



# Employment Law and Coronavirus Summer Attorneys Conference July 10, 2020

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**SCHOOL OF GOVERNMENT**

# Presentation Overview

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1. Summer's Most Frequent FFCRA Issues
2. Monitoring the Health of Employees in the Workplace
3. Employees Who Test Positive for COVID-19 and  
Employees Who Have Been Exposed to COVID-19
4. Wearing Masks in the Workplace

# **Families First Coronavirus Response Act (FFCRA)**

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## **Emergency Family and Medical Leave Act (eFMLA)**

- Adds an additional reason for which FMLA may be taken

## **Emergency Paid Sick Leave Act (EPSL)**

- Single 80-hour grant of leave that may be taken for any of five reasons.

# Emergency Paid Sick Leave

1. The employee is subject to a federal, state or local **quarantine or isolation order** related to COVID-19;
2. The employee has been advised **by their healthcare provider to self-quarantine** because they are infected with or have been exposed to COVID-19 or because they are at high risk of complications from COVID-19;
3. The employee is showing symptoms of COVID-19 and **is seeking but has not yet received a medical diagnosis**;
4. The employee is caring for someone subject to a federal, state or local quarantine or isolation order related to COVID-19 or who has been advised by their healthcare provider to self-quarantine for COVID-19 related reasons; or
5. The employee is caring for their son or daughter because the child's school or childcare facility has been closed or the childcare provider is no longer available because of a COVID-19 related reason.

# Four Common Questions

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1. Employee has been exposed to C-19 and we have advised him to quarantine at home. Is he eligible for EPSL under reason 2?
2. Employee says she has C-19 symptoms and has asked for EPSL. Does she qualify under reason 3?
3. Employee lives with a family member who is high-risk for COVID-19 complications. Is EPSL available for this reason?
4. School is closed now. Do employees still qualify for eFMLA?

# Reopening the Workplace: Temperature and Wellness Checks

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# Americans with Disabilities Act

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1. Prohibits employers from asking medical questions or performing medical examination of current employees.
2. Prohibits employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a "**direct threat.**"
3. Requires reasonable accommodations for individuals with disabilities (absent undue hardship) during a pandemic.

An employer may:

1. Take employee temperatures
2. Ask about **symptoms**

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- Fever or chills
- Cough
- Shortness of breath or difficulty breathing
- Fatigue
- Muscle or body aches
- Headache
- Sore throat
- New loss of taste or smell
- Congestion or runny nose
- Nausea or vomiting
- Diarrhea
- Persistent pain or pressure in the chest



# An employer may also:

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1. Ask questions about contact with persons who have tested positive for COVID-19
2. Ask questions about participating in mass gatherings
3. Ask questions about travel

# The ADA and Confidentiality

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- ❑ N.C.G.A. § 153A-98(a) says that “an employee's personnel file consists of any information in any form gathered by the county . . .”
- ❑ 42 U.S.C. § 12112 says that “information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record.”



# Employees Who Test Positive

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# Employees Who Test Positive

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- Qualify for up to 80 hours of emergency paid sick leave
- Positive test v. physician diagnosis
- Disclosure to local health department permitted by ADA
- Disclosure of name of infected employee to the public and to other employees not permitted.
- Workplace should be disinfected.

# DOL FAQ # 56

For the purposes of Employees who may be exempted from Paid Sick Leave or Expanded Family and Medical Leave by their Employer under the FFCRA, a health care provider is **anyone** employed at ***any doctor's office, hospital, health care center, clinic***, post-secondary educational institution offering health care instruction, medical school, **local health department or agency**, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, **pharmacy**, or any similar institution, Employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

# Return to Work: COVID-19 + Symptoms

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- Three days with no fever **and**
- Respiratory symptoms have improved (e.g. cough, shortness of breath) **and**
- Ten days have passed since symptoms first appeared
- Retesting if health care provider advises.

# **Return to Work: Asymptomatic COVID-19**

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- Ten days have passed since the positive COVID-19 test and no symptoms have appeared



# Employees Exposed to COVID-19

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# What Does Exposure Mean?

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Contact within 6 feet or fewer with a person who has tested positive for C-19 or who has C-19 symptom for 15 or more minutes

# **What Should an Exposed Employee Do?**

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Self-quarantine for 14 days

# CDC Exception for Critical Infrastructure Workers

Critical infrastructure workers who have had an exposure to COVID-19, but who do not have symptoms, may continue to work if employer and employee observe additional safety precautions:

1. Taking the employee's temperature;
2. Checking for symptoms of COVID-19 before each work shift;
3. Asking the employee to self-monitor for symptoms during their work shift;
4. Requiring the employee to wear a cloth face mask.

# Who is a Critical Infrastructure Worker?

- All human services workers & support staff
- All public safety workers & support staff
- All utilities staff
- County engineers
- Water and wastewater staff
- Transit workers and dispatchers
- All public works staff
- All IT staff
- Facilities staff
- Mechanics
- RoD and employees
- Finance
- Planning, zoning and permitting
- Purchasing and procurement



**EEOC: Requiring an Antibody Test violates the ADA**

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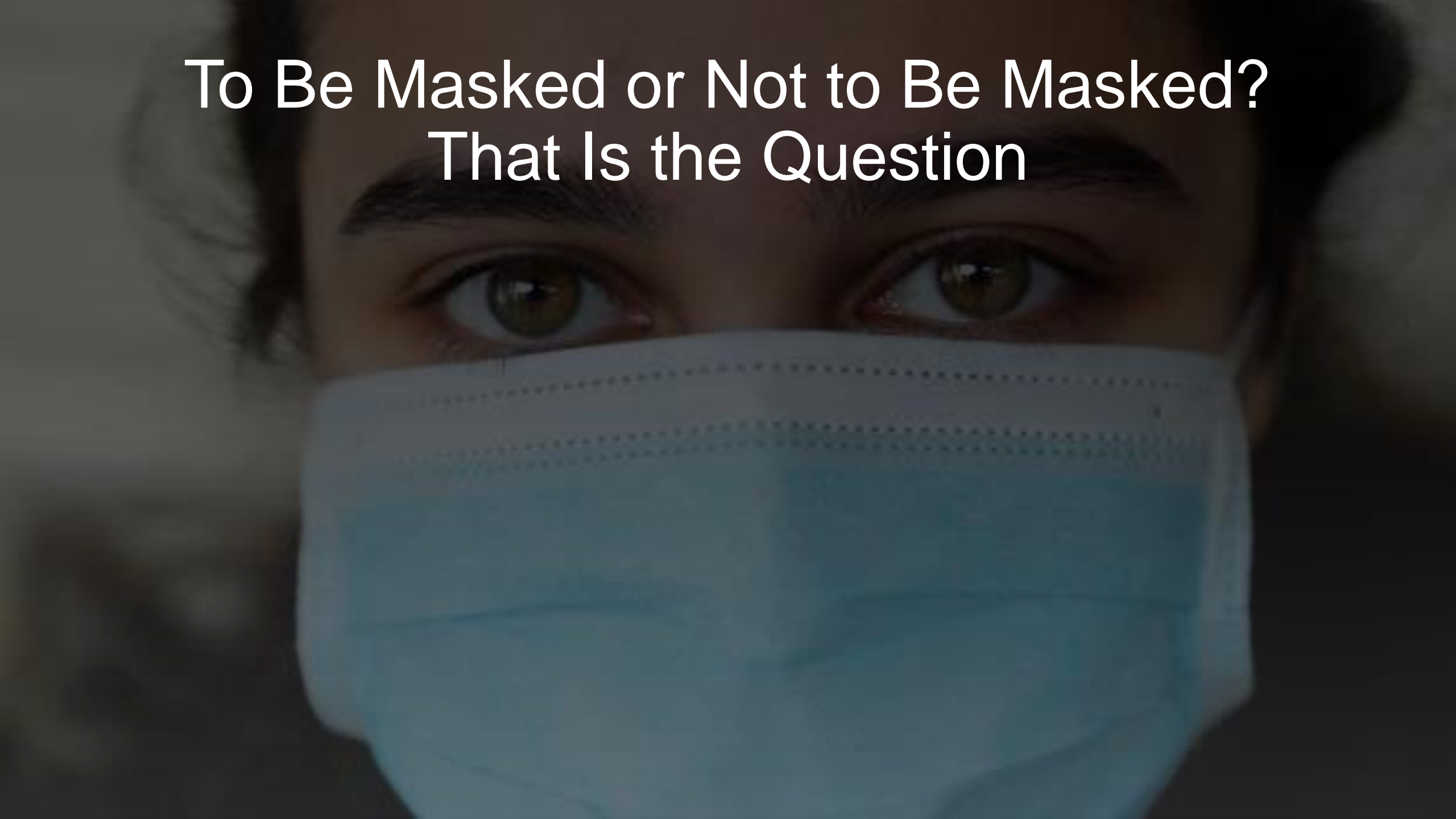
# Employees Who Refuse to Work

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Reasons:

1. Child care
2. Live with person who is high risk
3. Fear
4. Unemployment benefits pay more than employee's wages.

To Be Masked or Not to Be Masked?  
That Is the Question



# Executive Order 147

June 24, 2020

- ❑ **E.O. 141 (May 20, 2020) extended to July 17, 2020.**
- ❑ **E.O. 147 modifies E.O. 141 to require**
  - All state employees to wear masks when within 6 feet of one another.
  - All customers of public-facing state offices to wear masks when they are inside the agency and may be within 6 feet of another person, unless the customer states that an exception applies.
  - All workers and riders on public transportation and at bus stops to wear masks when they are or may be within 6 feet of another person.
  - Exceptions on an honor system.
- ❑ **Local governments encouraged to do the same.**



# Masks

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1. Must we require employees to wear masks?
2. May we require employees to wear masks?

**Question 1:**

**Must We Require Employees to Wear Face Masks?**

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## **To Mask or Not to Mask: What Say Federal Agencies?**

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**CDC: Face masks recommended,  
not mandatory**

**EEOC: Permissive;  
accommodations required  
for disability-related reasons  
and religious reasons.**

**OSHA: Required for some  
employees, but not for others**

# OSHA

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- ❑ Federal Occupational Safety and Health Administration
- ❑ North Carolina Occupational Safety and Health

# Hazard Assessment and PPE: 29 CFR § 1910.132

**(d)(1):** The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE). If such hazards are present, or likely to be present, the employer shall:

- (i) Select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment;
- (ii) Communicate selection decisions to each affected employee; and,
- (iii) Select PPE that properly fits each affected employee.

**(d)(2):** The employer shall verify that the required workplace hazard assessment has been performed through a written certification that identifies the workplace evaluated; the person certifying that the evaluation has been performed; the date(s) of the hazard assessment; and, which identifies the document as a certification of hazard assessment.

**Hazard Assessment  
and PPE:  
29 CFR § 1910.132**

The regulations also require the employer to:

- Pay for the PPE;
- Train the employee in proper use of the PPE;
- Assure the adequacy, proper maintenance, and sanitation of any equipment employees provide themselves.

# Not All Masks are PPE

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- ✓ Respirators

  - Respirators are subject to OSHA Respirator Standard at 29 CFR §1910.134 and OSHA PPE Standard at 29 CFR § 1910.132.

- ✓ Surgical Masks

- ✗ Cloth face coverings

# Surgical Mask



VS

# N95 Respirator



- ASTM certified and FDA approved for surgery
- Fluid resistance and provides protection against large droplets, splashes, and bodily fluids
- Loosely-fitting
- Unreliable filtration protection against smaller airborne molecules
- Leakage during inhalation through mask's edges

- NIOSH evaluated, tested, and approved
- Reduces exposure to large droplets and small aerosol particles
- Tight-fitting
- Must filter a minimum of 95% of airborne particles against smaller airborne molecules
- Minimal leakage when properly fitted and worn



**FOR WHOM IS  
A RESPIRATOR  
OR SURGICAL  
MASK  
REQUIRED  
PPE?**

Those in

- Very High Exposure Risk
- High Exposure Risk

Occupations

# ***But Accommodations Are Required***

## **Accommodating a Disability**

- Required where an employee with a disability needs an ADA reasonable accommodation (e.g., non-latex gloves, modified face masks gowns designed for individuals who use wheelchairs)

## **Accommodating a Religious Practice**

- Required where an employee needs a Title VII religious accommodation (such as modified equipment due to religious garb or alternative to mask such as a face shield)


**Question 2:**

**May We Require Employees to Wear Face Masks?**

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## EEOC Guidance

ADA and other EEO laws continue to apply during the COVID-19 pandemic, but do not interfere with or prevent employers from following the guidelines and recommendations of the CDC and state and local public health authorities.

 An employer may require employees to wear **protective gear** like masks and gloves and to observe regular hand washing and social distancing protocols.



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