Office of Congressional Workplace Rights

PANDEMICS AND THE CAA
APRIL 22, 2020

I. Introduction

For the past several weeks we have all been facing unprecedented challenges both professionally and personally. Many of us are working from home, and some of us are also caring for young children and/or elderly parents. We are facing shortages of food and household goods, and dealing with the added stress of uncertainty as to when the curve will start to flatten and life will begin returning to normal.

Through all of this, the OCWR has remained committed to promoting and enforcing compliance with the statutes applied to the legislative branch through the Congressional Accountability Act (CAA). Generally speaking, pandemics do not give rise to new legal obligations or alter existing ones under the various statutes, except to the extent that Congress specifically passes legislation to do so. However, employees' existing rights – and employing offices' existing obligations – remain intact during times of pandemics or other health crises, and it is important to consider how such circumstances may implicate each of the CAA-incorporated laws.

Some of those implications are significant and obvious, with the three most relevant statutes being the Occupational Safety and Health Act (OSHAct), the Americans with Disabilities Act (ADA), and the Family and Medical Leave Act (FMLA) as amended by the Families First Coronavirus Response Act (FFCRA). Pandemics might have less of an impact on other laws under the CAA, but each of them nonetheless warrants discussion, to ensure that the requirements of the laws are still being followed even in such extraordinary times.

II. Occupational Safety and Health Act (OSHAct)

There are no OSHA standards that cover pandemics specifically. However, OSHA's standards governing personal protective equipment (PPE), found at 29 C.F.R. Part 1910, Subpart I, could apply, along with the General Duty Clause, section 5(a)(1) of the OSHAct of 1970, 29 U.S.C. § 654(a)(1). These apply to the legislative branch through section 215 of the CAA, 2 U.S.C. § 1341. Here are some of the key considerations for promoting employee safety and health during pandemics, whether they are reporting to their regular workplaces or working from home:

Workplace Controls

During a pandemic, it may not be possible to eliminate the virus from the workplace because a person may carry and transmit the virus even though they are asymptomatic. OSHA standards require employers to assess the hazards to which their workers may be exposed. In cases of pandemic, workplace controls should be implemented in order to minimize the spread of infection between workers:

- **Engineering controls** could include, for example, installing high efficiency air filters or increasing ventilation rates in the workplace.

- **Administrative controls** could include a wide variety of options, depending on the nature of the work being performed. Some examples include: permitting employees to telework; allowing employees to alter their work schedules to avoid commuting during rush hours; staggering shifts to reduce the number of employees in the workplace at any given time; postponing projects that require employees to work closely together; spacing out employees in the workplace, including sitting safe distances apart during meetings; and implementing safe work practices such as requiring regular hand washing and providing hand sanitizer.

- **Personal protective equipment** that may help reduce the spread of infection includes face masks, gloves, respiratory protection, and goggles. See 29 C.F.R. § 1910.132 for the general requirements for PPE.

Respiratory Protection

When respirators are required to protect employees' health, an employer must implement a comprehensive respiratory protection program in accordance with 29 C.F.R. § 1910.134. In response to the COVID-19 pandemic, OSHA has issued temporary guidance regarding annual fit tests for medical workers and updated the guidance to include all workplaces covered by the OSHAct where the use of respirators is required. The guidance includes the following points:

- Initial fit tests are still required.

- Employees should be informed that annual tests are suspended.

- This applies to both healthcare providers and general industry.

- Qualitative fit tests are recommended during this time.

- Employers may provide a manufacturer equivalent of employees' original respirator if the original respirator is out of stock. If fit testing is not available, the inspector should use discretion before citing.

To address the shortage of N95 respirators the guidance also advises for employers to assess their engineering controls, work practices, and administrative controls on an ongoing basis to identify any changes they can make to decrease the need for N95s. If there is no way for employees to perform their job duties safely without a respirator, and respirators are not available, then those job duties must be suspended until the required respiratory protection is available.

Even if the use of a respirator is not mandatory in the workplace, the employer still has certain responsibilities to ensure that if an employee chooses to use one (provided either by the employer or by the employee) it is used safely and its use does not present a hazard. These obligations are found in Appendix D to 29 C.F.R. § 1910.134 and include the following:

- Read and follow all instructions provided by the manufacturer on use, maintenance, cleaning and care, and warnings regarding the respirator's limitations.

- Choose respirators certified for use to protect against the contaminant of concern. The National Institute for Occupational Safety and Health (NIOSH), which is part of the Centers for Disease Control (CDC), certifies respirators. A label or statement of certification should appear on the respirator or respirator packaging, and will tell you what the respirator is designed for and how much it will protect you.

- Do not wear your respirator into atmospheres containing contaminants for which your respirator is not designed to provide protection. For example, a respirator designed to filter dust particles will not protect you against gases, vapors, or very small solid particles of fumes or smoke.

- Keep track of your respirator so that you do not mistakenly use someone else's respirator.

Finally, keep in mind that the types of face coverings that might be worn in public during times of pandemic – including dust masks, surgical masks, bandanas, homemade cloth masks, etc. – are not respirators. These types of coverings cannot take the place of certified respirators and may not be used for work that requires respiratory protection under the OSHAct.

Safety While Teleworking

During times of pandemic, many employees may be required to work from home. When employees telework – whether in dedicated home offices or in makeshift workspaces – they must still observe safe work practices.

Using an improper workstation for an extended period of time can increase the risk of ergonomic-related injuries or cause awkward posture. Although there is no OSHA standard for ergonomic safety, employees should still be mindful when setting up and using their home work areas. Some recommendations include:

- Work at a desk or a table, instead of on a couch or in bed.

- Use a good chair if possible, and add pillows or a cushion for back support.

- Raise your monitor or laptop to eye level to prevent damage to neck muscles. This can be done by using everyday items (books, boxes, etc.) as long as they provide a stable base. If your laptop is raised to eye level, you'll need to use an external mouse and keyboard.

Please see https://www.ocwr.gov/sites/default/files/commonofficehazards116th.pdf for guidance on avoiding common office safety hazards, which applies to home workspaces as well as formal office settings.

Protection for Employees Raising Safety Concerns

As always, it is important to remember that a covered employee who raises good-faith concerns over occupational safety and health issues – even if those concerns turn out to be unfounded – is engaging in protected activity under section 207 of the CAA, 2 U.S.C. § 1317. Should employees report concerns, either to the OCWR or internally to employing office management, that they believe the employing office is not taking adequate steps to protect employees from becoming infected during times of pandemic, it is prohibited for the employing office to take any retaliatory action against them, including any adverse personnel actions or the creation of a hostile work environment.

For more information on workplace safety and health during the coronavirus pandemic, please see the OCWR's resources at https://www.ocwr.gov/coronavirus and OSHA's COVID-19 resource page at https://www.osha.gov/SLTC/covid-19/.

III. Americans with Disabilities Act (ADA)

The ADA applies to the legislative branch through sections 201 and 210 of the CAA, 2 U.S.C. §§ 1311 and 1331. Section 201 applies the rights and protections afforded by Title I of the ADA, which concerns employment, while section 210 applies the public access provisions found in Titles II and III.

Title I is most likely to be implicated for employing offices during a pandemic because of its focus on employment issues. Title I prohibits discrimination against qualified individuals with disabilities in applying for jobs, hiring, firing, and job training. It also prohibits discrimination against applicants and employees on the basis of their relationship or association with an individual with a disability, regardless of whether the employee has a disability. Further, under Title I, employing offices may be required to provide reasonable accommodations to qualifying employees with a disability. Such accommodations should enable an employee to perform the essential functions of their job.

Potential ADA issues to consider in a pandemic include:

- **Non-discriminatory personnel decisions.** Personnel decisions such as hiring, firing, promotions, demotions, pay increases, etc., must be made free from discrimination on the basis of a disability. To the extent that an employee who has been diagnosed with a pandemic illness is considered to have a disability under the ADA or is caring for or associated with such an individual, the employing office must ensure that its personnel decisions about that employee are not made in a discriminatory manner.

- **Direct Threat Exception.** In a pandemic, the anti-discrimination provisions of the ADA must also be read in conjunction with the ADA's "direct threat" exception. A direct threat is a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. If an individual with a disability poses a direct threat despite reasonable accommodation, he or she is not protected by the nondiscrimination provisions of the ADA.

  Based on guidance from the Centers for Disease Control and the World Health Organization, the COVID-19 pandemic likely meets the standard for direct threat. However, the fluctuations and changes in the risk associated with COVID-19 may affect whether infected employees would still be considered to pose a direct threat in the future. Employers should be mindful to use currently relevant information in making their assessments.

- **Telework as a Reasonable Accommodation**. Under mass "social distancing" measures like those implemented in response to COVID-19, entire offices may begin to telework. Employers should be mindful of any past determinations that telework was not possible as a reasonable accommodation for a qualifying employee with a disability, and reassess as appropriate once the pandemic situation has ended.

- **Testing and Excluding Employees.** During the COVID-19 outbreak the EEOC issued guidance about certain issues implicating the ADA, including testing employees for the virus, taking employees' temperatures, sending employees home if they display symptoms of the virus, and requiring doctors' notes before allowing employees to return, among others. Although this guidance is specific to the current pandemic, it is likely that similar guidelines would be issued for future such occurrences, and although the OCWR Board is not bound by EEOC determinations, we often look to them for guidance.

- **Building Accessibility.** During pandemics, legislative branch buildings might be closed to the public, and staffing levels might warrant the closure of some building entrances, restrooms, and other facilities. It is important to ensure that employees with disabilities who are required to report to the workplace still have accessible entrances and restrooms available to them.

For more information about employee testing and other pandemic-related concepts relevant to the ADA, please see the EEOC's guidance on pandemic preparedness and the Americans with Disabilities Act, available at https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm.

For more information about Title I of the ADA, please see our Brown Bag outline regarding ADA reasonable accommodations and modifications: https://www.ocwr.gov/sites/default/files/ADA%20Outline%20for%20Brown%20Bag%20-%20FINAL.pdf

IV. Family and Medical Leave Act (FMLA)

The FMLA applies to the legislative branch through section 202 of the CAA, 2 U.S.C. § 1312, and provides rights and protections, including unpaid leave and job protection, to eligible employees who need to take time off from work for specified family and medical reasons. Under recent amendments made by the FFCRA, these reasons now include an additional qualifying need related to a COVID-19 emergency – specifically, caring for children whose schools or childcare are closed because of the pandemic. The FFCRA amendments expire at the end of 2020 and there are certain limitations on the amount of pay an employee can receive for FMLA leave taken for a qualifying COVID-19 emergency need.

Additionally, the Coronavirus Aid, Relief, and Economic Security (CARES) Act reduces the standard 12-month/1,250 hours time-in-service FMLA eligibility requirements for employees seeking leave for a qualifying need related to a COVID-19 emergency. Under the CARES Act FMLA amendment, employees are eligible for such leave if they have been employed by their employing office for at least 30 days.

There are several issues to consider with respect to the FMLA during times of pandemic. Most readily apparent would be increased requests for leave and job protection for employees who take leave for a covered reason. Here are some examples of FMLA leave and job protection issues that may arise, as well as other unique considerations:

- **Staffing.** If an employee meets the eligibility requirements for the FMLA and they are requesting leave for a qualifying reason as defined by the statute, the employing office must allow the employee to take time off. Manpower considerations have no bearing on whether the employee is entitled to leave. Thus, during a pandemic, employing offices may encounter situations where multiple eligible employees qualify to take FMLA leave at the same time, and employers should prepare for how they will continue to operate in the event of mass staffing shortages. This preparation may involve identifying essential or time-sensitive services that the office must continue to provide, planning for service automation where possible, and conducting cross-functional training.

- **Job Protection.** Employees are generally entitled to return to their same job or an equivalent position when they return from leave. Employing offices must consider this if they choose to hire or contract with additional staff to perform the job responsibilities of employees who are out on leave.

- **Medical Certification.** During a pandemic, the increased demand for medical services may affect employees' ability to obtain completed FMLA medical certifications from their medical providers in a timely manner. Timely medical certification completion may be further complicated where employees have presumed pandemic-related symptoms but

do not meet the criteria for testing or in-person care because their symptoms are less severe. While employers are required to provide employees at least 15 days to return their completed medical certifications, the FMLA does not prohibit employers from extending this due date.

- **Privacy.** In the event that an employing office must conduct "contact tracing" because of potential or confirmed employee exposure to a pandemic illness, employing offices must remain mindful that access to an employee's FMLA-related information should be limited to as few persons as possible, to maintain the employee's privacy and confidentiality.

- **Prohibition Against Retaliation.** Requesting and taking FMLA leave are protected activities, and it is unlawful for an employing office to interfere with an employee's exercise of his or her FMLA rights or to discriminate against the employee for exercising those rights. An employee who initially provides sufficient information indicating that the leave being requested may be for an FMLA qualifying reason – including reasons specified under the FFCRA – is protected against interference and discrimination even if the employee does not specify that the leave is being requested under the FMLA.

To learn more about the FMLA, please see our FMLA Brown Bag outline: https://www.ocwr.gov/sites/default/files/FMLA%20Outline%20for%20Brown%20Bag%20%283%29.pdf .

For more information about the FFCRA, please see https://www.ocwr.gov/coronavirus.

For more information about the FMLA and COVID-19 implications, please see https://www.dol.gov/agencies/whd/fmla/pandemic.

V. Other Statutes

Although not likely to be as frequently implicated as the three statutes above, the other laws applied by the CAA remain in force during times of pandemic, and might still come into play in spite of – or perhaps because of – changing working conditions and environments. Below are a few examples of issues that might arise under each of these laws.

A. Title VII of the Civil Rights Act of 1964

Title VII applies to the legislative branch through section 201 of the CAA, 2 U.S.C. § 1311. Title VII prohibits discrimination on the basis of race, color, religion, sex, and national origin. Some situations to keep in mind in times of pandemic may include:

- Adverse employment decisions – including layoffs, furloughs, pay reductions, or other changes to terms and conditions of employment (even temporary ones) that may be

viewed as unfavorable – must, as always, be made free from discrimination on the basis of employees' race, color, religion, sex, or national origin.

- When viruses originate in certain parts of the world, employers must ensure that no employees are discriminated against – including being subjected to hostile work environments – by virtue of their national origin. Reports of bias against individuals of Asian descent during the COVID-19 pandemic indicate that this is a real issue, and such bias cannot be allowed into the workplace.

- Certain employees may object to vaccinations on the basis of their sincerely-held religious beliefs, which may pose challenges for some employers. Generally, employers must offer employees a reasonable accommodation in such situations, although employers are not required to incur undue hardship in order to accommodate employees' religious beliefs, and are not required to provide the exact accommodation requested by an employee. *See*, *e.g.*, *Horvath v. City of Leander*, 946 F.3d 787 (5th Cir. 2020) (city and fire department did not violate Title VII because they offered the plaintiff firefighter several reasonable alternatives to receiving a TDAP vaccination).

- The prohibition against discrimination on the basis of sex includes discrimination based on pregnancy, so employing offices may not take adverse employment actions against pregnant workers – even if they are doing so out of concern that the virus may harm the employee and/or the fetus.

The OCWR Office of the General Counsel has hosted several Brown Bag lunch presentations related to Title VII's prohibitions, including discussions about disparate treatment, hostile work environments, religion in the workplace, sexual harassment, third-party harassment, and sexual orientation and gender identity. To access the outlines from past Brown Bag lunches, please visit https://www.ocwr.gov/resources-training/resources/general-counsel%E2%80%99s-brown-bag-outlines.

B. Age Discrimination in Employment Act (ADEA)

The ADEA applies through section 201 of the CAA, 2 U.S.C. § 1311. Under the ADEA, adverse employment decisions – including layoffs, furloughs, pay reductions, or other changes to terms and conditions of employment (even temporary ones) that may be viewed as unfavorable – must not disfavor employees aged 40 or over.

Certain viruses, including COVID-19, seem to have disproportionately serious health consequences for older individuals than for younger ones. Employers might think they are doing the right thing by barring older employees from the workplace, placing them on furlough, or taking other such actions in an effort to minimize the risk of infection for these potentially more vulnerable employees. However, good intentions notwithstanding, this sort of age-based disparate treatment is likely a violation of the ADEA, so employers should think of ways to protect *all* employees regardless of age, and make decisions about furloughs, telework, and other workplace adjustments based on other factors that do not implicate protected characteristics such as age.

For more information, please see the outline from our ADEA Brown Bag presentation: https://www.ocwr.gov/sites/default/files/brown-bags/ADEA%20Brown%20Bag%20Lunch%20Outline.pdf

C. Uniformed Services Employment and Reemployment Rights Act (USERRA)

Section 206 of the CAA, 2 U.S.C. § 1316, applies certain rights and protections of USERRA to covered employees performing service in the "uniformed services." The uniformed services includes the Armed Forces (active and reserve), the National Guard, the Public Health Service, or any other category designated by the President during time of war or emergency.

During the COVID-19 pandemic, the National Guard has been called in to several areas of the country, and the President has declared a national state of emergency. If legislative branch employees are mobilized for National Guard duty under a federal order, or other uniformed services duty related to a pandemic, the usual rights and obligations under USERRA apply:

- Assuming certain conditions are met (such as advance notice of the absence, and timely application for reemployment), and with certain exceptions (including impossibility or undue hardship), a covered employee returning from duty in the uniformed services has the right to be reemployed to their position upon their return. They must be reemployed to the job that they would have attained with the same seniority, status, and pay had they not been absent for the performance of their uniformed services duty.

- There are also certain requirements pertaining to continuing or reinstating health coverage for qualified employees.

- It is prohibited to discriminate against employees on the basis of their service, including adverse employment actions and the creation or toleration of hostile work environments.

For more information, please see the outline from our Brown Bag presentation on veterans' rights: https://www.ocwr.gov/sites/default/files/bulletins/OOC%20Brown%20Bag%20-%20Veterans.pdf

D. Fair Labor Standards Act (FLSA)

The FLSA provisions applied by section 203 of the CAA, 2 U.S.C. § 1313, require payment of the minimum wage and overtime compensation to nonexempt employees, place restrictions on child labor, and prohibit sex discrimination in pay.

Some key pandemic-related issues to consider under the FLSA are:

- **Mandated Telework and Pay for Employees Who are Unable to Telework.** In a pandemic, employing offices may close for in-person business due to government-imposed social distancing and quarantine mandates. As to whether an employing office is obligated to pay its employees who are unable to work from home because of the

nature of their jobs, the FLSA does not mandate that employers pay non-exempt employees who are unable to telework. This is because employers generally only have to pay non-exempt employees for hours actually worked, whether at home or in the workplace. (However, salaried exempt employees must receive their full salary in any week in which they perform any work, subject to limited exceptions.)

To ease the financial impact of a pandemic on employees who are unable to telework, if possible, employing offices may consider staggered work shifts as a way to comply with social distancing guidelines. (See recommendations for work controls in the OSHAct section above.)

- **FFCRA enforcement.** A COVID-19 specific issue that employing offices must consider is that of FFCRA enforcement. If an employing office fails to provide paid sick leave to its employees in accordance with the FFCRA provisions allowing such leave for a qualifying COVID-19 emergency, the employing office violates the FLSA minimum wage provisions.

The OCWR has three sets of regulations implementing the FLSA:
House: https://www.ocwr.gov/sites/default/files/wp-content/uploads/2010/05/FLSA-House.pdf
Senate: https://www.ocwr.gov/sites/default/files/wp-content/uploads/2010/05/FLSA-Senate.pdf
Instrumentalities: https://www.ocwr.gov/sites/default/files/wp-content/uploads/2010/05/FLSA-Instr.pdf

For more information, please see the outline from our FLSA Brown Bag presentation:
https://www.ocwr.gov/sites/default/files/FLSA%20Brown%20Bag%20Outline.pdf

E. Worker Adjustment and Retraining Notification (WARN) Act

The WARN Act, applied by section 205 of the CAA, 2 U.S.C. § 1315, requires that larger employing offices (generally speaking, those with 100 or more employees, with certain qualifications) provide employees and unions with at least 60 days' notice in the event of mass layoffs or office closings. "Mass layoffs" are reductions in force of certain numbers of employees or percentages of an employing office's workforce, while "office closings" are temporary or permanent shutdowns of single sites of employment, facilities, or operating units, if certain conditions are met.

- Such layoffs or closings may become more likely in times of pandemic, so employing offices should familiarize themselves with the OCWR's regulations implementing the WARN Act, which go into detail regarding who is covered, which employment actions trigger the notice requirement, what the notice must contain, how and to whom the notice must be served, and other requirements.

- The WARN Act contains two exceptions to the 60-day notice requirement that may be relevant to layoffs or closings resulting from a pandemic: the "natural disaster" exception, defined in the OCWR regulations at section 639.9(b) to include "Floods, earthquakes, droughts, storms, tidal waves or tsunamis and similar effects of nature," and

the "unforeseen business circumstances" exception, which is defined in section 639.9(a) of the regulations as "circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required." The regulations discuss both exceptions in greater detail, including what employing offices must demonstrate in order to qualify for each exception.

- It is conceivable that an office closing could result directly from a pandemic outbreak if it could be shown that employees in a facility had contracted the virus, making the immediate shutdown of the facility necessary. In that case, although it does not quite fit with the examples of earthquakes, floods, etc., a pandemic could potentially be viewed as a "natural disaster." Notice would still have to be given as soon as practicable, even if it is not a full 60 days before the layoff or closing (or even if it is after the fact).

- In the more likely scenario, where mass layoffs or office closings result indirectly from the outbreak of a pandemic, the "unforeseen business circumstances" exception, rather than the "natural disaster" exception, would apply. The test for determining whether an employing office can take advantage of the unforeseen business circumstances exception focuses on the employing office's reasonable business judgment, and is evaluated on a case-by-case basis. For a discussion of this exception, see *Roquet v. Arthur Andersen LLP*, 398 F.3d 585 (7th Cir. 2005), *cert. denied*, 546 U.S. 871 (2005) (Arthur Andersen was exempt from liability for failing to give 60 days' notice of mass layoffs in the wake of the Enron scandal, because it could not have reasonably foreseen that the entire firm would be indicted, and that indictment is what caused the need for the mass layoffs).

The OCWR's regulations implementing the WARN Act are found at https://www.ocwr.gov/sites/default/files/wp-content/uploads/2010/05/WARN.pdf.

F. Federal Service Labor-Management Relations Statute (FSLMRS)

The FSLMRS, applied by section 220 of the CAA, 2 U.S.C. § 1351, typically prohibits employing offices from unilaterally making changes to terms and conditions of employment of bargaining unit employees without bargaining. Certain management rights are exempted from this requirement, including the right "to take whatever actions may be necessary to carry out the agency mission during emergencies." 5 U.S.C. § 7106(a)(2)(D). Accordingly, during times of pandemic, certain changes may be made without bargaining, but employing offices should proceed with caution:

- Review any applicable collective bargaining agreements (CBAs) to see if they have provisions specifically addressing pandemic illnesses, or applying more generally to unforeseen emergencies.

- The Federal Labor Relations Authority (FLRA) has held that "Management's right, under § 7106(a)(2)(D), to take whatever actions may be necessary to carry out the agency's mission during emergencies includes the right to: (1) independently assess whether an emergency exists, and (2) decide what actions are needed to address the emergency. However, the Authority has never held that, pursuant to § 7106(a)(2)(D), an

agency is free to label any particular set of circumstances an emergency and act unilaterally. Rather, the Authority has held generally with regard to management's rights that… At a minimum, an agency must support its claim that a given action constitutes the exercise of such a right. ... Moreover, an agency has a burden to support a determination made pursuant to the exercise of a management right." *U.S. Dep't of Veterans Affairs, VA Reg'l Office, St. Petersburg, Fla.*, 58 F.L.R.A. 549 (2003) (internal quotations and citations omitted).

- Under 5 U.S.C. § 7106(b)(2) and (b)(3), even if certain actions taken in response to pandemics are not themselves subject to bargaining, employing offices may still have to engage in impact and implementation bargaining in connection with those actions – i.e., bargaining over procedures that management will observe in exercising its authority, or appropriate arrangements for employees adversely affected by management's exercise of its authority.

- Keep in mind that discrimination against individuals on the basis of protected union activity is unlawful. In March 2020, for example, an Amazon employee named Chris Smalls was fired for leading a strike at a New York warehouse to protest the company's response to the coronavirus outbreak. Smalls claimed that this was unlawful retaliation, while Amazon argued that Smalls was fired for ignoring management's instructions for him to stay home (with pay) for 14 days because he had been in close contact with an infected individual. Amazon claimed that Smalls showing up at the work site to lead the walkout put his coworkers at risk, thereby justifying his termination. The incident is currently under investigation.

The OCWR's regulations implementing the FSLMRS are found at https://www.ocwr.gov/sites/default/files/wp-content/uploads/2010/05/LM.pdf.

For more information, please see the outline from our Brown Bag presentation on unfair labor practices:
https://www.ocwr.gov/sites/default/files/ULP%20outline%20final%2010%2019%202016_0.pdf

G. Genetic Information Nondiscrimination Act (GINA)

GINA applies to the legislative branch by its terms and through CAA section 102(c), 2 U.S.C. § 1302(c). Although pandemics such as COVID-19 do not involve genetic disorders, employers must still take care not to run afoul of GINA, which defines "genetic information" broadly to include, among other things, "the manifestation of a disease or disorder in family members of" the employee. 42 U.S.C. § 2000ff(4)(A). Therefore, although it seems somewhat incongruous, whereas it is acceptable during pandemics to ask an employee about the employee's *own* test results, diagnosis, or symptoms, it could be a violation of GINA to ask the employee whether any of the employee's family members has tested positive, been diagnosed, or shown symptoms consistent with the pandemic disease.

However, there is an exception in 42 U.S.C. § 2000ff-1(b)(3) that allows an employer to request or require genetic information to comply with the medical certification provisions of the FMLA,

29 U.S.C. § 2613. As discussed above with respect to the FMLA, caring for a family member with a serious illness – including COVID-19 specifically – is a qualifying reason for requesting and taking FMLA leave, and employing offices may require that the employee provide supporting documentation of the family member's condition.

For more information, please see the outline from our GINA Brown Bag presentation: https://www.ocwr.gov/sites/default/files/GINA%20Brown%20Bag%20Outline.pdf.

H. Employee Polygraph Protection Act (EPPA)

Last – and probably least likely to come up, but still important to mention – is the EPPA, which applies through section 204 of the CAA, 2 U.S.C. § 1314, and prohibits employers from requiring employees or prospective employees to take lie detector tests, or discriminating against employees or prospective employees based on their refusal to take a lie detector test or on the basis of the results of a lie detector test. This prohibition, including certain exceptions and waivers as specified in the statute, applies during times of pandemic just as at any other time.

The OCWR's regulations implementing the EPPA are found at https://www.ocwr.gov/sites/default/files/wp-content/uploads/2010/05/Polygraph.pdf.

I. Retaliation

Under section 207 of the CAA, 2 U.S.C. § 1317, "It shall be unlawful for an employing office to intimidate, take reprisal against, or otherwise discriminate against, any covered employee because the covered employee has opposed any practice made unlawful by this chapter, or because the covered employee has initiated proceedings, made a charge, or testified, assisted, or participated in any manner in a hearing or other proceeding under this chapter."

Additionally, some of the statutes listed above contain their own anti-retaliation provisions, which might provide alternative avenues of recovery for employees who can demonstrate that they raised good-faith concerns over potential violations of those laws.

It is not uncommon for employees to succeed on retaliation claims even in situations where they fail to prove that the employing office committed the violations that were originally alleged. For example, an employee may request a safety and health inspection, and even if the OCWR ultimately determines that there was no violation of the OSHAct, the employee might still be able to prove unlawful retaliation if they can show that they suffered an adverse employment action or were subjected to a hostile work environment because they requested the inspection. Likewise, if an employee believes that they were subjected to a hostile work environment because of their national origin or another protected characteristic, and that complaining about it to management or filing a claim with the OCWR led to even worse harassment or an adverse personnel action, the employee might be able to show retaliation even if they can't prove that the original hostility was unlawful.

For more information, please see the outline from our Retaliation Brown Bag presentation: https://www.ocwr.gov/sites/default/files/Retaliation%20Outline%20for%20Brown%20Bag%20FINAL.pdf