

Federal Law Alerts - June 2020

SCOTUS Prohibits Employment Discrimination Based on Sexual Orientation or Gender Identity

On June 15, 2020, the Supreme Court of the United States (SCOTUS) ruled in a landmark case, *Bostock v. Clayton County*, that an employer who fires an individual merely for being gay or transgender violates Title VII of the Civil Rights Act (Title VII).

Under Title VII, it is unlawful for an employer to discriminate against any individual in its hiring (or firing) because of their race, color, religion, sex, or national origin. An employer violates Title VII when it intentionally fires (or refuses to hire) an individual based in part on sex. It is irrelevant if other factors, aside from the individual's sex, contributed to the employer's decision. This is because it is a Title VII violation if an employer intentionally relies in part on an individual employee's sex when deciding to discharge them. In *Bostock*, the court held that because discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat individuals differently because of their sex, an employer who intentionally penalizes an individual for being homosexual or transgender also violates Title VII.

The court also clarified that:

- It is irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it. When an employer fires an employee for being homosexual or transgender, it necessarily intentionally discriminates against that individual in part because of sex.
- An individual's sex does not need to be the sole or primary cause of the employer's adverse action. It is of no significance if another factor, such as an individual's attraction to the same sex or presentation as a different sex from the one assigned at birth, might also be at work, or even play a more important role in the employer's decision.
- Employers cannot escape liability by demonstrating it treats males and females comparably as group. An employer who intentionally fires an individual homosexual or transgender employee in part because of their sex violates the law even if the employer is willing to subject all male and female homosexual or transgender employees to the same rule.

The court clearly stated, "In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law."

This ruling takes immediate effect.

Read the [ruling](#)

COVID-19, the ADA, the Rehabilitation Act, and Other EEO Laws

On June 11, 2020, the U.S. Equal Employment Opportunity Commission updated its *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* guidance to address:

- Employees are not entitled to an accommodation under the Americans with Disabilities Act to avoid exposing a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition.
- Responding to pandemic-related harassment due to national origin, race, or other protected characteristics.
- Actions an employer can take when it learns that an employee who is teleworking due to the pandemic is sending harassing emails to another worker.
- A best practice for employers to invite employees to request flexibility in work arrangements before employees return to work.
- Steps an employer can take if an employee entering the worksite requests an alternative method of screening due to a medical condition.
- Employees age 65 and over are at higher risk for a severe case of COVID-19 if they contract the virus subsequently the CDC has encouraged employers to offer maximum flexibilities to this group. Employers must be mindful that employees over age 65 have protections under the federal employment discrimination laws and are prohibited from involuntarily excluding an individual from the workplace based on his or her being 65 or older, even if the employer acted for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19.
- Employers may provide any workplace flexibilities (telework, modified schedules, or other benefits) to employees with school-age children due to school closures or distance learning during the pandemic as long as these employees are not treated differently based on sex or other EEO-protected characteristics.
- Employers may not exclude an employee from the workplace involuntarily due to pregnancy.
- A right to accommodation based on pregnancy continues during the pandemic.

Read the [guidance](#)

OSHA, COVID-19, and Cloth Face Coverings

On June 10, 2020, the Occupational Safety and Health Administration (OSHA) released frequently asked questions and answers related to COVID-19 and cloth face coverings that address:

- The key differences between cloth face coverings, surgical masks, and respirators.

- That OSHA's PPE standards do not require employers to provide cloth face coverings because they are not considered personal protective equipment (PPE) and are not intended to be used when workers need PPE for protection against exposure to occupational hazards.
- OSHA's recommendation that employers encourage workers to wear face coverings at work for source control purposes.
Face coverings are intended to prevent wearers who have COVID-19 without knowing it (i.e., those who are asymptomatic or pre-symptomatic) from spreading potentially infectious respiratory droplets to others (this is source control).
- Cloth face coverings do not substitute for social distancing measures.
- CDC guidance on washing face coverings.
- Surgical masks or cloth face coverings are not acceptable respiratory protection in the construction industry when respirators are needed but not available due to the pandemic.

Read the [FAQs](#)

Paycheck Protection Program Flexibility Act

On June 5, 2020, President Trump signed legislation (H.R. 7010) enacting the Paycheck Protection Program Flexibility Act (PPPFA) which amends the CARES Act's Payroll Protection Program (PPP). Some of the key amendments are as follows:

- The covered period during which borrowers must spend the PPP funds received was expanded to 24 weeks (from eight weeks) or December 31, 2020, whichever is earlier. This is effective immediately and applicable to all loans as if the language was part of the original CARES Act. However, borrowers may choose to retain the eight-week covered period if they received their PPP loans prior to June 4, 2020.
- The date when workers must be rehired was extended to December 31, 2020 (originally June 30, 2020).
- The PPPFA lessened rehiring requirements by adding a loan forgiveness exemption based on employee availability from February 15 through December 31, 2020. During this time, loan forgiveness will be determined without regard to a proportional reduction in the number of full-time equivalent employees if the borrower can document in good faith that:
 - They are unable to rehire former employees on February 15, 2020 and are also unable to hire similarly qualified employees for unfilled positions by December 31, 2020; or
 - They are unable to return to their pre-COVID-19 level of business activity (prior to February 15, 2020) because of federal safety and health requirements (issued from March 1, 2020 through December 31, 2020) for sanitation, social distancing, or any other worker or customer COVID-19-related safety requirement.
- Businesses now have five years to repay a loan and the first payment will be deferred for six months after a forgiveness determination. This is only applicable to loans made on or after June 5, 2020.

- The allocation of funds that must be used for payroll was modified to requires borrowers to spend 60 percent of the loan on payroll and then 40 percent can be used for other expenses (the prior allocation was 75 percent payroll and 25 other expenses).
- Employers may delay paying employer payroll taxes for Social Security through December 31, 2020. This is effective immediately and applicable to all loans as if the language was part of the original CARES Act.

The Small Business Association and Treasury Department are expected to release detailed guidance on the PPPFA and more.

Read [US H.R. 7010](#)

Hurricane Preparedness

In anticipation of the Atlantic 2020 hurricane season (June 1 through November 30), which is predicted by the National Oceanic and Atmospheric Administration (NOAA) to have above-normal activity, the U.S. Department of Homeland Security (DHS) has provided a series of Ready Business Toolkits for specific hazards, including:

- A Business Emergency Preparedness Social Media Toolkit with safety and preparedness messages that employers can share on their social media channels.
- An Earthquake “QuakeSmart” Toolkit to help employers understand risk, develop preparedness and mitigation plans, and act in the event of an earthquake.
- A Ready Business Hurricane Toolkit to help employers protect their employees and customers and help ensure business continuity.
- An Inland Flooding Toolkit to help businesses understand the impact of floods.
- A Power Outage Toolkit to help business leaders understand the damage outages can cause to businesses.
- A Severe Wind/Tornado Toolkit with tools for businesses in areas that are at risk for severe wind and tornado damage.

See these [DHS resources](#) (most are also available in Spanish) and [NOAA season prediction](#)

COVID-19 Mental Health and Stress Resources

In response to the COVID-19 outbreak and subsequent fallout, the following federal resources are available to share with your employees:

- The Centers for Disease Control and Prevention’s [Coping with Stress](#) page provides information about handling the stress of an outbreak, reactions, caring for yourself and your community, who is at a higher risk, and coming out of quarantine.
- The U.S. Department of Health & Human Services (HHS) offers the following resources:

- [COVID-19 Behavioral Health Resources](#) lists a collection of resources created by federal agencies and their partners to help healthcare providers, caregivers, and the general population prepare for and manage the negative behavioral effects that can accompany a public health emergency.
- [Mental Health and Coping](#) links to resources and advice to help individuals cope and to support their mental and behavioral health during the COVID-19 pandemic. Many of these resources are available in multiple languages.
- The HHS Substance Abuse and Mental Health Services Administration (SAMHSA) [COVID-19 resources](#) page links to resources to help individuals, providers, communities, and states across the country deal with mental health challenges related to the COVID-19 pandemic.
- The Centers for Medicare & Medicaid Services (CMS) [COVID-19 Partner Toolkit](#) links to CMS and HHS materials on COVID-19.
- The National Council for Behavioral Health's [Resources for COVID-19](#) provides links to resources for managing mental health during COVID-19 as well as tax, loan, and leave information for employers and employees.
- The National Association of State Mental Health Program Directors [COVID-19 Resource Links](#) page provides federal government COVID-19 compliance resource links, state health department links, and more.

See our [COVID-19 resources page](#) for many more state and federal resources and materials to help you cope with workplace changes.