



## June 2020 Employment Law Update

### Unemployment Compensation Update

The Texas Workforce Commission (TWC) announced that it will delay the enforcement of the work search requirement for unemployment recipients due to the COVID-19 pandemic. This requirement will likely be suspended until the pandemic eases. The TWC also announced that unemployment benefits paid as a result of the COVID-19 pandemic will not be charged back to employers. In addition, the federal \$600/week supplemental unemployment benefit is scheduled to end in Texas on July 25, 2020.

### Workers' Compensation Update

The Texas Department of Insurance has indicated that COVID-19 infections which are shown to have occurred at work are compensable. Thus, an employee's health care expense and wage replacement (not covered by FFCRA paid leave) will be covered by worker's compensation. The TDI has indicated, however, that such COVID-19 related worker's compensation claims will not impact an employer's worker's compensation experience ratings.

### Antibody Testing Update

As [I wrote last month](#), the Equal Employment Opportunity Commission (EEOC) announced that an employer cannot require an employee to undergo COVID-19 antibody testing. An employer can however, mandate that an employee test for the presence of the actual virus. The EEOC reasoned that antibody testing does not provide information concerning the actual presence of the virus but only those employees who are possibly immune from contracting the virus in the future. COVID-19 serology testing, however, can reveal if an employee has early response antibodies (IGM) to the virus and, therefore, may currently have the virus. Serology tests also reveal whether an employee has long-term antibodies (IGG).

An employer testing for antibodies could, therefore, use the presence of early response antibodies (IGMs) in a serology test as a first step in determining if a virus test is needed. As serology testing is far cheaper than virus testing, this could result in significant cost savings for an employer who wants to conduct wide-scale testing of its workplace.

The EEOC does not explicitly preclude an employer from making antibody serology tests available to employees, or asking employees to voluntarily submit to tests. However, employers taking this course could be subject to an allegation that the antibody tests were not truly voluntary, which carries the risk of future litigation. Further, employers who make employment decisions based on voluntary test results may still be found to have violated the ADA.

### **Faking COVID-19**

Employees who test positive for COVID-19 are [afforded paid leave under the Family First Coronavirus Response Act](#) (FFCRA) and cannot be discriminated against as a result of the diagnosis or the taking of paid leave under the FFCRA. However, employees who fake COVID-related illness or symptoms could lose their jobs and face criminal prosecution. Employers should have procedures in place to identify false claims and take action should the submission of false claims be detected. Such procedures should include requiring notes from a healthcare provider and COVID-19 test results. Such materials will likely be required by an employer seeking tax credits for paid leave given to employees under the FFCRA.

**For more information please contact [Tony Stergio](#).**