acknowledged that the EPSLA has "no connection" to the FMLA and Plaintiff did not allege any facts suggesting that she qualified for FMLA leave.
  - Nevertheless, the Court found that under Circuit precedent, an employee does not necessarily have to be eligible for FMLA benefits in order to state a claim for retaliation under the FMLA.
  - The FMLA prohibits employer interference with both the exercise of rights provided under the FMLA and the "attempt to exercise any right."According to the Court, firing an employee just for asking about benefits would frustrate the purpose of the statute, regardless of whether the employee would actually be eligible for those benefits.

Americans with Disabilities Act (ADA) Developments



ADA Implications in the Midst of a Pandemic

- Key developments in 2020 were centered on COVID-19.
  - Issues surrounding:
    - Offering reasonable accomodations for employees with disabilities;
    - Administering COVID-19 tests to employees and applicants;
    - Screening employees for symptoms of COVID-19.

- EEOC has continually updated its Technical Assistance Q&As to address common employer Issues.
  - What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, available at: https://www.eeoc.gov/wysk
  - As we move into 2021, this will continue to be a key resource for employers.

ADA Issues to watch for in 2021

- Telework
  - EEOC has stated that employers do not automatically have to grant requests for remote work as a reasonable accommodation when an employer reopens the workplace and recalls employees to the worksite. (Q&A D.15)
    - If employer is permitting telework because of COVID-19 and choosing to excuse an employee from performing one or more essential functions, then a request—after the workplace reopens—to continue telework as a reasonable accommodation does not have to be granted if it requires continuing to excuse the employee from performing an essential function. The ADA never requires an employer to eliminate an essential function as an accommodation for an individual with a disability.
  - BUT… temporary telework experience is relevant to determining whether working remotely could be a reasonable accommodation.
    - EEOC has stated that the COVID-19 pandemic could serve as a trial period that showed whether or not the disabled employee was able to satisfactorily perform all essential functions while working remotely.
- Vaccines

COVID-19 Vaccinations

- There are currently two vaccines authorized for the treatment of COVID-19 and both require two shots to be effective

- Each state has its own plan in place for vaccine prioritization, distribution, and allocation

- Vaccinations will be provided at no cost to Americans and any administration fee will be covered by an employer's group health plan

COVID-19 Vaccine & the ADA

- December 16, 2020 - EEOC issued new guidance that seemingly permits employers to mandate COVID-19 vaccinations, provided that employers are prepared to make exceptions when required.

- The EEOC has opined that a COVID vaccine ***itself*** is not a "medical examination" under the ADA.
  - If a vaccine is administered to an employee by an employer for protection against contracting COVID-19, the employer is not seeking information about an individual's impairments or current health status and, therefore, it is not a medical examination.

- ***But***, if the employer administers the vaccine, then any pre-vaccine questions ***may*** be medical inquiries under the ADA and will need to be job related and consistent with business necessity

Vaccinations & the ADA

- Vaccine Administration
  - Employer must keep any employee medical information obtained in the course of the vaccination program confidential
  - Requesting proof of a COVID-19 vaccination is also not a disability related inquiry, ***but*** questioning an employee about why they have not been vaccinated may elicit information about why they have not received a vaccination must be "job-related and consistent with business necessity."

- Disability Accommodation
  - Reasonable accommodations to qualified employees with disabilities are required unless it would pose an undue hardship or a direct threat to the safety of the employee or others.
  - Employer must conduct individualized assessment of 4 factors to determine whether an unvaccinated employee poses a direct threat in the workplace: the duration of risk; nature and severity of potential harm; and the imminence and likelihood potential harm will occur. A conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to the virus at the worksite.

Vaccinations & the ADA

Scenario – Employee claims that he/she cannot receive vaccine due to health condition.

- **Step 1:** Request supporting documentation from employee's health provider.
- **Step 2:** Conduct individualized assessment to determine whether unvaccinated employee would pose a direct threat.
  - If NO, cannot exclude employee from workplace.
  - If YES, go to Step 3.
- **Step 3:** Engage in interactive process to identify whether reasonable accommodation would eliminate or reduce risk so employee does not pose a direct threat.

Vaccinations & the ADA

Employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce risk so the unvaccinated employee does not pose a direct threat.

Voluntary Vaccines

- Educate employees about the benefits of the vaccine and effectively communicate about its availability.
- Make the vaccine as easily accessible to employees as possible.
- Consider incentives, but be mindful of ADA Wellness Program issues.

Proposed Rule – Voluntary Wellness Programs

- **January 7, 2021** - EEOC issued its proposed rule regarding the incentives employers may offer to encourage employee participation in wellness programs that require disclosure of medical information, without violating the ADA or GINA.

- Employee participation in a wellness program must be **"voluntary,"** but ADA and GINA do not define voluntary.

- The proposed rule provides :
  - wellness program is voluntary so long as the employer does not offer more than a "*de minimis incentive (such as a water bottle or gift card of modest value) in echange for an employee participating in the wellness program . . .* "
- EEOC takes the position that offering too high of an incentive would make employees feel coerced to disclose protected medical information to receive a reward or avoid a penalty.

- Rule was forwarded to Office of Federal Register for publication on January 14, 2021, and was supposed to become effective 30 days after the date of publication, but likely subject to Biden's regulatory freeze

A Rising Tide of COVID-19 Claims

- More than 1,400 employment lawsuits relating to the pandemic were filed between **January 30, 2020** and **January 19, 2021**.

- Complaints involved employment discrimination, remote work/leave conflicts, unsafe workplace, wage & hour, wrongful discharge, etc.
  - Most common claims: remote work/leave conflicts.

- In 2021, expect cases challenging mandatory COVID-19 testing/vaccination policies and discrimination claims.

Questions?

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