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Labor & Employment Law

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ADA Permits Employers to Require Medical Examinations for Problematic Behavior

BY FIONA W. ONG

Two federal appellate courts in May 2020 affirmed the right of employers under the Americans with Disabilities Act to require a medical examination to assess an employee's fitness for duty based upon troubling conduct.

In *Johnson v. Old Dominion University*,

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Cities Legislate Employee Rights in Response to COVID-19

BY JULIE TRESTER & JEREMY GLENN

Since COVID-19 first reared its ugly head in the U.S. earlier this year, cities across America have played a significant role in responding to the public health crisis. Among other things, city governments have issued stay-at-home orders and implemented protective face-covering requirements. Beyond triggering these measures directed at the general public, COVID-19 is also leading to municipal legislation in the employment context. While some changes may be temporary, others will not. The impact of the crisis on employee rights could be substantial.

Mandatory Scheduling Ordinances

Even before COVID-19 struck, a number of municipalities were taking steps to enact fair scheduling ordinances to give employees some certainty about their work schedules. In general, these measures

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ADA Permits Employers to Require Medical Examinations for Problematic Behavior

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the U.S. Court of Appeals for the 4th Circuit found that the employer had a basis for requiring the employee to undergo a fitness for duty examination based on his increasing inability to communicate and his "adversarial and erratic behavior," as demonstrated by the excessive number of meritless grievances and document requests that he filed, and his interactions with his manager and co-workers that caused them to fear that he would harm them. Because he refused to undergo the examination on four separate occasions, he was disciplined and then terminated from employment.

In *Lopez-Lopez v. The Robinson School*, the U.S. Court of Appeals for the 1st Circuit also upheld the employer's requirement that the employee undergo a medical examination and obtain treatment following a meeting to discuss the teacher's inappropriate classroom behavior, during which she had a breakdown that resulted in her crying on the floor and threatening suicide.

In both cases, the courts found that the examinations met the standard under the ADA of being job-related and consistent with business necessity, as there was a reasonable basis – Johnson's impaired communications skills and Lopez's breakdown and suicidal statements – to believe that the individuals in each situation were unable to perform their essential job functions. As the 1st Circuit stated, "requiring medical examinations may be justified based on business necessity where there is a basis to believe that the employee's ability to perform her job may be impaired or the employee presents a troubling behavior that would impact the work environment."■

Cities Legislate Employee Rights in Response to COVID-19

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require covered employers to give covered employees a certain amount of advance notice about when they are scheduled to work. In some cases, changes to a schedule after the notice period has expired will result in affected employees being awarded "predictability pay," a premium designed to compensate them for an untimely schedule change.

These fair scheduling ordinances are likely to gain more traction in light of the pandemic. One consequence of COVID-19 is that it has magnified how difficult it is to juggle work and family when childcare options are limited. This has already brought into the spotlight issues that hourly employees face when their schedules change with little notice and, among other things, they struggle to find childcare. For this reason, even more local governments are expected to enact scheduling ordinances in the future.

On the other hand, while in the midst of the crisis, some municipal governments have actually taken temporary steps to relax their fair scheduling ordinances. For example, the City of Philadelphia has put "on hold" the requirement of premium pay under the Philadelphia Fair Workweek Law if a shift is cancelled due to COVID-19.[1] Likewise, the Chicago Business Affairs and Consumer Protection Department (the "CBACPD") recently clarified that scheduling changes made because of the COVID-19 pandemic need not comply with the requirements outlined in Chicago's Fair Workweek Ordinance (the "Chicago FWO").[2] While this may seem a welcome development, employers are cautioned about relying on this exemption, which

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only applies when the schedule change is required because the pandemic has caused the employer to "materially change its operating hours, operating plan, or the goods or services provided …."

The current public health crisis has also resulted in a reprieve for employers with respect to private employee lawsuits under the Chicago FWO. With the July 1 deadline looming and most businesses still closed or operating at a reduced capacity, the City Council amended the ordinance to delay the filing of private employee lawsuits until January 1, 2021. However, the amendment did not otherwise change the effective date of the ordinance, meaning that the City's Office of Labor Standards within the CBACPD will begin enforcement as planned on July 1.[3]

Unfortunately, while employers might applaud this temporary reprieve from employee lawsuits, the proposed amendment does nothing to delay the ordinance's most exacting requirements. This is an ordinance with teeth. As of July 1st, the CBACPD will have the power to investigate violations of the Chicago FWO and levy fines of between $300 and $500 per day, per employee. Thus, a covered employer who fails to provide appropriate scheduling notice for ten of its employees for a single workweek (Monday-Friday) could be subject to a fine of up to $25,000.[4]

Anti-Retaliation/Paid Sick Leave Ordinances

Employers should also expect to see municipalities take steps to enact or expand paid sick leave requirements and prohibit retaliation against employees because they take time off as a result of COVID-19. At an emergency meeting in late March 2020, the Los Angeles City Council approved an ordinance that required employers in LA with over 500 employees to provide the emergency paid sick leave and expanded family medical leave that was required of smaller employers under the Families First Coronavirus Response Act. The ordinance was later supplanted by an Executive Order[5] issued by Mayor Eric Garcetti that – while expanding paid sick leave – attempted to strike a balance between the need to protect employees and the need to ensure that the businesses who employ them are able to function. Other municipalities, including the City of San Jose, have passed ordinances similar to that passed by the LA City Council.[6]

Chicago likewise has amended its Paid Sick Leave Ordinance ("PSLO"), expanding it to cover some individuals who were removed from coverage under a previous amendment passed in December of 2019. Attributing the need for the changes to a "scrivener's error," the more recent amendment – which was passed on May 20, 2020 and will take effect on June 1 – extends paid sick leave to those who work as outside sales representatives, members of religious corporations or organizations, and student-workers of accredited colleges and universities in Chicago.

Chicago has also adopted an anti-retaliation provision that protects employees against retaliation for taking time off in response to COVID-19. The ordinance provides that an employer may not take adverse action against a covered employee for obeying orders requiring them to stay at home in order to: (1) minimize the transmission of COVID-19; (2) recuperate from symptoms of the virus or the virus itself; (3) obey a quarantine order issued to the covered employee; (4) comply with an isolation order issued to the covered employee; and (5) obey an order issued by the Commissioner of Health regarding the duties of hospitals or other congregate facilities.[7]

For purposes of the ordinance, the employee is protected if he or she is complying with orders from the Mayor of Chicago, the State of Illinois, the Chicago Department of Public Health or – in the case of subparagraphs (2) through (4) – the employee's treating physician. In addition, an employer cannot take an adverse action against a covered employee because he or she is caring for an individual subject to subparagraphs (1) through (3).

Penalties for violating the ordinance are steep and – like the enforcement provisions of the Chicago FWO – include both agency action and private rights of action by affected employees. In a private civil action, employees can obtain reinstatement to the same or an equivalent position, damages equal to three times the wages lost as a result of the retaliatory action, other actual damages, and attorneys' fees and costs.

Right of Recall Ordinances

In anticipation of businesses eventually reopening, some municipalities are passing ordinances that provide laid-off employees with a right of recall. For example, on April 29, 2020, LA passed a recall ordinance (signed by Mayor Garcetti) that applies to a limited group of businesses, including airports, commercial property employers who employ 25 or more janitorial, maintenance, or security employees, event centers, and hotels who have 50 or more guestrooms or gross receipts exceeding $5 million in 2019, as well as their on-site restaurant facilities.[8]

The ordinance gives recall rights to certain laid-off workers, meaning a person who in a particular week performs at least two hours of work within the city's geographical boundaries, worked for the employer in question for six months or more, and who was most recently separated from active employment on or after March 4, 2020 because of a reduction in work force, lack of business, or some other non-disciplinary reason. The ordinance provides a rebuttable presumption that any termination after that date was due to a non-disciplinary reason. It does not require recall of managers, supervisors, confidential employees or persons whose primary duty is sponsorship sales for an event center.

Employers must recall "Laid Off Worker[s]" who are "qualified" when positions become available in the order of priority set forth in the ordinance. An employee is qualified if he or she "held the same or similar position" at the time of his or her most recent separation or "is or can be qualified for the position with the same training that would be provided to a new worker hired into that position." If more than one worker is entitled to preference for a position, the employer is required to offer it to the employee with the greatest length of service, with length of service at the particular employment site being the tiebreaker.

If the employer fails to comply, the employee may – after providing notice and an opportunity to cure the violation – commence a civil suit. In addition to

reinstatement, the employee may seek to recover the greater of his or her actual damages or $1,000. Punitive damages are also available. A prevailing employee can recover his or her attorneys' fees, as can a prevailing employer who persuades the Court that the employee's lawsuit was frivolous.

Employers Must Monitor and Adapt to Greater Municipal Regulation

The COVID-19 pandemic brought into sharp relief the vulnerability of businesses that serve the public and the employees who earn their paychecks providing that service. State and local governments played a significant role in shelter-in-place or stay-at-home orders, which led to millions of employees being furloughed or laid off. Now, as the stay-at-home orders begin to ease, local governments are creating significant new employee rights. The impact of more regulation creates additional challenges for businesses as they strive to call back employees and resume customer services. Only time will tell if the local government action in this area will help or hinder businesses attempting to return to pre-COVID levels of activity and employment.

Either way, employers must stay abreast of developments at the municipal level as city governments take a greater entrée into labor and employment issues. The following actions are recommended:

- Pay special attention to existing scheduling practices, as well as employee communications about schedule changes. Develop a system of planning, notifying, and documenting. Mandatory scheduling laws in the era of COVID-19 pose unique challenges that need to be identified before they result in lawsuits or government investigations.
- Engage in direct discussions with any employee who is seeking time off or an accommodation due to specific impacts of COVID-19. Anti-retaliation laws such as the new Chicago ordinance raise the stakes if an employer is found to have unlawfully disciplined or discharged an employee who took leave for valid reasons related to COVID-19.
- Make decisions about layoffs, furloughs and return-to-work offers with an eye toward federal, state, and now, more than ever, local laws that impact recall and hiring decisions.
- Consult with experienced labor and employment lawyers when considering how to respond to an employee policy violation to reduce the risk of violating a local ordinance and exposing the business to significant monetary damages.■

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1. https://www.phila.gov/2020-04-21-fair-workweek-during-the-covid-19-pandemic/.
2. https://www.chicago.gov/city/en/depts/bacp/supp_info/fairworkweek.html.
3. https://chicago.legistar.com/LegislationDetail.aspx?ID=4456753&GUID=605DB29F-AD44-4AC5-A062-8B8276258132&Options=Advanced&Search=.
4. https://www.chicago.gov/city/en/depts/bacp/supp_info/fairworkweek.html.
5. https://www.lamayor.org/sites/g/files/wph446/f/page/file/20200519%20Mayor%20Public%20Order%20SUPPLEMENTAL%20PAID%20SICK%20LEAVE%20Revised.pdf.
6. https://www.sanjoseca.gov/your-government/departments-offices/public-works/labor-compliance/urgency-covid-19-paid-sick-leave-ordinance.
7. https://chicago.legistar.com/LegislationDetail.aspx?ID=4424788&GUID=200E1B58-E5D5-4B5C-B14C-294DAAACA6FC&Options=Advanced&Search=.
8. http://clkrep.lacity.org/onlinedocs/2020/20-0147-S15_ORD_186602_06-14-2020.pdf.

Employment Law Claims Arising Out of the COVID-19 Pandemic

BY DAVID FISH

The workplace has been dramatically changed. As we transition out of the blindsiding-shock phase of the COVID-19 pandemic (where, for example, restaurant workers were terminated because local authorities shut them down on a few days' notice) and we enter the "new normal", at least for the foreseeable future, we are starting to see employers make illegal decisions such as cutting those employees who are exercising their legal rights, using COVID-19 as a pretext for an illegal termination, and failing to properly navigate the new legislation being passed on the federal, state, and local levels.

Here are the types of employment cases that will result because of the COVID-19/ Coronavirus Pandemic:

1. Health & Safety Retaliation Claims

We have already seen, and we predict we will continue to see, many retaliation claims filed where workers raise COVID-19 related health and/or safety complaints. A typical situation involves an employee raising some type of concern about the safety of the workplace. These concerns can be things relating to the lack of personal protective equipment, an employer's failure to follow social distancing guidelines, or an employee being forced to work next to someone who has a bad cough (and potentially

COVID-19).

Employees at this time are scared because they're worried about catching COVID-19. Imagine if you had to sit in a cubicle next to the guy who kept coughing and you had a newborn at home and a spouse with health conditions that make her more susceptible to dying from COVID-19. Employees are, understandably, worried about getting sick. They are also scared about bringing an infection home and infecting their family members.

As a result of this fear, the new water-cooler chat inevitably turns to health and safety concerns. In every crowd, there is usually an employee who speaks up and starts asking about things like working from home, having the company buy more PPE, or allowing other accommodations. Unfortunately, making a workplace safe costs money and, in this economy, some employers are more keen on saving than spending. This creates tension between worker rights and employer rights.

Management often does not like it when people complain. What can unfortunately happen is that the employee who raises the concerns gets fired. Terminating employees for complaining about health and safety issues is often illegal and, understandably, there are a number of different laws that protect workers in this arena.

When our clients have engaged in concerted activities with other workers concerning safety concerns (i.e., speaking up at a safety meeting), we suggest pursuing claims with the National Labor Relations Board (NLRB).

While I have several criticisms about the NLRB, one thing I cannot complain about is how quickly it responds. In the last two NLRB retaliation claims that we have filed since the pandemic, our clients have had their NLRB retaliation interviews scheduled in less than three business days from the day we filed the complaint and the interviews were conducted telephonically. Remember, contrary to popular belief, the National Labor Relations Act protects many non-union employees and can allow employees to get reinstated to their prior positions and receive back wages. As such, I anticipate a substantial increase in NLRB claims.

I also foresee that OSHA whistleblower litigation will substantially increase. Although not as quick as the lightning fast-NLRB process, OSHA provides another forum for resolving health and safety-related complaints. OSHA has a very easy online whistleblower complaint form. As it is so easy to file, and workers are scared right now about health and safety, we anticipate a number of OSHA claims.

Over the next few years, many retaliatory discharge claims arising out of COVID-19 issues will work their way through the courts. In some jurisdictions, the best way to maximize damages for a retaliation claim based upon health and safety issues is by filing a retaliatory discharge claim in court. The downside of this method is that the process takes a long time; the upside is juries do not like to see employees being fired for complaining about health and safety issues. Also, in some jurisdictions (like those where I practice), punitive damages are allowed. Multi-million jury awards are not uncommon for retaliation claims.

Finally, one nice thing about retaliation claims based on health and safety issues is that you can file in multiple forums. For example, you can file with the NLRB and also proceed in court. This allows you to have the benefit of a governmental investigation of your claims which may provide you with a head-start in court.

2. False Claims/Qui Tam Claims

In the near future, there will be an explosion in False Claims and Qui Tam cases. The federal government is quickly spending over $2 trillion dollars. State and local governments are also putting out money. Billions are being spent on the care of those who have contracted COVID-19. The Department of Justice has prioritized the investigation of COVID-19 related fraud and directed local offices to appoint a Coronavirus Coordinator.

As a lawyer representing workers, I am keeping an eye out for this abuse. Employees often know the dirt on what their employers are doing and are eager to share it when they are fired. This makes them prime candidates to be a whistleblower to expose fraud on the government. For example, is an employer taking paycheck protection money and doing something with it other than paying employees defrauding the government? Are physicians and health care providers improperly billing for medical care? Are the companies that are being contracted to provide essential equipment during the pandemic lying to boost up their profits?

3. Workers Compensation Claims

There will be a significant number of workers compensation claims filed as a result of employees becoming sick or dying from COVID-19. An example of such a claim is a health care aide at a nursing home who dies or becomes sick from COVID-19 exposure in the workplace.

Work-related injuries typically must go into a workers' compensation venue and not court. You may have heard about the highly publicized Wal-Mart case where a wrongful death claim was filed by the estate of a COVID-19 victim. See *Evans v. Wal-Mart, Inc.*, 20L2928, Cook County, Illinois. We do not think this case stands a chance of success against Wal-Mart; such claims are typically filed before the Workers Compensation Commission. As such, while the Wal-Mart case was highly publicized, we don't think there are likely to be many similar cases filed.

Typically, in a workers' compensation claim, a successful claim requires an injury in the line of duty. Usually, this is simple: if a worker has a finger taken off while operating a press at work, that is the type of claim that is clearly in the line of duty. However, showing this is not an easy task in the case of COVID-19; for example, how would an employee be able to prove that she was infected at work as opposed to while shopping at the grocery store?

The Workers' Compensation Commission announced that first responders and essential front-line workers "will be rebuttably presumed to be causally connected to the hazards or exposures of the petitioner's COVID-19 First Responder or Front-Line Worker employment."[1] In English, this means first responders and front-line workers will likely will be able to recover workers' compensation if they contract COVID-19. But, this was challenged in Court and was dropped; in other words, the presumption is no longer with us. New legislation is pending.

The interesting question will be how to value these claims. I think it will be somewhat hard to value non-death claims. For example, if someone is sick but recovers in two weeks without any permanent injuries or serious hospitalizations, what is the value of their claim? I anticipate that the most common claim will be death claims, i.e., people who died from their COVID-19 exposure. And, unfortunately, there will be many such fallen heroes.

4. CARES Act Claims/Disability Related Claims

There will be a significant number of cases brought under the Coronavirus Aid, Relief, and Economic Security (CARES) Act and related emergency legislation. In addition, given the panic in the workplace by those with symptoms that make them more susceptible to dying from COVID, there will be an uptick in disability-related claims under the Americans with Disabilities Act and related legislation. With this said, we think that the majority of these claims are likely to be brought on an individual/non-class basis.

The Family and Medical Leave Act (FMLA) now allows an eligible employee to take FMLA leave on an expanded basis, *i.e.*, to care for a child whose school is closed or unavailable due to the COVID-19 pandemic. Like the FMLA, the Emergency Paid Sick Leave Act (EPSLA), includes anti-retaliation and anti-discrimination provisions. It incorporates the Fair Labor Standards Act (FLSA) by allowing for liquidated damages and attorneys' fees.

Many employers are very reasonable when it comes to COVID-19 related accommodations. Where we tend to find the highest level of claims is for those employees who are "below-average" employees. While the employer may have been willing to put up with these employees under normal circumstances, now that the employee has the "audacity" to ask for an accommodation (that the law allows), that employee may be looking at termination. We anticipate the future issue in many of these cases will be whether the employee would have ended up being terminated anyway, or whether they were fired because he/she requested some type of leave or accommodation. In many respects, I believe that the next few years of employment litigation will be similar to what it was like after the tragic 9-11 attacks: some employers will claim that these employees would have ultimately been fired (anyway) because the economy was crashing.

5. Wage and Claims

Last, but certainly not least, there will be some wage and hour litigation. I think the hype on the anticipated explosion in this area (mostly from defense law firms) is overblown. With that said, I do believe that there will be some claims in these areas.

As direct employers go out of business and cannot pay wages, one interesting area will be testing the scope of what constitutes an "employer" or "joint employer" under the wage laws. For example, if a temporary agency fails to pay its workers, the end client (i.e., where the employee is placed) may be a viable target for collection purposes. Likewise, because employment laws have expansive liability for certain individuals who own/operate a business, those individuals may be brought in as defendants in wage cases.

There will be claims in the future under the WARN Act. I don't believe that these claims will necessarily arise from the sudden government shutdown, although there have been some cases filed already. (*See e.g.*, *Siers v. Velodyne Lidar*, No. 5:20-cv-02290 (N.D. Cal. Apr. 3, 2020) (claim under WARN Act alleging Pandemic as a pretext for the improper layoffs). We will see some WARN Act claims down the road for those businesses that are dying a slow death (a restaurant, of course, does not need to WARN when it is given no notice that it must shut down); however, a business that is slowly seeing its sales decline and is predicting internally the need to layoff may have a WARN obligation.

Executives with contracts that are prematurely terminated due to the economy will have significant claims. There may also be ERISA claims due to employee benefit violations and diminishing employee retirement account balances.

I anticipate that there may be some claims associated with worker expenses that arise from working at home in those states that require employee expense reimbursement. I don't think these claims are particularly exciting (nor valuable), but having an employee work from home does result in the employee potentially incurring some costs. And, in some instances, the "free and clear" take-home pay could dip below minimum wage and trigger FLSA liability.

There will be some overtime claims from people who are claiming to be working more at home, but I think that these are going to be small, insignificant, and individualized claims (although, from what I have read, the defense bar seems to think otherwise).

With all of these new laws, some with no precedent, the next few years should be an exciting time for employment lawyers. There will be bumpy roads ahead and we, as lawyers, will help keep everyone on the straight and narrow. ■

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1. https://www2.illinois.gov/sites/iwcc/news/Documents/15APR20-Notice_of_Emergency_Amendments_CORRECTED-clean-50IAC9030_70.pdf.

Ninth Circuit Issues Two (Mostly) Pro-Employer Background Check Decisions

BY GUSTAVO A. SUAREZ & STEPHEN R. WOODS

The ninth circuit recently issued two mostly pro-employer federal Fair Credit Reporting Act (FCRA) background check decisions that held:

- background check disclosures **may contain some concise explanatory language**, but there is a limit to what is explanatory and what is unlawfully extraneous;
- background check disclosures may be presented **at the same time as other materials**, including application materials, as long as the background check disclosures are on a separate form;
- language in a separate authorization form has **no impact** on the disclosure form's compliance with the FCRA standalone/ "consists solely" requirement; and
- the FCRA does not mandate that the pre-adverse action letter include an express request to the applicant/ employee to **contact the employer** directly to dispute the accuracy of the information in the background check report.
- The cases are *Walker v. Fred Meyer, Inc.,* No. 18-35592 (March 20, 2020), and *Luna v. Hansen & Adkins Transport, Inc*., No. 18-55804, (April 24, 2020).

Background Check Disclosures May Contain Some Concise Explanatory Language

Under the FCRA, 15 U.S.C. § 1681 et seq., an employer that wants to obtain a background check report about a job applicant or employee must first provide the individual with a **standalone document with a clear and conspicuous** disclosure of the employer's intention to do so, and the employer must obtain the individual's authorization.

In *Walker v. Fred Meyer, Inc.*, the ninth circuit evaluated the **standalone** requirement (also known as the "consists solely" requirement) but did not consider the **clear and conspicuous** requirement. (The ninth circuit's principal "clear and conspicuous" case, *Gilberg v. California Check Cashing Stores*, was decided after Walker submitted his opening brief, so the parties did not have an opportunity to submit arguments about that standard and the district court did not consider the disclosures at issue in *Walker* in light of *Gilberg*'s definitions and holdings.)

For the standalone/"consists solely" requirement, the court held that "beyond a plain statement disclosing 'that a consumer report may be obtained for employment purposes,' some **concise explanation** of what that phrase means may be included as part of the disclosure." (Emphasis added.) "For example, a company could briefly describe what a 'consumer report' entails, how it will be 'obtained,' and for which type of 'employment purposes' it may be used." The ninth circuit cautioned that "any such explanation should not be confusing or so extensive as to detract from the disclosure. In other words, it must still meet the separate 'clear and conspicuous' requirement."

In *Walker,* among other allegations, the plaintiff claimed that the FCRA disclosure violated the standalone/"consists solely" requirement "because it mention[ed] investigative consumer reports in addition to consumer reports." An investigative consumer report (also known as an investigative background check) is "a special consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through **personal interviews** with neighbors, friends, or associates of the consumer . . . ."

The ninth circuit expressly ruled that mentioning **investigative background checks** in the disclosure (e.g., "Company may obtain a consumer report, including an **investigative background check**") does not violate the FCRA's standalone/"consists solely" requirement "because investigative [background checks] are a subcategory or specific type of consumer report" ("consumer reports" are the subject of the principal FCRA "disclosure" statute), as long as the investigative background check disclosures are limited to (1) **disclosing** that such reports may be obtained for employment purposes and (2) "providing a **very brief description** of what that means."

In its decision, the court seems to distinguish between a passing reference to an investigative background check and the separate **investigative background check disclosure** mandated by 15 U.S.C. § 1681d (a different FCRA section), which requires additional information, including a "statement informing the consumer of his right to [a complete and accurate disclosure of the nature and scope of the check] and the [FCRA "A Summary of Your Rights" form]." The court suggested that including the §1681d investigative background check disclosures would amount to extraneous information that would violate the non-investigative background check standalone/"consists only" requirement under §1681b.

The ninth circuit reviewed the employer's disclosure in detail and held the following about each respective paragraph of the background check disclosure at issue in Walker, which are included here for reference and discussion:

Language	Court Finding
We … will obtain one or more consumer reports or investigative consumer reports (or both) about you for employment purposes. These purposes may include hiring, contract, assignment, promotion, reassignment, and termination. The reports will include information about your character, general reputation, personal characteristics, and mode of living.	Does not violate the standalone/consists solely requirement. "Helpfully explains what 'employment purposes' may include and what type of information may be included in the" background check report. Reference to investigative background check is acceptable, subject to the limitation and as explained in the first full paragraph above this table.
We will obtain these reports through a consumer reporting agency. The consumer reporting agency is General Information Services, Inc. GIS's address is P.O. Box 353, Chapin, SC 29036. GIS's telephone number is (866) 265-4917. GIS's website is at www.geninfo.com To prepare the reports, GIS may investigate your education, work history, professional licenses and credentials, references, address history, social security number validity, right to work, criminal record, lawsuits, driving record and any other information with public or private information sources.	Does not violate the standalone/"consists solely" requirement. • "Elucidate(s) what it means to 'obtain' a consumer report by providing helpful information about who will provide such a report to [employer] and what private and public information about the applicant will be examined to create a 'consumer report.'"
You may inspect GIS's files about you (in person, by mail, or by phone) by providing identification to GIS. If you do, GIS will provide you help to understand the files, including communication with trained personnel and an explanation of any codes. Another person may accompany you by providing identification. If GIS obtains any information by interview, you have the right to obtain a complete and accurate disclosure of the scope and nature of the investigation preformed.	While likely included in good faith, these paragraphs do not satisfy the standalone/"consists solely" requirement. • May "pull[] the applicant's attention away from his privacy rights protected by FCRA."

Background Check Disclosures May Be Presented at the Same Time as Other Materials, But Not on the Same Form

In *Luna v. Hansen & Adkins Transport, Inc*., the ninth circuit rejected the plaintiff's argument that the FCRA's physical standalone/"consists solely" requirement for hard-copy forms was a temporal one. As long as the background check disclosure itself is in a standalone form, the ninth circuit found, it can be presented with and at the same time as other employment documents. (In Luna, all relevant items were in paper/hard-copy form. Only a few cases have examined what standalone means in the electronic, online context.)

Separate Authorization Form Language Is Irrelevant to Whether Disclosure Language Satisfies the Standalone/'Consists Solely' Requirement

In *Walker*, the plaintiff argued that the language of the employer's **authorization** form "'underscores the confusing and distracting nature of [the employer's] disclosure form,' thereby reinforcing his claim" that the disclosure in question violated the FCRA's standalone/"consists solely" requirement. The ninth circuit found that "the authorization form is not relevant to the [FCRA] disclosure" form's standalone/"consists solely" requirement where "the authorization is not included in the disclosure. Either the disclosure meets the 'clear and conspicuous' and 'standalone' requirements, or it does not; that determination does not depend on what is in a separate authorization form."

Pre-Adverse Action Letter Does Not Have to Include an Express Request That Applicant/Employee Contact the Employer Directly to Dispute the Accuracy of the Background Check Report Information

In ***Walker***, the ninth circuit concluded that while the FCRA provides a right to dispute inaccurate information in a background check report, that right does not require an opportunity for the applicant/employee to discuss his or her consumer report **directly with the employer,** versus with the background check company/vendor.

The FCRA "mandates that, before an employer may take adverse action against an applicant/employee based on a consumer report, the employer must provide the consumer with 'a copy of the report' and 'a [copy of the FCRA "A Summary of Your Rights" form, describing] in writing . . . the rights of the consumer." Walker argued that the FCRA also establishes a right to dispute or discuss a report directly with an employer, rather than with a consumer reporting agency—"that is, an opportunity to change the employer's mind—before adverse action is taken." Fred Meyer's pre-adverse action notice did not advise Walker of a right to speak directly with the employer (just its consumer reporting agency, GIS) about any negative items in his

consumer report.

The ninth circuit rejected that argument, finding that the FCRA provides no right or requirement that a pre-adverse action notice include information about contacting a consumer's employer directly.

That said, this holding is somewhat limited. This case examined **FCRA** requirements. Other laws, including **Title VII's individualized assessment requirement**, may require employer solicitation of applicant/employee information from the applicant/employee, either directly to/with the employer or through a third-party background check company/vendor.

Key Takeaways

Employers may want to consider reviewing their background check disclosure and authorization forms/online screens, including the method of presentation of those materials to applicants and employees, to ensure:

- there is no surplus, extraneous language in the disclosure; and
- the disclosure is clear and conspicuous.
- In addition, employers may want to consider reviewing the online screens and/or paper forms provided by their background check companies/vendors before relying on them.

Finally, employers may want to review their pre-adverse action letters for legal compliance.

Further information on federal, state, and major locality background check requirements is available in the firm's **OD Comply: Background Checks** subscription materials, which are updated and provided to **OD Comply** subscribers as the law changes.■

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U.S. Privacy Law Implications With the Use of No-Contact Temperature Taking Devices

BY DAVID STAUSS, MALIA ROGERS, & MEGAN HERR

As U.S. companies start planning and implementing return-to-work plans, many are considering whether to use no-contact temperature taking devices.

The federal government has recognized that taking temperatures is a step that companies can take to mitigate the risk of spreading coronavirus. For example, the CDC interim guidance for critical infrastructure workers recommends[9] that employers "measure the employee's temperature and assess symptoms prior to them starting work." EEOC return-to-work guidance[10] also recognizes that employee screening "may include continuing to take temperatures . . . of all those entering the workplace."

States and cities also have recommended taking temperatures. For example, in Colorado[11], the Governor's office has encouraged large workplaces to implement symptom and temperature checks as part of the state's gradual return-to-work strategy. New York Mayor Bill de Blasio has stated[12] that temperature checks will be part of the City's return-to-work program. New Jersey Governor Phil Murphy suggested[13] that restaurants could check temperatures before allowing customers to enter.

However, the taking of temperatures creates logistical issues such as who should take the temperatures, what precautions should be in place, and when and where the temperatures should be taken. As with many other facets of this pandemic, companies have looked to technology to answer some of these questions, and there are many solutions – some old, some new – in the marketplace.

Depending on the type of device, the use of no-contact temperature taking devices can raise numerous privacy issues. As companies begin to vet and implement these devices, they will need to ensure that they do not unintentionally violate privacy laws or assume potential liabilities.

Overview of Available Devices

Based on our research, there are three categories of no-contact temperature taking devices that are currently available and that can be utilized by companies for employee or customer screening.

The simplest type of device are no-contact infrared scanners. To operate these devices, an individual places the scanner a few inches from an individual's forehead and pushes a button.

The second type of device uses facial recognition to identify the faces of individuals walking past the device and thermal scanning to take their temperatures. Depending on the sophistication of the device, they can be used to take temperatures of one person at a time or groups of people. These devices can be used to scan employees, customers or even larger gatherings of people in airports and train stations. Typically, these devices can be placed a few feet away from the individual and still accurately take their temperature.

The third type of device is categorized as "wearables." These devices include watches, rings, and stick on sensors. Depending on the sophistication of the device, they can collect not only temperatures but also heart rate, sleep information, steps, calories, and altitude, among other information. Some of these devices can be pared with smart phone apps.

U.S. Privacy Law Implications for Using These Devices

State Biometric Privacy Laws

Although the use of simple no-contact infrared scanners likely will not implicate state biometric privacy laws, the use of any temperature-taking device that deploys facial recognition to identify individuals could violate some states' biometric privacy laws. For example, Illinois' Biometric Information Privacy Act (BIPA) requires private entities that collect, retain, or disclose biometric information to follow detailed requirements to ensure that any individual providing biometric identifiers or biometric information has consented to the private entity's collection of such information. The law defines "biometric identifiers" to include a "scan of . . . face geometry."

Moreover, BIPA requires private entities in possession of biometric information to develop a publicly-available written policy establishing a retention schedule and guidelines for permanently destroying biometric information when the initial purpose of collecting or obtaining the information has been satisfied, or within three years of the individual's last interaction with the private entity, whichever occurs first.

Persons "aggrieved by a violation" of BIPA have a private right of action and may seek statutory remedies, including the greater of actual or liquidated damages of $1,000 (for each negligent violation) or $5,000 (for each intentional or reckless violation). Over the past few years, plaintiffs' attorney have been aggressively pursuing BIPA class action lawsuits.

Both Texas and Washington have enacted similar biometric information laws governing the capture and use of individuals' biometric information. However, both of these statutes do not create a private right of action – enforcement may only be brought by the Attorney General. To date, BIPA is the only state biometric statute that includes a private right of action.

State Breach Notification and Information Security Statutes

Companies must be aware that no-contact temperature taking devices could be collecting personal information that is potentially subject to state breach notification laws. In general, these statutes require entities to notify affected individuals if there is a loss of personal information. The definitions of personal information vary by statute; however, several statutes include biometric information and medical information as covered data elements. The definitions of biometric information and medical information also vary, such that it is important to analyze each statute to determine if it is applicable.

It is important to note that many of these breach notification statutes are limited to the collection of computerized data. Thus, the handwritten collection of individuals' temperatures may not be subject to these breach notification statutes.

Further, companies may be subject to liability under state information security and document retention statutes. These statutes generally require businesses to implement and maintain reasonable security procedures and practices to protect personal information and to dispose of personal information when there is no longer a business purpose for keeping it. Several states have incorporated biometric and medical information into their statutes. Although these statutes are enforceable by state Attorneys General, class action litigants often use them as a basis for negligence *per se* claims against companies that have suffered a data breach.

Because of the number of states that have incorporated either biometric information or medical information into their definition of personal information, companies should consider the risks associated with deploying no-contact temperature taking devices into their return-to-work strategy. Primarily, companies should consider the implications of a potential data breach. For example, should a company collect and store individuals' medical or biometric information and be subject to a data breach, the company may be required to notify every affected individual of the breach and potentially notify state Attorneys General. Those notifications could trigger class action lawsuits and/or state attorney general investigations. Notably, as discussed more fully below, California law allows litigants to seek statutory damages of between $100 and $750 per consumer, per incident for data breaches caused by a company's failure to implement and maintain reasonable security procedures.

CCPA

Companies that do business in California and have in excess of $25 million in annual gross revenues (commonly understood to mean globally, not just in California) or otherwise possess or sell a significant amount of personal information of California residents, have additional obligations and risks to consider under the California Consumer Privacy Act (CCPA).

The CCPA covers a business's collection of "personal information" both online and offline. Personal information is defined to mean "information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household."

Categories of personal information protected by the CCPA include both "medical information" and "biometric information." Biometric information is broadly defined to include physiological characteristics, including imagery of the face and health data that contains identifying information. Medical information is not defined in the statute. Whether temperature and related information falls within these categories of personal information is unclear; however, facial scans would be covered as would much of the information collected by smart phone apps.

Assuming the CCPA applies, businesses will have certain obligations with respect to their collection and use of this information. At or before the point of collecting this information, a business needs to provide notice to California residents, whether prospective or current employees or customers, of the information to be collected and the purpose(s) for which it will be used. However, unlike BIPA and the other biometric information laws discussed above, consent is not required under the CCPA.

Further, a business is prohibited from using the information collected for any purpose other than as disclosed in the notice at collection. The notice

can be provided to California residents electronically (e.g., by email to employees), orally, in hard copy, or via prominent signage that contains the notice or a web address where the notice may be found online. The notice must be accessible to individuals with disabilities.

Additionally, assuming the business maintains this information, it must set up designated methods by which California residents may exercise their right to know, delete, and opt out of the sale of this information. As it concerns current and prospective employees from which this information is collected, the CCPA only requires a business to provide the notice at collection – a business does not need to provide the right to, or comply with requests to, know, delete or opt-out of sales. However, unless amended, this exemption is set to expire January 1, 2021, after which time current and prospective employees' personal information will be subject to consumer requests.

The California attorney general is authorized to enforce the CCPA beginning July 1, 2020, and the office has stated that its enforcement actions can cover activities between January 1 and July 1. Intentional violations of the CCPA may result in civil penalties of up to $7,500 for each violation.

Further, the CCPA provides a private right of action where a breach occurs as a result of failure to implement and maintain reasonable security procedures and practices. There is no exemption for current and prospective employee personal information as with consumer requests.

California's breach notification law includes medical information and, in 2019, was expanded to include biometric information. If a breach occurs, a business risks facing a class action lawsuit seeking statutory damages under the CCPA ranging from $100 to $750 per consumer, per incident.

Other Considerations

The EEOC has provided guidance on maintaining the confidentiality of employee temperature information. According to the EEOC, this information must remain confidential. Additionally, the EEOC guidance notes that the Americans with Disabilities Act "requires that all medical information about a particular employee be stored separately from the employee's personnel file."

Best Practices for Implementing These Devices

Understand the Device

Companies should approach selecting a no-contact temperature taking device based on what information is necessary for the company to collect to protect the health and safety of its employees and/or customers. Some of the devices discussed at the outset of this post may provide a company with more information than necessary. For example, some devices may simply collect temperature readings, while others involve identity recognition capabilities. If there is not a business need for the collection of certain information, companies should avoid doing so.

Further, to analyze the risks associated with using the device, companies should thoroughly understand what information the device collects, how that information is stored, and if that information may be shared with the product developer or others (particularly as it concerns wearable devices). Only after a company answers those questions, can it begin to analyze whether the use of the device could expose the company to unnecessary liability.

Vet the Company Selling the Device

COVID-19 has created a new demand for these devices. Many new companies are entering the market and existing companies are shifting their focus to take advantage of this business opportunity. Before investing in a no-contact temperature taking device, it is important to conduct due diligence on the company, particularly those that are new to the market.

While the website marketing the product may look impressive, companies should investigate things such as whether the company has an existing and updated privacy policy with thorough and complete disclosures as to what personal information the company's device collects, how it is used, and how it is shared. Further, companies should read and understand the company's terms of service to determine how the company approaches notice and liability in the event of a data breach.

Understand the Device's Information Security Protections

As we have seen with many of the new products popularized in this new economy, the security of these new devices is going to be tested by hackers. Therefore, having your information security department analyze the device and identify vulnerabilities is a crucial step in vetting the product.

The device itself is not the only security risk. Consideration should also be given to a company's own security measures. For example, who will be conducting these screenings on behalf of the company, how and where will the company record the information (paper versus electronic), and who within the company will be notified and/or have access to this information?

Prepare Employee and Customer Notices

Perhaps the most significant hurdle for implementing these devices is to make sure that your employees and customers are comfortable with them. That is particularly true with devices that collect and store sensitive data such as facial recognition scans.

In that respect, it is crucial for companies to be transparent about what information they are collecting, why, and how that information will be used. Companies should develop written policies explaining why they are using these devices, the types of information that will be collected, how that information will be used and shared, and the information security measures in place to protect the information.

Conclusion

The use of no-contact temperature taking devices can be an important (or even government-mandated) part of a company's return-to-work strategy. However, before deploying these devices, companies should fully vet them to avoid violating privacy laws or assuming unnecessary potential liabilities.■

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1. https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html.
2. https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm.
3. https://www.cpr.org/2020/04/21/colorado-will-shift-from-stay-at-home-to-safe-at-home-heres-what-that-looks-like-as-the-state-slowly-reopens/.
4. https://nypost.com/2020/04/20/temperature-checks-may-come-to-nyc-offices-after-coronavirus/.
5. https://www.nbcphiladelphia.com/news/coronavirus/phil-murphy-new-jersey-coronavirus-schools/2365346/.