

PLUNKETT COONEY  
ATTORNEYS & COUNSELORS AT LAW

## New Challenges in the New Year

A Virtual Seminar for Employers & HR Professionals

Presented by  
Labor & Employment Law Practice Group

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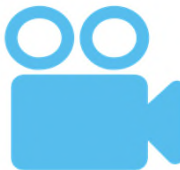
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## Recording Reminder



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## Welcome & Opening Remarks!

- Plenary Session
  - 2020: A long and winding road
  - Where we stand today
  - Primary issues facing employers
  - Best practices
  - Questions and answers
- Breakout Sessions
  - Speech in the workplace vs. wage and hour issues

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## Plenary Panelists



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## The Difference A Year Makes

February 25, 2020



February 25, 2021



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### Snapshot: What We've Worked Through

- March 10** State of Emergency declared in Michigan
- March 23** Stay Home, Stay Safe Order entered
- April 1** Families First Coronavirus Response Act becomes effective
- Oct. 2** Supreme Court invalidates Executive Orders entered after April 3, 2020
- Oct. 14** MIOSHA Issues Emergency Rules to be in effect for six months
- Oct. 22** PA 238 of 2020 becomes effective - mandating certain COVID-related employee protections
- Nov. 15** Updated Gatherings and Face Masks Order entered by MDHHS
- Dec. 29** PA 339 of 2020 becomes effective – amending PA 238 of 2020



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### Where We Are Today

<b>MIOSHA Emergency Rules:</b>	<u>Still in effect</u>
<b>FFCRA:</b>	Leave provisions <u>may</u> be applied with eligible tax benefits through Q1
<b>Executive Orders:</b>	Orders regarding workplace protections <u>invalidated</u>
<b>MDHHS Orders:</b>	<u>Still in effect</u>
<b>PA 339 of 2020:</b>	<u>Still in effect</u>
<b>OSHA Rules:</b>	<u>Applicable</u>
<b>ADA/FMLA:</b>	<u>May Be Applicable</u>
<b>PMLA:</b>	<u>May Be Applicable</u>



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### Primary Issues Employer Face

- Confusion regarding MIOSHA Emergency Rules as compared to MDHHS orders
- "Remote work" – who can do it and when?
- Public policy discharge/FFCRA retaliation claims
- Lack of knowledge regarding Michigan law (PA 339) and workplace protections
- Failure to engage in ADA interactive process



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### MIOSHA Emergency Rules

- Issued on Oct. 14, 2020 and in effect through April 14, 2021
- Available online at: [https://www.michigan.gov/documents/leo/Final\\_MIOSHA\\_Rules\\_705164\\_7.pdf](https://www.michigan.gov/documents/leo/Final_MIOSHA_Rules_705164_7.pdf)
- FAQs answered at: [https://www.michigan.gov/leo/0,5863,7-336-100207\\_103271---,00.html](https://www.michigan.gov/leo/0,5863,7-336-100207_103271---,00.html)
- Incorporates many of the requirements of the invalidated executive orders

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### Common MIOSHA Questions

- Is our COVID-19 Preparedness and Response Plan compliant?
- How do we document our exposure analysis and what information should we include?
- What is our risk if we do not have a COVID-19 Preparedness and Response Plan?
  - Note: MIOSHA has issued several citations pursuant to Emergency Rules
    - Typically, plan violation is coupled with other related violations.

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### MOST Common MIOSHA Issue

- Are we required to allow our employees to work remotely / can we bring everyone back now?
- Rule Implicated = Rule 5(8)
  - **The employer shall create a policy prohibiting in-person work for employees to the extent that their work activities can feasibly be completed remotely.**
- MIOSHA increased scrutiny of policies to ensure compliance with that rule in November 2020.
- Publishes cases where failure to have the plan documented has been cited as a violation (in addition with other violations)

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## Retaliation Claims

- Trend developing:
  - Employees alleging they have been retaliated against because:
    - They did not come to work when they had COVID symptoms/after close contact with someone who did.
    - They complained about workplace safety policies.
    - They complied with a provision of an executive order or Michigan law.
- Applicable federal and state law contain anti-retaliation provisions.

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## FFCRA Retaliation

- General concept: employee asked for leave or did take leave that is considered by Emergency Paid Sick Leave Act and/or Emergency Family and Medical Leave Act and was subsequently demoted/laid off/terminated/etc.
- Employees pursuing a private action against their employers to seek remedies under the FFCRA same remedies as allowed under FLSA
  - Lost wages
  - Liquidated damages
  - Attorney fees
- Individual managers may be sued under FFCRA.

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## FFCRA Retaliation

- No requirement that employees exhaust an administrative remedy before filing a federal lawsuit
- Often involves “close temporal proximity” given nature of the claim
- Training and documentation are critical to limit exposure.
  - FFCRA in-house “expert”
  - Train your managers!
  - Document decision-making process/reasoning
  - Beware “red flags” when taking adverse employment actions.

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**PA 339 of 2020 – Now What?**

- An act to prohibit an employer from taking certain actions against an employee who does not report to work under certain circumstances related to COVID-19
- To prohibit an employee from reporting to work under certain circumstances related to COVID-19
- To prohibit discrimination and retaliation for engaging in certain activities
- To provide remedies

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**PA 339 of 2020 – Positive Test**

- Employee who tests **positive for COVID -19**
  - Must **not** report to work until they are advised by health care provider or public health professional that they have completed their isolation period; OR all of the four following conditions are met:
    - If employee has a fever, 24 hours have passed since fever has stopped without use of fever-reducing medication.
    - Isolation period (per CDC guidelines) has passed.
    - Employee’s principal symptoms of COVID-19 have improved.
    - If employee has been advised by a health care provider or public health professional to remain isolated, the employee is no longer subject to such advisement.

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**PA 339 of 2020 - Symptomatic**

- If employee displays principal symptoms of COVID-19 but has not yet tested positive, that employee shall not report to work until **ONE** of the following conditions is met:
  - A negative diagnostic test result has been received.
  - All of the following apply:
    - Isolation period has passed since the principal symptoms of COVID-19 started.
    - Employee’s principal symptoms of COVID-19 have improved.
    - If employee had fever, 24 hours have passed since fever subsided without use of fever-reducing medication.

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**PA 339 of 2020 - FAQs**

- What is applicable “quarantine period?”
- How many symptoms does employee need to be experiencing to have protection under this law?
- What is a “diagnostic test?”
- What are the exceptions to the “close contact” rule?
- What if employee drags process out – i.e., waits several days to get tested, continues to complain about symptoms, has multiple cases of “exposure,” etc.?



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**PA 339 of 2020 – Close Contact**

- With certain exceptions, employees who have close contact with an individual who tests positive for COVID-19 shall not report to work until **ONE** of the following conditions is met:
  - Quarantine period has passed since employee last had close contact with individual.
  - Employee is advised by health care provider or public health professional that they have completed their period of quarantine.



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**Don't Forget: ADA & FMLA Implications**

- Americans with Disability Act (ADA)
  - Obligated to provide reasonable accommodation to qualified individual with disability
- Most common COVID-related issues
  - Psychiatric conditions
  - Autoimmune conditions
  - Particular susceptibility
- Inability to comply with COVID-19 policies
  - Wearing masks
  - Working from home



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**ADA FAQs**

- What do we do if employee tells us he cannot come to work because he has a particular vulnerability to COVID-19?
- What if employee cannot wear mask because of pre-existing medical condition?
- What if employee reports that she is having trouble working remotely, as our company is requiring, due to major depressive disorder?
- What if we need to layoff or terminate employee on ADA leave due to impact of COVID-19 on our business?

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**Mandatory/Vaccination Incentive Programs**

- December 2020 – EEOC issued guidance: “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws”
- Includes section providing information regarding how COVID-19 vaccination interacts with legal requirements of ADA, Title VII, and GINA
- Key takeaways:
  - Required to engage in interactive process to determine if reasonable accommodations are required for a disability or religious belief
  - Should avoid pre-screening questionnaires

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**Potential FMLA Implications**

- Emergency FMLA Expansion Act sunset on Dec. 31, 2020 (employer may choose to extend through Q1 2021)
- Traditional FMLA analysis applies for other than child/school issue
- Do not discount COVID as never triggering FMLA protections
- Do not discount COVID-related mental health concerns as not triggering FMLA protections
- Important to provide certification paperwork and follow standard FMLA process

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**Potential PMLA Implications**

- Potentially relevant reasons for eligible employees to take leave:
  - Employee's mental or physical illness, injury or health condition; medical diagnosis, care or treatment of eligible employee's mental or physical illness, injury or health condition; or preventative medical care for eligible employee.
  - Employee's family member's mental or physical illness, injury or health condition; medical diagnosis, care or treatment of eligible employee's family member's mental or physical illness, injury or health condition; or preventative medical care for family member of eligible employee.

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**Potential PMLA Implications**

- For closure of employee's primary workplace by order of a public official due to public health emergency.
- For employee's need to care for child whose school or place of care has been closed by order of a public official due to public health emergency.
- If it has been determined by health authorities having jurisdiction or by a health care provider that employee's or employee's family member's presence in community would jeopardize health of others because of employee's or family member's exposure to communicable disease, whether or not employee or family member has actually contracted communicable disease.



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**General "State of the Pandemic" FAQs**

- What exposure do we have if employee contracts COVID-19 while at work?
- How do we handle employees who seem to be manipulating various rules and regulations?
- How should we address "serial complainers" who now lodge repeated COVID-19 complaints or "concerns?"
- Do you think federal government will pass legislation with additional workplace protections?
- What is triggering MIOSHA investigations?
- How often should we update our COVID-19 policies?



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## Questions?




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## Breakout Rooms

**Breakout 1:**  
**Free Speech in the Workplace**

**Breakout 2:**  
**Wage & Hour Issues**

Breakouts – 45 minutes

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# Breakout Highlights

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# Questions?

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# Surveys

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- They will be emailed to you following this event.
- Please take the time to fill them out.
- We really do appreciate your responses.



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## Today's Event


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Events

**Register Now - Virtual Employment Law Seminar**


2021: New Challenges in the New Year  
02/25/2021 | 9am to Noon

Share




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A Virtual Seminar for Employers & HR Professionals

New Challenges in the New Year  
A Virtual Seminar for Employers & HR Professionals  
Date: February 25, 2021  
Time: 9am to Noon



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## The Sophisticated Employer Blog

PLUNKETT COONEY

Home About Services Contact Careers [www.plunkettcooney.com](http://www.plunkettcooney.com)

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**Important COVID-19 Updates for Michigan Employers**

Michigan amended its COVID-19 laws to provide infection liability protections for business owners and affirmative defenses for employers responding to employee retaliation claims, as well as to address other important changes.

[Continue Reading](#)



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Thank You For Attending!



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