

NOVEMBER 2, 2020

## WHAT'S INSIDE

- 2 Sharpen Your Judgment**  
Fired after never returning from FMLA leave: Retaliation?
- 3 Employment Law Update**  
Employee fired after contracting COVID: Court to decide if it's legal
- 4 Answers to Tough HR Questions**  
Do we need to give employees time off to vote?
- 6 What Would You Do?**  
Retention issues: How can we get people to stick around long-term?

## HRMORNING

### Keep Up To Date with the Latest HR News

With **HRMorning** arriving in your inbox, you will never miss critical stories on labor laws, benefits, retention and onboarding strategies.

**HRMorning**, part of the *SuccessFuel* Network, provides the latest HR and employment law news for HR professionals in the trenches of small-to-medium-sized businesses. Rather than simply regurgitating the day's headlines, **HRMorning** delivers actionable insights, helping HR execs understand what HR trends mean to their business.

## Legal expert tackles tricky ADA, COVID-19 questions

### ■ Ask your employees, 'How can I help you?'

**A** lot of employers are struggling with all the unknowns of COVID-19.

How long will you need to take these precautions in the workplace? What do you do when an employee comes down with the virus? What are your legal obligations?

Employment lawyer David K. Fram of the National Employment Law Institute tells employers it doesn't have to be as complicated as they think.

### Handling it like the ADA

Fram says so many employers are worrying about COVID-specific questions and issues coming up, but

they can handle them in the same way they handle ADA issues.

Whenever an employee comes to you with a medical or compliance concern, the best thing you can ask them is, "How can I help you?"

And that question is just as effective in this COVID-19 world, Fram says.

Just like when dealing with ADA accommodations and concerns, employers should focus on finding "quick, easy fixes" to COVID-19 issues, Fram says. It's also crucial to document every step of the process.

While the basic strategy to

*(Please see COVID-19 ... on Page 2)*

## Study: Higher-ups aren't fans of remote work

### ■ 77% say remote work, social distancing hinder productivity

**W**hile a good amount of employees are fans of remote work during the coronavirus pandemic, a recent survey found that company leaders don't feel the same way.

According to recent research by consulting firm West Monroe, 40% of C-suite leaders say social distancing hinders productivity, and 37% say remote work is the true culprit.

### Adapting to the new normal

Though upper management isn't a fan of the current remote situation,

the study found they generally accept it, with some even embracing the new remote world.

Sixty-nine percent of respondents say their companies are investing more in tech tools to make remote communication easier – and 21% reported adopting artificial intelligence.

While remote work and flexibility have been linked to improved employee wellness and accessibility, a lot of leaders still remain skeptical that it'll stick around long-term.

*Click: [bit.ly/remotework567](https://bit.ly/remotework567)*

# COVID-19 ...

(continued from Page 1)

addressing COVID-19 issues is the same as ADA concerns, there are obviously a few key differences.

Here are Fram's answers to four common questions about COVID-19 and the ADA employers may have:

### 1. Is COVID-19 classified as a disability under the ADA?

There is no formal guidance on whether COVID-19 is a disability, Fram says. An ADA-qualifying disability must substantially limit a major life activity, and COVID-19 doesn't always do this, as it doesn't always present symptoms.

Things can get tricky, however, when an employee has an underlying condition making them wary of coming into the workplace. In this case, you'll need to first determine if their underlying condition is considered a disability.

As always, you can be more lenient

than the laws require. If an employee is truly afraid of coming in and they have the ability to work remotely, you may just want to grant them that accommodation.

### 2. Is being on site an essential function?

The pandemic has vastly changed many companies' stances on remote work. In the past, working from home could be a reasonable accommodation for an ADA-qualifying disability. Now, Fram says, granting widespread remote work could be that "quick, easy fix."

Things only become a concern when an employee isn't able to perform an essential job function due to their work-from-home arrangement. If that's the case, Fram says, you should document this and communicate it to the employee. Temporary leniency could be granted if necessary.

### 3. What happens if employees aren't being careful enough regarding COVID-19 precautions?

It's possible some employees may complain about co-workers not being careful enough in the workplace. Some may even refuse to be in the same area as certain colleagues.

Again, Fram suggests attempting to accommodate this, even if it's not technically required by the law. Grant remote work if possible. Physically separate the employees having the conflict. Fram says something extreme like reassignment should be a last resort, as that could potentially constitute "undue hardship."

### 4. Is a temperature check a 'medical exam'?

Fram says yes, so you can't go around checking job candidates' temperatures before making offers.

However, you can check employees' temperatures if it's truly job-related and a business necessity. Fram notes it's important to remember to keep employee temperatures confidential – as well as the identity of anyone with a positive COVID-19 test.

Info: [bit.ly/COVIDq567](https://bit.ly/COVIDq567)

## Sharpen your JUDGMENT

*This feature provides a framework for decision making that helps keep you and your company out of trouble. It describes a recent legal conflict and lets you judge the outcome.*

### ■ Fired after never returning from FMLA leave: Retaliation?

HR Manager Lynn Rondo sipped her hot tea and examined the beautiful fall foliage from her office window. Everything looked so peaceful ...

"Sorry to barge in, Lynn," Company Attorney Eric Bressler said as he strode into her office. "But we've got a problem. Rick Johnson is suing us for retaliation for taking FMLA leave."

#### Attendance issues

Lynn sighed. "Well that's just ridiculous. We fired Rick because of his abysmal attendance record."

"How many times was he late to work?" Eric asked.

"Over a dozen times in just two months," Lynn replied. "I told him he was on very thin ice. Rick then signed an agreement stating if he had one more unexcused absence in the next 10 months, he could be fired immediately."

"So when he missed work the day after his FMLA leave ended, you went through with the termination?" Eric asked.

"Exactly," Lynn said. "Rick didn't even try to contact us saying he needed more time. He just didn't show up for work."

"Sounds like we're within our rights and have everything documented," Eric said. "But the timing doesn't look great for us."

When Rick sued for FMLA retaliation, the company fought to get the case dismissed.

Did it win?

■ *Make your decision, then please go to Page 4 for the court's ruling.*

### What's Working in HUMAN RESOURCES

EDITOR: RACHEL MUCHA  
MANAGING EDITOR: RICH HENSON  
EDITORIAL DIRECTOR: CURT BROWN  
PRODUCTION EDITOR: AMY JACOBY

*What's Working in Human Resources*, (ISSN 1088-3223) November 2, 2020, Vol. 25 No. 567, is published semi-monthly except once in December (23 times a year).

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal or other expert assistance is required, the services of a competent professional should be sought. — From a declaration of principles jointly adopted by a committee of the American Bar Association and a committee of publishers.

Copyright © 2020 HRMorning. Please respect our copyright: Reproduction of this material is prohibited without prior permission. All rights reserved in all countries.

# Employee fired after contracting COVID: Court to decide if it's legal

## ■ Employer worried about employee's 'irresponsible behavior'

Can you fire an employee if their behavior outside of the office poses a risk to your business and other employees?

This is exactly the question a court will soon consider.

### Out partying?

Nicolas Prada worked as a waiter at Tomukun Noodle Bar in Michigan. When he began experiencing symptoms of COVID-19, Prada alerted his manager and isolated for the required 14 days, after which he was medically cleared to return.

However, Prada's manager was wary and began asking Prada questions about how he contracted the virus. The manager was concerned Prada had been "out partying" and "acting irresponsibly," due to photos

posted on Prada's social media. The manager told Prada he wasn't permitted to come back to work yet.

Prada quit soon after and filed a lawsuit, suing for interference and retaliation under the Families First Coronavirus Response Act (FFCRA).

The case is pending, and legal and HR experts everywhere will be watching it closely.

Under the FFCRA, employers must hold on to COVID-positive employees' jobs for them. However, if Prada was partying as his manager suspected – causing him to be concerned for his other employees – the court could decide the manager had a non-discriminatory reason for firing Prada.

*Cite: Prada v. Trifecta Productions, 8/28/20.*

# Hearing-impaired worker couldn't pass safety test: Was there an accommodation?

## ■ Court rules employer didn't participate in interactive process

A disabled employee failed a safety test and was fired, but now the company's in hot water for not trying hard enough to accommodate the worker.

Here's a breakdown of the case.

### Suggested alternatives

Mark Mlsna was a train conductor with Union Pacific who had a hearing disability. Employees were required to wear ear protection, but when Mlsna wore it, his hearing was impaired even more, and he wasn't able to pass a hearing safety test.

Mlsna suggested alternative options, but the company claimed it looked into them and found no solution that would work. Mlsna was

later fired, and he sued for an ADA violation, claiming Union Pacific failed to accommodate his disability.

A district court initially sided with the company, claiming Mlsna wasn't qualified for the job because of his hearing impairment.

But the 7th Circuit reversed that decision. First, it questioned whether passing the hearing safety test was an essential function of Mlsna's job. The 7th Circuit also pointed out that Mlsna suggested reasonable accommodations that the company flat out refused to consider.

Union Pacific didn't carry out its duties under the ADA.

*Cite: Mlsna v. Union Pacific Railroad Co., 9/14/20.*

## ■ Company owes \$60K after firing epileptic employee

Terminating an employee after they experience a serious medical episode is a surefire way to catch the EEOC's attention.

PML Services, doing business as IHG Army Hotels in Milwaukee, fired an employee after she had an epileptic seizure, according to the EEOC's lawsuit.

The employee, who'd only been working for the hotel for a few months, experienced a seizure at home and required two days off to recover. But instead of granting this request, the employer fired her, because her absence occurred during her probationary period.

This violates the Americans with Disabilities Act (ADA), which protects disabled employees even during probationary periods.

PML Services agreed to settle the suit for \$60,000 in monetary relief for the employee.

*Info: bit.ly/ADA567*

## ■ Racial discrimination costs company \$115K

When two employees got into a heated conflict, only the African-American worker was fired – so the EEOC stepped in.

According to the EEOC's lawsuit, Thompson Construction Group, located in North Carolina, fired an employee due to his race.

A white employee allegedly made derogatory comments to his African-American supervisor. After the incident, the supervisor was fired, and the white subordinate wasn't disciplined. This is a clear violation of the Civil Rights Act, the EEOC said.

Thompson Construction Group will pay \$115,000 to settle the lawsuit. It also must revise and distribute anti-discrimination policies to its employees and report any discrimination complaints directly to the EEOC.

*Info: bit.ly/racebias567*

# ANSWERS TO TOUGH HR QUESTIONS

HR professionals like you face new questions every day on how to deal with workplace conflict and employment law. In this section, experts answer those real-life questions.

## Do we need to give employees time off to vote?

**Q:** Are we legally obligated to give employees time off to vote on Election Day? Can we tell them how much time to take and when to take it?

**A:** While there is no federal law requiring employers to grant employees leave on Election Day, several states offer voting leave, says employment law attorney Jill Vorobiev of the firm Reed Smith.

Employers should read up on their state laws because each one is different. Some states grant only one hour of leave; others allow several. Some laws also specifically dictate what time of day employees are allowed to vote, as not to disrupt business operations.

It's also a good idea to provide your employees with voting information, such as how to vote by mail, which will help alleviate staffing issues (not to mention keep employees safe from coronavirus risks).

However, employers must remember never to say anything that sounds like you're discouraging or penalizing

employees from voting in person during the workday.

## What should we do if we suspect a worker may quit?

**Q:** One of our normally great employees seems disengaged lately and is occasionally offline at strange times during the day. I'm worried they may be job hunting. What should I do?

**A:** The two best things you can do are don't jump to conclusions, and show your appreciation for this employee, say HR experts Jack Choros and Stephanie Crowe.

The signs you noticed may indicate personal problems and not necessarily job searching. It might be best to check in with the employee and ask if you can support them in any way. Showing you care can result in constructive, honest conversations with your worker.

Another thing you can do is recognize and show appreciation for all the employee does. It's easy for managers to get complacent and take a stellar employee for granted – but they need to feel appreciated, too.

## Is this team-building exercise a good idea?

**Q:** Like many other companies, our employees are all working remotely right now. Because of the disconnect, we started a team-building exercise where, before every meeting, we ask employees to rate their mood on a color-coded scale. A few people don't seem to be a fan of this – should we stop doing it?

**A:** You should drop this activity – especially if you're sensing some workers have a problem with it, says management expert and author of *Ask A Manager* blog Alison Green.

Asking people to share their mood or state of mind can be invasive, particularly to those who may be dealing with personal difficulties or ADA-protected conditions.

Not to mention, some people might not feel like answering honestly, like when an acquaintance asks, "How are you?" and the expected response is, "Good, you?"

*If you have an HR-related question, email it to Rachel Mucha at: [rmucha@HRMorning.com](mailto:rmucha@HRMorning.com)*

## Sharpen your judgment...

### THE DECISION

(See case on Page 2)

Yes. The company won when a court dismissed Rick's case.

Rick's attorney argued that the timing of his termination – mere days after his FMLA leave was up – proved the company retaliated against him for taking protected leave.

But the court disagreed. First off, it said Rick had a long, well-documented history of attendance problems, which he was disciplined for. Rick also knowingly signed an agreement that stated he could be fired for his next attendance issue.

While his FMLA leave was approved, Rick never returned or contacted the company to ask for more time off. Because of this, the court said, the company was justified in firing him.

Rick was fired for violating attendance policies, not for taking FMLA leave.

#### ■ Analysis: Keep problems documented

This case shows how good documentation can be the difference between winning and losing. The company kept track of Rick's attendance problems and warned him what could happen if he continued to miss work.

Because of these disciplinary measures, there was no question in the court's mind why Rick was fired.

**Cite:** *Alkins v. The Boeing Co., U.S. Ct. of App. 3rd Circ., No. 20-1233, 9/23/20. Fictionalized for dramatic effect.*

# Revamped hiring process led to better hires, saved time and money

■ *Spreadsheets and questionnaires ensure candidates are the right fit*

Our hiring and interview processes needed a complete makeover.

For many years, we had two very common hiring strategies:

- hire staffing agencies to fill positions, or
- have HR place an ad, review resumes, share the selected resumes with the department manager and then schedule interviews.

That process worked OK, but we knew we could be more effective in getting the right candidates in our doors.

### 4 steps to success

So we put together a four-step plan to streamline hiring. Here's how it works for each open position.

First, instead of using staffing agencies, HR now places ads on a site that posts those openings on multiple job boards at a time.

For out-of-state positions, ads are placed on local online job boards for specific regions.

Second, we meet with the managers of the department to form 10 key questions related to the job's duties.

These questions are compiled into a written questionnaire and include behavioral questions based on things the candidate would encounter in the position.

For example, a questionnaire for an administrative assistant opening might ask applicants how they'd handle dealing with interruptions and competing tasks.

Third, we put together an Excel spreadsheet containing the key traits for the position.

If the candidate has one of the key traits, a check mark is made in that

column. There's also a column for extra or additional skills.

Once the questionnaires are complete, HR reviews resumes and checks off the applicable skills in the Excel spreadsheet.

Those with the best match of the most key skills are called for phone interviews.

### How it works

For individuals selected to come in for an interview, they must complete the questionnaire and send it back before the interview.

The completed questionnaires and the spreadsheet showing the skills for each candidate are then emailed to the managers.

Now, when the applicant comes in, the department manager has the questionnaire and spreadsheet to refer to – instead of just a resume.

### It's made a difference

The questionnaires, unique to each opening, have become standard in the recruiting process for all open positions.

They not only give us the ability to see how the applicant's experience fits with the "actuals" of the position, we can also see their writing skill level, as well as clarify their past roles.

This new process has also made hiring more efficient – selections are made starting with the applicant's responses to the questionnaire instead of a well-written resume.

*(Sonya Mayfield, HR director, Gaming Partners International, Las Vegas)*

## REAL PROBLEM REAL SOLUTION

### ■ How we compete for talent in a competitive field

As a company that relies on skilled labor, we knew we had to fix how we attracted, managed and retained the right employee mix.

It's hard to find and attract workers with the required skills for the job, such as mechanics and welders.

When you find someone you'd like to hire, you're trying to take them from another job.

And when we have a problem with turnover, it's going to impact all our other metrics because our employees are the ones generating the revenue.

It was clear we had to connect managers and workers with tech that fits their work and skills.

### Using tech to our advantage

About 75% of our jobs are held by "low-tech-savvy" men over 40, and we knew they weren't going to get more comfortable with technology on their own.

Most of the day, our managers are away from their desks and out in the field. And because many of them never went to business school, we needed to show them the "why" of our numbers, not just the numbers themselves.

So, we worked with a vendor to build a talent management dashboard for smartphones that's easy for our employees and managers alike to learn and use.

Dashboards include head count, overtime, turnover and "cool" things like the average tenure of a team in real time.

The system's enabled front-line managers to be proactive in managing their teams and our talent pipeline.

*(Lisa Maxey, director of compensation and HRIS, GBW Railcare Services, as presented at the HR Technology Conference & Expo)*

## WHAT WOULD YOU DO?

Companies face competing agendas when dealing with their employees. They must find ways to inspire their people to excel, while controlling costs and staying within the law. Here we present a challenging scenario and ask three executives to explain how they'd handle it.

### Retention issues: How can we get people to stick around long-term?

#### The Scenario

HR manager Stu Capper was sorting through a stack of resumes when department manager Sam Hudson waltzed into his office. Without a word, Sam sunk down into a chair with a sigh.

"Everything alright, Sam?" Stu asked, concerned.

"Audrey just gave me her notice," Sam replied glumly.

"Oh, no," Stu said. "Audrey's one of our best. Not to mention, I'm still trying to replace Michael."

#### No opportunities?

"Did Audrey say why she was leaving?" Stu asked.

"She found a position with a

company that has more opportunities for advancement," Sam said. "I know this has happened to us a few different times."

"It's just the nature of our business," Stu replied. "Employees can advance quickly when they first get here but then they can get stuck if they don't keep pushing."

"And the thing is, we do have opportunities," Sam said. "Maybe we don't advertise that enough because employees never ask about them."

Stu nodded. "We'll definitely have to get the word out that there are ways to advance here."

"Before we lose anyone else," Sam added.

*If you were Stu, what would you do next?*

likely stay on with us. Your workforce will stick around if they feel you've really invested in them.

#### Reader Responses

##### 1 Jim Houser, co-owner, Hawthorne Auto Clinic, Portland, OR

*What Jim would do:* I would start investing our time and resources into employee training and advancement. Instead of waiting for employees to come to us about advancing, we could have them all go through paid training. I'd even try and set up internships through local colleges, so our employees can get practical experience after going through training. This would get them completely prepared for advancing in our company.

*Reason:* So many employees want these advancement opportunities, but they aren't always sure how to ask about them. This way, every single person gets the chance to go through training if they want. Employees will be excited by the opportunity and will

##### 2 Lisa Waldron, HR manager, Richmond Baking, Alma, GA

*What Lisa would do:* Since employees don't seem to realize all the advancement opportunities available to them at the company, I'd start explaining this in greater detail during the onboarding process. I'd take new hires on a tour of our facility and point out all the room for advancement. I'd also make sure we had professionals train our new employees, instead of current workers giving them a quick rundown.

*Reason:* Communication is key, and what better time to explain all the opportunities for advancement than during onboarding? Bringing in professional trainers also will show how dedicated we are to providing excellent training opportunities.

#### HR OUTLOOK

##### ■ How to communicate with colleagues – even in a mask

The coronavirus pandemic has brought a lot of new work challenges, and a major one is communicating while wearing a mask.

People can still hear voices through the masks, but they're missing out on key facial expressions that help convey sincerity and tone.

Nonverbal communication is incredibly important to get points across, and right now, we're all lacking that.

##### Keys to get your point across

Here are some keys to successful masked communication, courtesy of *Harvard Business Review*:

1. **Avoid clear masks.** Some think transparent masks are the key here, but they tend to fog up easily, which is more distracting. Unless you're communicating with a deaf person, stick to a regular mask.

##### 2. Practice your 'mask voice.'

While speaking with a face covering, it's important to remember four things: pause, accentuate, volume and emotion. Give people the chance to jump in, and slightly exaggerate both volume and tone, since the mask has a muffling effect.

3. **Be an active listener.** Nodding or the occasional "Mm-hmm" will let the person know you can hear them through the mask. If they seem upset or are expressing something negative, confirm this by stating, "So what I'm hearing is ..."

4. **Use body language.** This is so important in conveying tone, though you don't want to overdo it. Experts say to increase your amount of gestures by about 10%. Since handshakes aren't happening right now, a nice friendly wave can be used instead. Also, don't forget to smile. They won't see it through your mask, but your eyes will look more friendly.

**Info:** [bit.ly/masks567](https://bit.ly/masks567)