

COVID-19: Helping Non-Profits Through New and Developing Workplace Issues

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Agenda

- Introduction
- How We Got Here and Current Status
- The Latest from D.C. on Employment Law Issues
 - Paid Leave and Expanded FMLA – What Does this Mean?
- MI Unemployment Expansion
- Common Employment Law Issues and Solutions
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 - ADA/Discrimination
- Contracts
- Common Questions
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 - Adapt Your Communication Playbook
- Employee Wellbeing
- Questions?

COVID-19: How We Got Here and Current Status

- Pneumonia-like infection first identified in Wuhan, China in late-2019
- According to the CDC, the virus has been named “SARS-CoV-2” and the disease it causes has been named “coronavirus disease 2019” (abbreviated “COVID-19”)
- Symptoms include fever, cough, shortness of breath, and possibly death
- Elderly, those with underlying conditions (e.g., asthma, diabetes), or compromised immune systems are at greater risk of experiencing symptoms
- Infection spreads through close contact, coughing, sneezing, and potentially touching surfaces where the virus may live



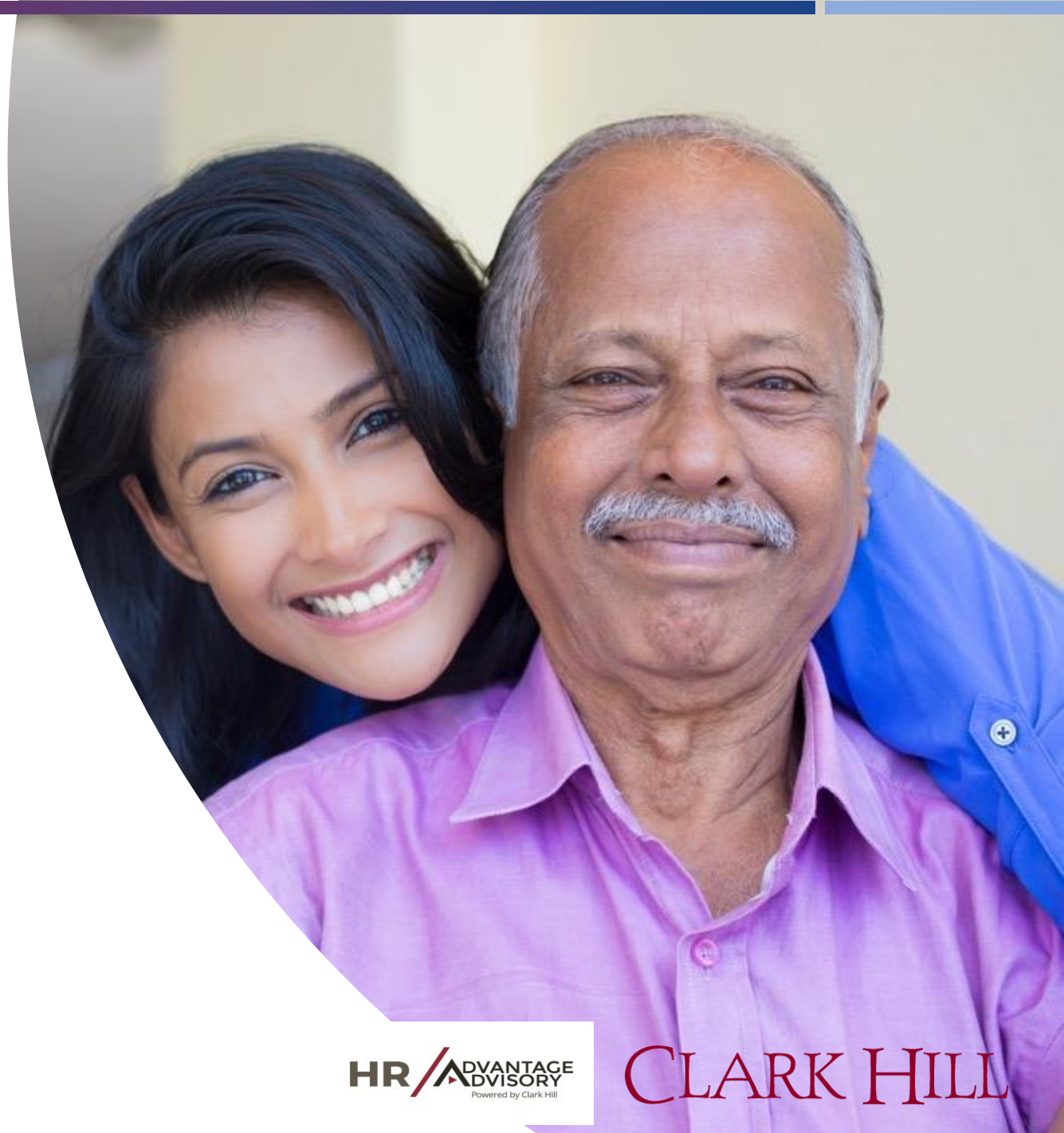


COVID-19: How We Got Here and Current Status

- March 11, 2020 – World Health Organization Declares Pandemic
 - Does speak to the severity of the illness
- March 13, 2020 – President Trump declares National Emergency
- As of March 18, 2020, cases have been reported in every state with over 100 deaths.

Proposed D.C.: H.R. 6201 Families First Coronavirus Response Act

- Passed the House on March 13th
- Negotiated by Speaker Pelosi and Secretary Mnuchin, and supported by President Trump
- Impact on employers
 - Emergency Paid Sick Leave
 - Expanded FMLA Coverage
- Current status of the bill



FMLA & COVID-19

- Family and Medical Leave Act
 - Provides 12 weeks of unpaid leave for eligible employees of covered employers to address their own serious health condition or to take care of a parent, spouse, or child with a serious health condition
 - Continuation of health benefits
- If an employee is afraid of contracting the virus and does not want to come to work, are they FMLA-eligible?
- May still require certification under existing and expanded FMLA laws, but consider relaxing standards given the rush at doctor's offices
- Remember State and local leave requirements



Michigan Unemployment Changes

Governor Whitmer temporarily expanded eligibility for unemployment benefits by executive order.

Benefits are extended to:

- Workers who have an unanticipated family care responsibility, including those who have childcare responsibilities due to school closures, or those who are forced to care for loved ones who become ill.
- Workers who are sick, quarantined, or immunocompromised and who do not have access to paid family and medical leave or are laid off.
- First responders in the public health community who become ill or are quarantined due to exposure to COVID-19.

Governor Whitmer's office also stated that the State is "seeking solutions for self-employed workers and independent contractors who traditionally do not have access to unemployment insurance."

Access to benefits for unemployed workers will also be extended as follows:

- Benefits will be increased from 20 to 26 weeks.
- The application eligibility period will be increased from 14 to 28 days.
- The normal in-person registration and work search requirements will be suspended.

The Order also states that *employers will not be charged for unemployment benefits if their employees become unemployed because of an executive order requiring them to close or limit operations.*



Our Business Is Closed – Do I Have to Keep Paying My Employees?

Non-exempt employees (hourly)

- Only must pay them if they actually work – does not matter where
- Must be paid at least minimum wage *and* are entitled to overtime
- Employer options to provide pay during difficult times

Exempt employees (salary)

- If these employees work at all during a week, they are entitled to that full week's salary.
- May deduct from salary for full-day absences for sickness and disability under sick leave policies

Title VII and COVID-19

- Title VII prohibits employers from treating employees adversely because of their race or national origin solely out of fear of pandemic virus
- Many states have their own statutes
- Recommended Employer Steps
 - Keep health information of employees confidential to minimize gossip
 - Educate employees on how virus is actually spread and that it is not unique to any ethnic group
 - Reinforce your non-discrimination policy
 - Reinforce anti-bullying measures



The ADA and COVID-19

- ADA applies to employers with 15 or more employees
- Typically, viruses like the flu or common cold (i.e., short-term impairments) do not qualify as disabilities under the ADA
 - Do not have the full-picture for COVID-19 yet
- Employer Pitfalls: “Regarded As” claims





Prior EEOC ADA Guidance During H1N1 Pandemic

- H1N1 Pandemic Preparedness in the Workplace and Americans with Disabilities Act (https://www.eeoc.gov/facts/pandemic_flu.html)
- ADA regulates what employers can ask of employees
 - Inquiries and examinations must be job-related and consistent with business necessity
 - Must have reasonable belief that ability to perform essential job function will be impaired by medical condition or that employee poses a direct threat
 - Reasonable belief must be based on objective evidence obtained prior to making the inquiry or requiring the examination
- Must provide accommodations, unless doing so would cause an undue burden

Prior EEOC ADA Guidance During H1N1 Pandemic

- Cannot exclude individuals with disabilities from the workplace, unless they pose a direct threat to others (i.e., a significant risk of substantial harm, even with a reasonable accommodation)
- Must treat all medical and health-related information and records as confidential and separate from personnel file





Prior EEOC ADA Guidance During H1N1 Pandemic

Employer rights during a pandemic:

- May send employees home if they are displaying influenza-like symptoms
- May ask employees who report feeling ill at work or who call in sick if they are experiencing influenza-like symptoms
- May ask about exposure to pandemic disease while traveling, even if they are not showing symptoms
- May encourage telework as a control strategy

What Can I Do About Employees Not Showing Symptoms?

- If they have recently traveled to hotspots (i.e., China, Iran, Italy, Washington state), you may ask them to stay home for 14 days
- If they have traveled to other impacted areas and report contact with an affected person, you may ask them to stay home.
- CDC Interim Guidance – Consider requiring employees with affected household members with the virus to notify employer





Can We Take Temperatures?

- According to the EEOC, taking an employee's body temperature is a medical examination
- If pandemic influenza symptoms become more severe than the seasonal flu or the H1N1 virus in the spring/summer of 2009, or if pandemic influenza becomes widespread in the community as assessed by state or local health authorities or the CDC, then employers may measure employees' body temperature.

Can We Take Temperatures?

On March 11, 2020, the CDC issued guidance for the next thirty (30) days for Santa Clara County, CA, and Seattle-King, Pierce, and Snohomish Counties, WA that specifically recommends that employers in these jurisdictions conduct “[r]egular health checks on arrival each day (e.g., temperature and respiratory symptom screening) of staff and visitors entering buildings.”





Can We Take Temperatures?

Minimize (but not eliminate) risk by taking these steps:

- Emphasize symptom identification – not trying to determine whether an employee has impairment/condition
- Use non-invasive means of temperature readings
- Conduct testing in ways that ensure employee privacy

Employee Safety and COVID-19

- No specific OSHA standards formulated for COVID-19, but existing standards likely apply
- OSHA Interim Guidance Issued:
<https://www.osha.gov/Publications/OSHA3990.pdf>



Existing OSHA Standards

- The General Duty Clause 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.”
- OSHA's Personal Protective Equipment (PPE) requires using gloves, eye and face protection, and respiratory protection.
- OSHA Bloodborne Pathogens Standard
- Recording/reporting occupational injuries and illnesses
- Access to employee exposure and medical records
- Hazard Communication





OSHA Recordkeeping and COVID-19

- Per OSHA, COVID-19 can be a recordable illness if a worker is infected as a result of performing work-related duties.
- Must meet the following:
 - The case is a confirmed case of COVID-19;
 - The case is work related as defined by 29 C.F.R. § 1904.5;
 - The case involves one or more of the general recording criteria in 29 C.F.R. 1904.7 (e.g., medical treatment beyond first-aid, days away from work)

Employee Rights and COVID-19

- Section 11(c) – prohibits retaliation against employees for raising concerns about safety and health conditions
- Section 13(a) – entitles all employees to refuse to work if they reasonably believe they are in imminent danger
 - If employees are unionized, “No-Strike” clause may not necessarily help.
 - Under NLRA, refusing to come to work may constitute “protected concerted activity”





Industry Specific OSHA Concerns

- Big concern around healthcare workers and first responders at front-lines of the battle
- CDC has issues specific guidance for these workers:
<https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-risk-assessment-hcp.html>



Worker's Compensation and COVID-19

- State dependent
- Healthcare workers/first responders would likely qualify
 - Washington Gov. Inslee's efforts
- Other employees? Depends on the facts
 - Did they contract at work?
 - How do they prove that?
 - Caused by conditions peculiar to work?



Unionized Workforces

- NLRA requires you to bargain in good-faith over terms and conditions of employment, wages, and hours
- Is COVID-19 a “compelling economic exigency?”

Contracts

- Review insurance policy to determine what coverage is available for business interruption due to a potential closure in response to the Covid-19 pandemic.
- If you have events planned, check your contract for a “Force Majeure” provision - loosely put, typically excuses a party from performing its obligations under a contract if an event occurs that is beyond the parties’ control, such as a labor shortage, strike, terrorist act, natural disaster or other “act of God.”
- Negotiate postponement of scheduled events rather than cancellation





Teleworking Policies

- Do you even have one?
 - Does it have suggested OSHA language?
- Is your IT system capable of handling influx of remote workers?
- What equipment will you provide?
- How will you ensure security of proprietary information or trade secrets?
 - Personal equipment, USBs, third-party email and storage accounts
- What will you allow employees to take home?
- How will you handle IT disruptions?



Common Questions

Can I tell employees if a co-worker has tested positive for the coronavirus or other communicable disease?

No. The Americans with Disabilities Act (ADA) privacy rules restrict employers from sharing personal health information of an employee. Employers should inform employees that possible exposure has occurred in the workplace without disclosing any identifying information about the individual who tested positive.

Can I ask an employee if he or she has the coronavirus?

The EEOC references its guidance for pandemic flu situations for how to handle the current situation with Coronavirus.

ADA-covered employers may ask the employees if they are experiencing influenza-like symptoms, such as fever or chills and a cough or sore throat.

All information gathered about an employee illness must be maintained as a confidential medical record in compliance with the ADA.

Common Questions

Can I require an employee to go home (or stay home) if he or she is sick?

Yes, employees who show signs of respiratory illness can be asked to leave the workplace and stay at home until they are symptom free. Additionally, the action would be permitted under the ADA if the illness were serious enough to pose a direct threat to both the employee or other employees.

What should we do if an employee discloses that they have been in close contact with a person who tested positive for COVID-19?

According to CDC guidance, individuals who have had close contact with a person diagnosed with COVID-19 should self-quarantine. Employers can require an employee who has been exposed to the virus to stay at home.

Can we require a doctor's note before allowing a sick employee to return to work?

Yes - if an employer applies the practice consistently, clearance from a health care provider to return to work can be required. However, guidance from the Centers for Disease Control and Prevention (CDC) suggests employers remove such requirements during a health crisis as access to health care providers may be limited.

Do we have to allow employees to work from home?

While not required, telecommuting may be a practical measure to reduce exposure of the virus in some work environments. Employees with disabilities that put them at high risk for complications may request telework as a reasonable accommodation to reduce their chances of infection during a pandemic.



Common Questions

Does OSHA require non-healthcare employees to wear respirators?

There is no general requirement for non-healthcare employees to wear respirators or other types of personal protective equipment (PPE) at this time.

What if an employee requests to wear some type of mask as an accommodation?

The CDC does not recommend that people who are well wear a mask to protect themselves. Surgical masks should be used by people who show symptoms of COVID-19, however, the CDC recommends that the employee be separated from other employees and be sent home immediately, thus negating the need for a mask as an accommodation.

Is COVID-19 a Recordable Illness for MIOSHA purposes?

Yes. Employers are responsible for recording cases of COVID-19 if all of the following are met:

- The case is a confirmed case of COVID-19
- The case is work-related
- The case involves one or more of the general recording criteria set forth in 29 CFR 1904.7 (medical treatment beyond first aid, days away from work).

Can we fire an employee who has complained on social media that we do not do enough to protect our employees from COVID-19?

An employee complaint may be protected under the National Labor Relations Act (NLRA), which protects concerted activity by employees regarding working conditions as well as under the anti-retaliation provisions of various employment laws. Employers should proceed carefully and engaging legal counsel for guidance is recommended.



Communicating through Disruption

- This situation is fluid - making the need for communication even more critical
- Across the board, people are asking questions; *economy, job security, supply chain, service disruption, emotional distress*
 - It's critical that organizations provide regular and honest updates to address the growing anxiety and uncertainty of this situation
- **Don't overpromise** – communicate facts
- **Be transparent** - communicate what you do know
- **Streamline communication** – set a cadence of regular updates
- **Prioritize safety** – communicate safety is top of mind
- Let clients/customers know you are prioritizing staff safety while doing what you can to provide support and services with minimal disruption



Create an Adaptable Communication Playbook

- Know your audiences: *employees, customers, media, vendors, investors, etc.*
 - What is your communication plan and message to each audience?
- Designate a spokesperson and create message approval process
- Be prepared to provide timely updates and answer questions.
- Designate a single email or team of people and provide them with talking points and FAQ.
- Create meaningful communications

Know Your Audiences

Employees:

- Am I getting paid?
- Will I have a job?
- Am I safe coming to work?
- What are you doing to protect me?
- What can I expect?

Clients/Customers:

- Will I still get my products and services?
- Will there be service delays or cancellations?
- Is it safe to do business with you?

Media:

- Are you a good steward of public health?
- How are you keeping your employees and customers safe?
- Are you making decisions in the best interest of your employees and community?

Investors and stakeholders:

- Financial impact of the pandemic
- What is the business plan moving forward?
- How are local and state mandates affecting current and future operations?



Key Messaging

Educate employees on the situation

- What are you doing to keep workplace safe
- Let employees know what to do if they think they are sick
- Inform employees if there is possible exposure
- Reassure employees that you will provide regular and factual updates

Set and manage expectations

- Communicate contingency plans
- Operational changes
- Remote work policies/adaptations
- Self –screening before coming to work

Reduce anxiety among workforce

- Let employees know you are in this with them
- Communicate that the situation is fluid but you will remain transparent

Communicate what you know *right now*

- Don't speculate
- Don't be paralyzed by fear of the unknown

Create messaging that assures clients/customers/partners that your organization is doing all it can to ensure consistent delivery of services they need and expect. If there are delays, substitutions, cancellations – make sure to let them know.



Stay True to Your Brand Promise

- Communication is just as much about what you do as what you say
- This is a time for organizations to stay true to their brand promise
 - Mission
 - Vision
 - Values
- Remember the big picture and who your organization serves
- When a brand's actions align with its core values, it reminds clients/customers and employees that they've selected the right partner



Key Takeaway's

- Focus on your most immediate communication needs and don't make promises about the future
- Communicate regularly with the information you do have
- Remain empathetic
- Remember – this is new territory for many of us and our communications will need to adapt day-by-day
- Keeping your lines of communication open, actionable and transparent will help reduce the anxiety and fears of your workforce

Employee Wellbeing - General

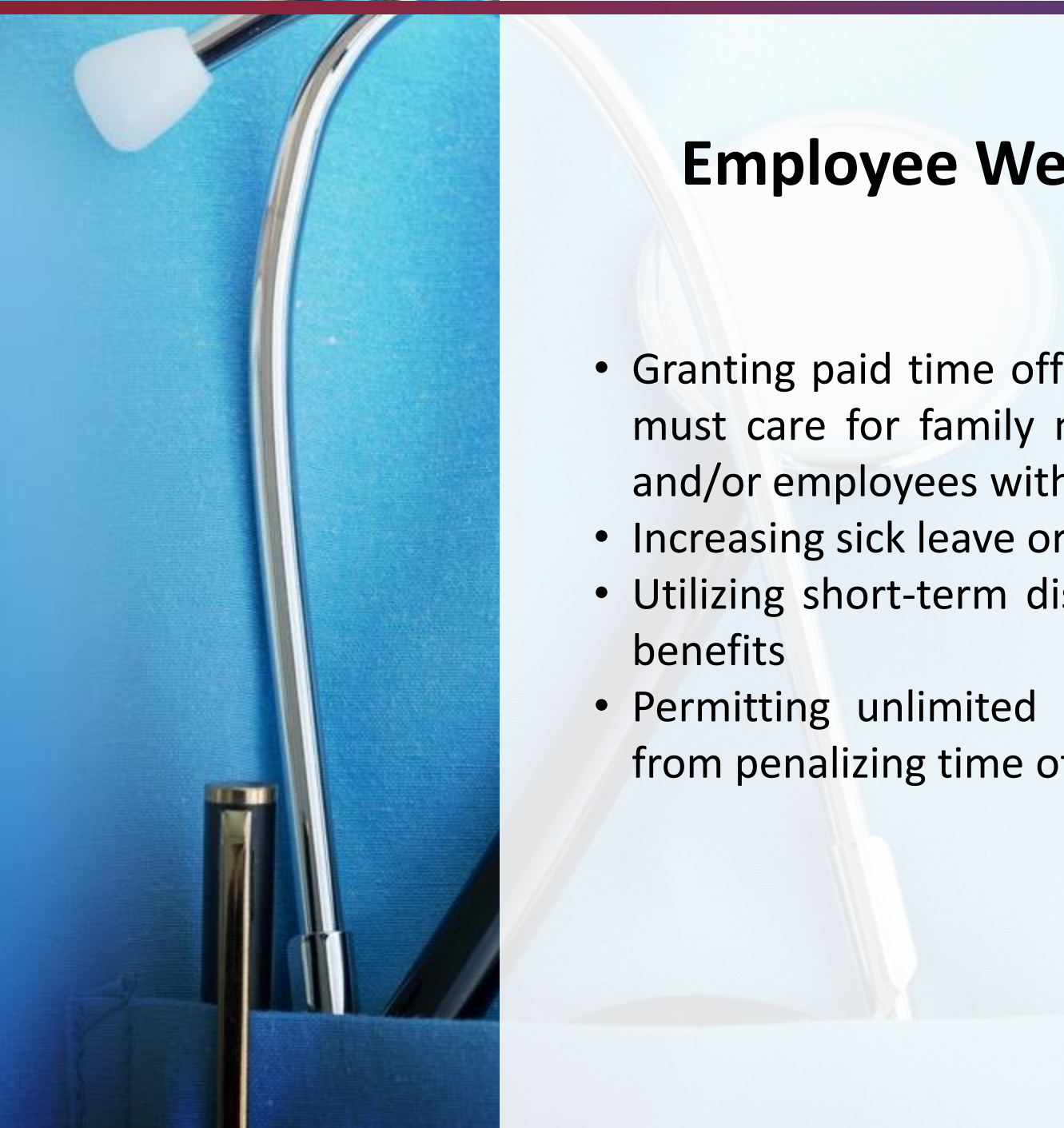
- Providing travel/international SOS (medical and travel security) services
- Advising employees to avoid public transportation
- Advising employees to avoid visiting high-traffic events or locations on personal time





Employee Wellbeing - Workplace

- Mandatory work-from-home or remote work policies where possible
- Closing on-site facilities such as gyms, cafeterias and common areas
- Adjusting schedules due to school closures
- Staggering shifts to help employees avoid busy commutes
- Reconfiguring meeting rooms, break rooms and other common areas to promote social distancing



Employee Wellbeing – Time Off/Sick Days

- Granting paid time off for symptomatic employees, employees who must care for family members who are diagnosed with COVID-19, and/or employees with diagnosed cases of COVID-19
- Increasing sick leave or paid time off for all or on a case-by-case basis
- Utilizing short-term disability, family leave (FMLA) or other existing benefits
- Permitting unlimited unpaid time off without penalty; refraining from penalizing time off of any kind

Employee Wellbeing – Other Benefits

- Making revisions to employee compensation and benefits policies
- Recommending available Employee Assistance Programs (EAPs)
- Reminding employees about mental health services for stress management
- Using back-up care programs, childcare subsidies or other dependent care benefits
- communicating employer-sponsored insurance and other relevant benefits



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Thank You

