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## **FEW Washington Update April 15-30, 2020**

***The House is out - The Senate Returns May 4, 2020***

### **Congress**

After passage and enactment of the “Phase 3.5” measure on April 23, lawmakers have left Washington. House leadership has reversed course and will not bring the chamber back into session next week with House Majority Leader Steny Hoyer (D-Md.) making the announcement Tuesday morning, citing advice from the Capitol physician and a continuing major increase in coronavirus cases in Washington, D.C.

Senators say as of now they expect to return to Washington, D.C., the week of Monday, May 4. If senators return on Monday, they are expected to potentially stay in Washington through May 22 before leaving for a one-week Memorial Day recess under the Senate's previously announced schedule.

Meanwhile, Congress is continuing to weigh various potential policy items that could be included in the next round of COVID-19 response legislation. Democratic leadership has outlined several of their priorities for the “Phase IV” legislation, including: (1) addressing additional health care needs and bolstering health infrastructure; (2) more funding for unemployment insurance and another round of direct payments; (3) stabilizing the U.S. postal service; (4) additional funding for state and local governments and election support; (5) strengthened oversight and protections for inspector generals; and (6) “technology modernization.”

## **FEW Washington Update – April 15-30, 2020 Tier I**

### **Updated EEOC Guidelines**

The EEOC released guidance for employers trying to navigate the Americans with Disabilities Act and the Rehabilitation Act in the COVID-19 era: [What You Should Know about the ADA, the Rehabilitation Act, and COVID-19](#). The guidance gives employers practical Q&A-style guidance on how they can navigate the safety concerns associated with COVID-19 while staying in compliance with the federal disability discrimination laws. The guidance has been updated by the EEOC several times since it was issued in March. On April 9 and 17, 2020, in particular, the EEOC added significantly to its discussion of requests for reasonable accommodation during the COVID-19 emergency, pandemic-related harassment issues, and issues that could arise as employees are furloughed or laid off and as they return to work.

### **Reasonable Accommodation Guidance**

The EEOC's updated guidance adds several Q&A points regarding requests for reasonable accommodations. Some of the most significant points include the following:

- For individuals who have a pre-existing condition that puts them at higher risk from COVID-19, the EEOC recommends several low-cost changes to the work environment, such as designating one-way aisles, using plexiglass, tables, or other barriers to ensure minimum distances between customers and coworkers, or other accommodations that reduce chances of exposure. According to the EEOC, flexibility by employers and employees is key. Temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment are other possible solutions recommended by the EEOC.
- The EEOC reminds employers that employees' preexisting mental illnesses or disorders can be exacerbated by the circumstances brought on by the health emergency, meaning that some individuals may now be in need of reasonable accommodations that had not been necessary before. Moreover, some employees may require different accommodations to deal with changed work situations, such as an employee who may need a different accommodation so he or she can effectively work from home.
- The EEOC also opined that employers may still request information from an employee to determine if a medical condition is a disability and that they may still engage in the interactive process to see whether a disability requires an accommodation. Employers may also choose to shorten or forego the interactive process and simply grant an employee's accommodation on a temporary basis. Employers are encouraged to be proactive; they may ask employees with disabilities to request accommodations and engage in the interactive process for

accommodations that employees believe they may need when the workplace re-opens or they return to work.

- Employers are also advised that they are not required to provide a reasonable accommodation that would pose an “undue hardship” on the employer. In some cases, the pandemic may have changed what counts as an undue hardship for an employer. In particular, economic concerns brought on by the pandemic are relevant to determining what counts as a significant expense. According to the EEOC, “the sudden loss of some or all of an employer’s income stream because of this pandemic is a relevant consideration.” The EEOC cautions, however, that this does not mean that an employer can reject any accommodation that costs money: “an employer must weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic.”

### **Pandemic-Related Harassment Guidance**

The EEOC’s updated guidance also points employers to resources and tips they can use to prevent harassment that might arise as a result of the pandemic. Among other things, the EEOC recommends that employers explicitly communicate to their employees that fear of the pandemic should not be misdirected at individuals because of their national origin, race, or other protected characteristic. The EEOC also recommends that employers advise supervisors and managers of their roles in watching for, stopping, and reporting any harassment or other discrimination. Employers can also make it clear that they will continue to immediately review any allegations of harassment or discrimination and take appropriate action.

### **Guidance Relating To Furloughs, Lay-Offs, and Returning To Work**

The EEOC had little to say to employers who are forced to consider layoffs or furloughs of employees, beyond simply reminding them about its guidance regarding waivers of discrimination claims in severance agreements, which can be found [here](#).

With respect to returning employees, however, the EEOC reiterated that the ADA allows employers to make disability-related inquiries and to conduct medical exams if they are job-related and consistent with business necessity. That includes employees who might have a medical condition that would pose a direct threat to health or safety.

Determinations as to whether a medical condition is a direct threat should be based on objective medical evidence, such as guidance from the CDC or other public health authority. According to the EEOC, “employers will be acting consistent with the ADA as long as any screening implemented is consistent with advice from the CDC and public health authorities for that type of workplace at that time.” That can include taking employees’ temperatures and inquiring about symptoms for all employees who enter the workplace because those actions are consistent with CDC guidance.

Finally, the EEOC has stated that it is permissible for employers to require returning workers to wear personal protective gear and observe infection control practices (including social distancing practices, among other things), provided that they continue

to engage in the interactive process with any employee who requests an accommodation regarding those requirements. Employers' requirements to discuss an employee's requests and determine undue hardship are not lifted even for these COVID-19-related precautions.

### **Implications for Employers**

These are just some of the important points clarified by the EEOC in this updated guidance. The EEOC continues to update this guidance on a rolling basis as it attempts to respond to this fast-moving crisis. It is a valuable resource for employers who every day are finding themselves encountering situations that have never or only rarely been seen before in the American workplace.

We encourage all employers to review in detail the entirety of the EEOC's guidance [here](#).

See source [here](#).

## **FEW Washington Update – April 15-30, 2020 Tier II**

### **Federal Employee Telework Policy:**

Virginia and Maryland Democratic senators pressed the federal government to give a consistent telework policy for federal employees during COVID-19.

Sens. Tim Kaine and Mark Warner of Virginia, and Sens. Chris Van Hollen and Benjamin Cardin of Maryland, joined an effort led by Sen. Elizabeth Warren (D-Mass.) to challenge the new guidelines that appear to encourage returning federal workers to their offices.

The senators pointed to a [memo issued last week](#), on April 20, by the Office of Management and Budget and the Office of Personnel Management that stated, "Agencies are encouraged to allow Federal employees and contractors to return to the office in low-risk areas."

"Public health experts have expressed [serious concerns](#) about these guidelines and warned that there is still not sufficient testing, tracing, or personal protective equipment to know where, and when it is safe to relax social distancing and quarantine guidelines," the senators wrote.

The senators cited reports that some federal workers were denied requests to telework, even when their jobs could be done outside the office. Further, they added, there is no uniform policy for reporting COVID-19 cases.

Federal workers themselves have also pushed back against the suggestion that workers should be encouraged to return to their offices in some areas.

The American Federation of Government Employees that represents 700,000 federal and D.C. government workers recommends [six preconditions](#) that should be met prior to returning to offices.

See original article [here](#).

### **Hazard Pay and Workplace Protections:**

More than 150 House Democrats, led by Reps. Bonnie Watson Coleman of New Jersey, Mark Pocan of Wisconsin, and Salud Carbajal of California, urged congressional leadership in a letter on Monday, April 27, to include worker safety provisions protecting front-line federal workers in the upcoming coronavirus response legislation.

In [the letter](#), which was addressed to the House Speaker and Minority Leader called for an emergency temporary standard from the Occupational Safety and Health Administration, or OSHA, to protect essential federal workers who face elevated risk of exposure to Covid-19 with provisions that include increased hazard pay, parity in union bargaining, and expanded telework.

OSHA, an agency of the Labor Department, recently put out guidelines detailing steps workplaces can take in response to the pandemic — but the agency's recommendations aren't mandatory or being enforced. An emergency temporary standard, lawmakers say, would make the worker protections enforceable.

For the last several rounds of negotiations over coronavirus relief, lawmakers have advocated for expanding these protections to at-risk workers, including health care providers and support personnel at the Department of Veterans Affairs, employees at the Federal Emergency Management Agency, and TSA agents.

In an interview with The Intercept, Watson Coleman noted that there are thousands of federal employees not covered under Title 5 of the U.S. Code, including Transportation Security Administration officers and certain Federal Aviation Administration employees, who don't receive many of the basic workplace rights given to the majority of the federal workforce.

As part of the demands outlined in the letter, members are calling for the Rights for Transportation Security Officers Act (H.R. 1140) — which passed the House in March with *bipartisan* support and would give TSA workers collective bargaining rights — to be

included in CARES 2, the next federal stimulus package. “But it hasn’t been taken up by the Senate.”

See article [here](#).

## **FEW Washington Update – April 15-30, 2020 Tier III**

### **Violence Against Women Act:**

Stay-at-home orders to help contain the spread of the novel coronavirus have spurred fears about a wave of domestic violence, but the Violence Against Women Act, a key federal law on the matter, lapsed more than a year ago.

First approved in 1994, the Violence Against Women Act instituted a federal framework and funding for a host of programs dedicated to helping victims of sexual assault, domestic violence and other crimes against women.

Article source [here](#).

*FEW receives information from the following sources and contacts: Roll Call, The Hill, The Washington Times, The Intercept, DCist, JDSupra, CNN and Newsweek.*