

Navigating Difficult FMLA and ADA Issues in the Middle of a Pandemic

June 2021

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Compliance **HR**

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- Former General Counsel / HR Chief of Global Security Organization
- Career Compliance Geek
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Answering Your Questions

1. Q & A Box on your screen
(questions are confidential
visible to presenters only)





Jeff Nowak

Littler Shareholder

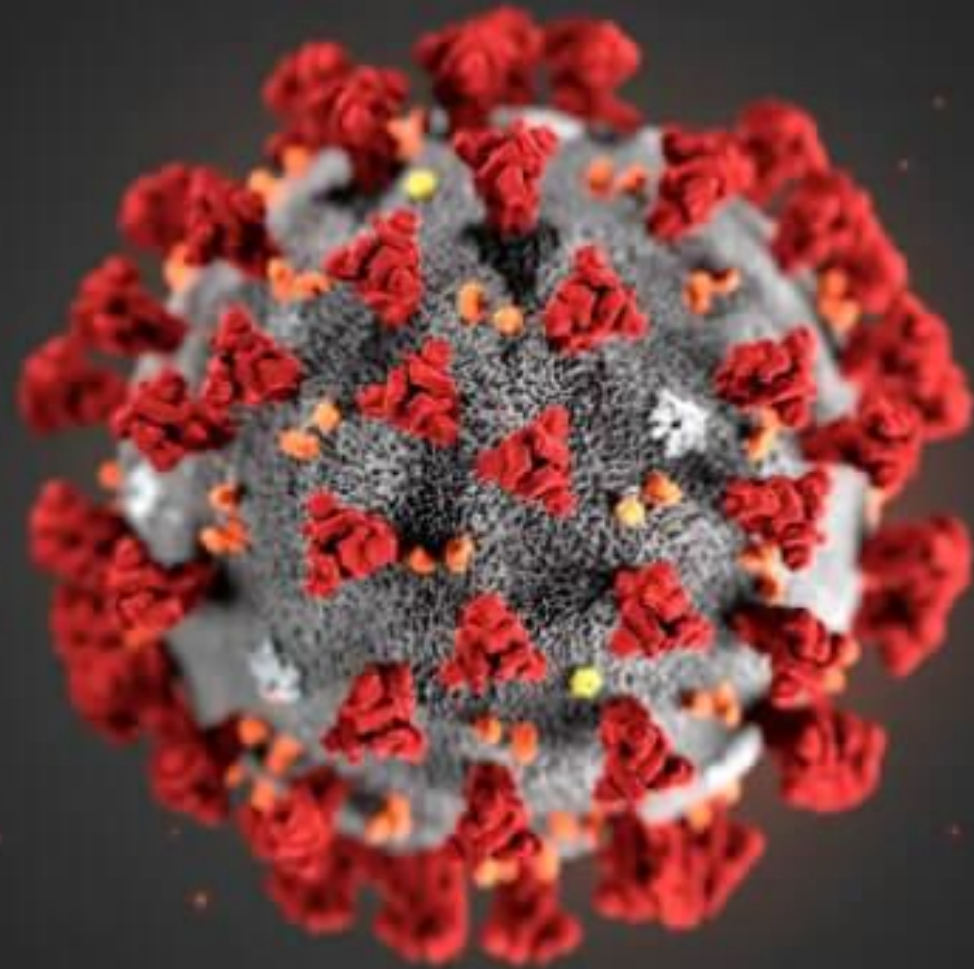
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 [@jeffreysnowak](https://twitter.com/jeffreysnowak)

- Recognized Leader on FMLA and ADA issues
- National Employment Law Institute (NELI) Faculty Member
- Author of the *FMLA Insights* Blog

Agenda

- Quick FFCRA Update
- Does a Positive COVID-19 test = FMLA Leave?
- Underlying Health Conditions during Pandemic: Do They Trigger FMLA Leave? What are the ADA Implications?
- “Caring for” a High-Risk Family Member = FMLA Leave?
- Is physical presence at work critical anymore? Handling work-from-home requests during the pandemic



FFCRA Update



Classic FMLA for Positive COVID-19 Test?



Positive COVID-19 Test

- COVID-19 as “Serious Health Condition”
 - Inpatient treatment and connected period of incapacity or subsequent treatment
 - Period of incapacity of more than three consecutive days + continuing treatment
- But Jeff, what if the employee is not incapacitated? (*Payne v. Woods Services*, 2021 U.S. Dist. Lexis 28198 (E.D. Pa. Feb. 16, 2021))



Employee's Underlying Health Condition

“I suffer from asthma and my doctor and I are worried about respiratory issues...”



“I am worried that my medical condition will be exacerbated if I get COVID-19”



Underlying Conditions: Do They Trigger FMLA?

- Is this request protected by FMLA?
 - Not incapacitated
 - Can an employee take FMLA leave simply because they are worried about becoming incapacitated?
- *Santiago v. Connecticut Dep't of Transportation*, 50 F. Supp. 3d 136 (D. Conn. 2014)
 - Cluster headaches; could not work OT during winter months
 - Doctor limited work as prophylactic measure
 - Forced to resign
 - Court: Summary judgment denied

“Absences . . . qualify for FMLA leave even though the employee . . . does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days. For example, an employee with asthma may be unable to report . . . because the employee’s health care provider has advised the employee to stay home when the pollen count exceeds a certain level.” 29 CFR 825.115(f)

Santiago v. Connecticut Dep’t of Transportation, 50 F. Supp. 3d 136 (D. Conn. 2014)



When to Designate FMLA Leave for Underlying Condition

- Medical Condition must be identified
- Employee must make connection between medical condition and inability to work
- FMLA notices and certification provided to employee
- Employee returns the certification
 - Leave is medically necessary
 - Handling physician “recommendations”

*“I’m not able to return
so long as this
pandemic is going on.”*

- Says Your Employee
after FMLA leave is exhausted



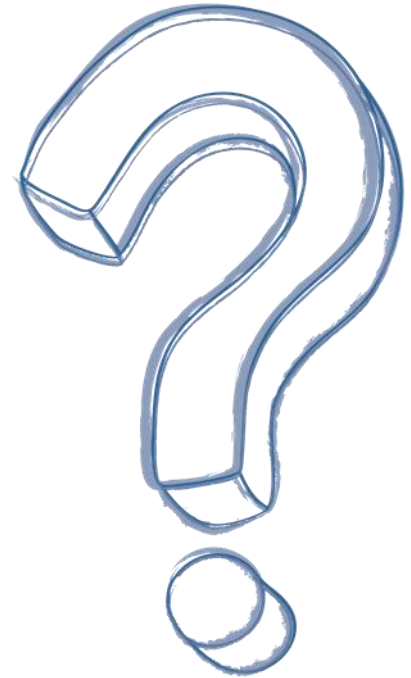


Questions for the Employee

- Obtain the basic medical facts
- How long do you anticipate being unable to work?
- Are there any changes or modifications we could make that would enable you to perform your job duties?
- How, specifically, would those help?
- Is leave the only thing you believe we could offer?

Questions for Your Manager

- What are the options for remote work?
- If you had to cover the work without the employee, how would you do it? How have you done it in the past? What do you do during FMLA?
- What is the specific impact, if any, if we provide additional leave, potentially for several more months?
- Are there any other adjustments that might make sense, given the employee's job duties?



Factors Establishing Undue Hardship



- Significant losses in productivity because work is completed by less effective, temporary workers or last-minute substitutes, or overtired, overburdened employees working overtime who may be slower and more susceptible to error
- Increased burden on management staff required to find replacement workers, or readjust workflow or readjust priorities in light of absent employees
- Deferred projects

Factors Establishing Undue Hardship



- Lower quality and less accountability for quality
- Less responsive client service and increased client dissatisfaction
- Lost sales
- Increased stress on overburdened co-workers
- Lower morale

How Do We Do This?

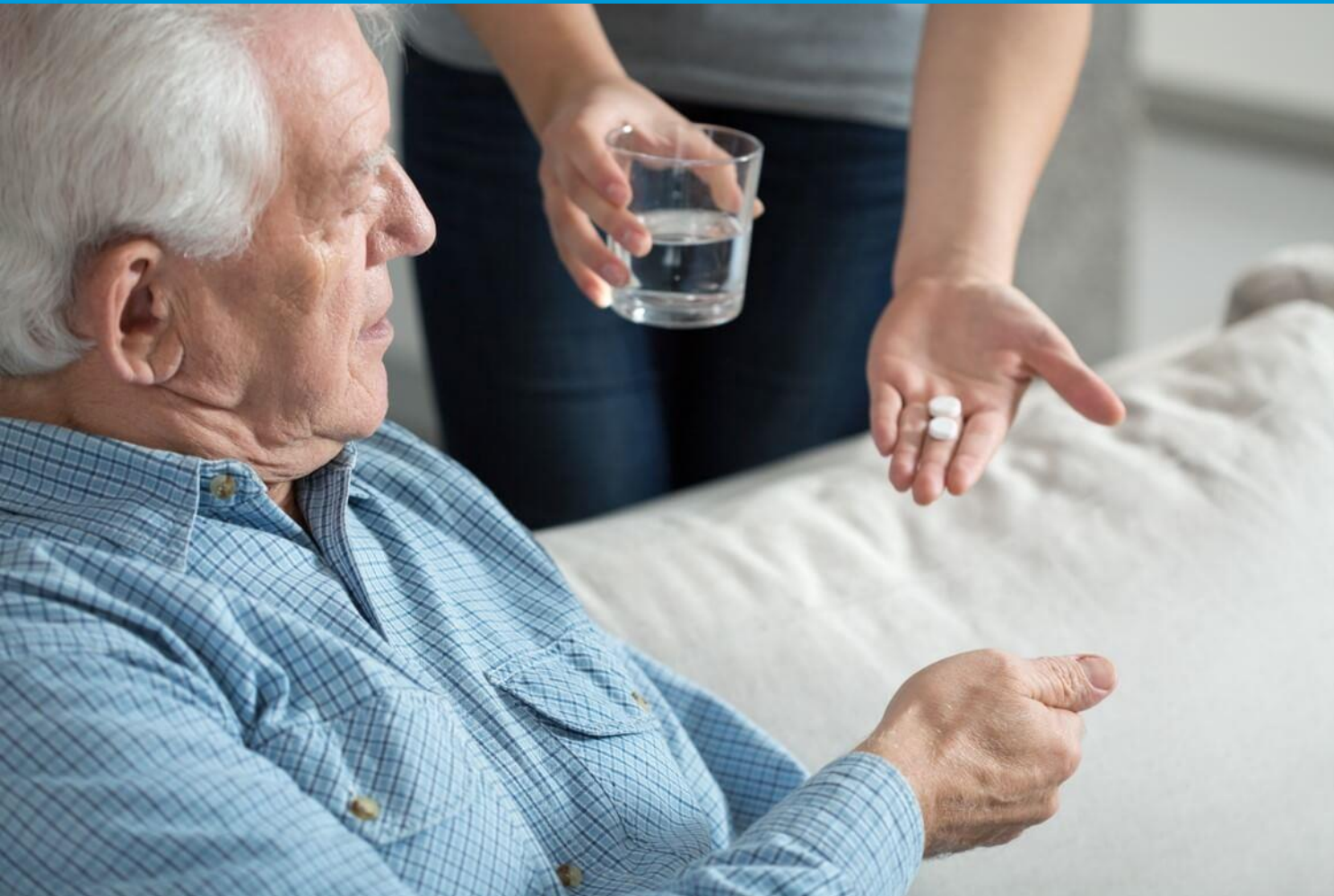
- Give serious consideration to employee's request
- Interview supervisory staff to determine:
 - How employee's work has been absorbed and may continue to be performed
 - What are the hardships created by the absence?
- Conduct an Individualized Assessment that you also document





How Do We Do This?

- Document the alternatives you have examined and the undue hardship
- Before termination, justify—with documentation—the rationale for the decision
- Any final decision should be a shared decision—involve HR and legal



Leave to Care for a High-Risk Family Member

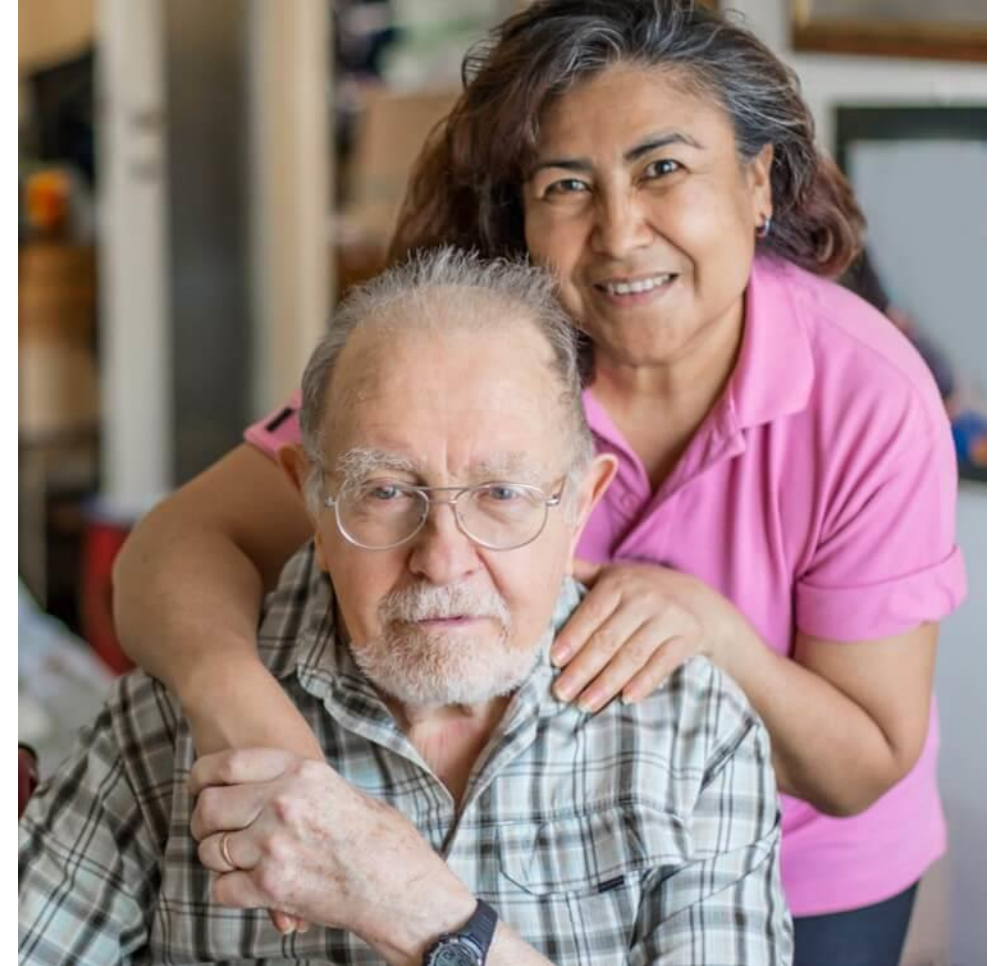


High-Risk Family Member

- Rick works in your processing plant
- Rick: Can't come into work because wife's autoimmune condition puts her at a bad risk of contracting COVID-19
- What are the considerations?

High-Risk Family Member

- No ADA: The ADA does not require an accommodation of a family member
- FMLA: Caring for a family member?
 - First: Can the employee telework?
 - Next: Is the family member being “cared for”?
 - Physical care and psychological care:
 - “comfort and reassurance that would be helpful to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.”



High-Risk Family Member

- Employee relations considerations
- Telework (regardless of FMLA)
 - Must the employee be on site?
 - Can you accommodate for a limited period?
- What affect will your decision have on the culture, either way?





The Status of Telework During the Pandemic

What Are Reasonable Accommodations in a COVID-19 World?

- What if, instead of asking for leave due to asthma, our employee requests to work from home:
 - Gabe is an assistant manager for one of your community programs; has moderate asthma
 - Has worked remotely for a time, requests that it continue
 - Gabe: “I am requesting to perform my job remotely from home.”
 - Gabe’s doctor: “Gabe needs to work from home for the next four weeks due to asthma. Exposure to COVID-19 will exacerbate condition.”



What Are Reasonable Accommodations in a COVID-19 World?

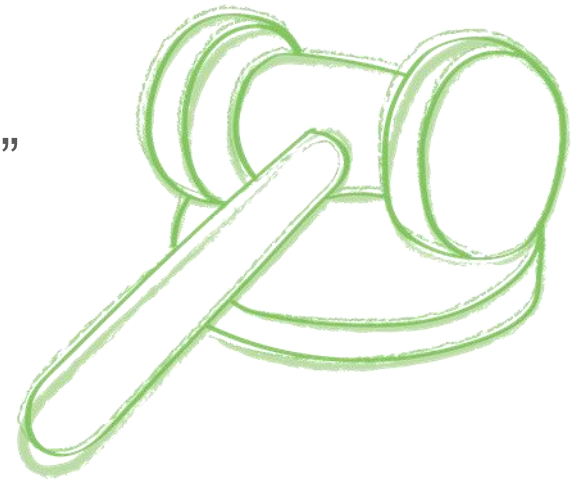


- Company response:
 - Four weeks of leave is provided
 - At conclusion, Gabe asks to continue telework
 - HR: “We’re not approving work from home for managers since we need managers in the building and supporting operations.”
- Is this a problem?

Work From Home

Peeples v. Clinical Support Options, 3:20-cv-30144-KAR (D. Mass. Sep. 16, 2020)

- Court: Employer has an obligation to engage in a meaningful dialogue with employee
- Employer failed to engage in interactive process
 - PPE insufficient, characterizing them as “workplace safety rules”
 - Employer should have conducted an “individualized assessment to determine whether teleworking should be permitted as a reasonable accommodation” for Gabe’s disability
 - No showing of undue hardship
- Injunction granted in favor of employee returning him to WFH



Peeples Case: Takeaways

- PPE alone will not cut it
- Interactive process and individualized assessment are critical
- COVID-19 as a trial period?
 - “. . . telework because of the COVID-19 pandemic could serve as a trial period” to show whether employee could perform all essential function
 - “Employer should consider any new requests in light of this information”

-- EEOC Pandemic Guidance D.16



Considerations for Teleworking



- Before COVID-19:
 - General consensus that physical presence in the office was an essential function of most jobs and remote work was not a reasonable accommodation
- Teleworking during the shutdown:
 - After weeks or months of teleworking, there will be questions about why employees cannot do so as an accommodation

Considerations for Teleworking



- Handling future accommodation requests for remote work:
 - Why is in-person work necessary?
 - What hardships are created by employees working from home?
 - Be prepared to agree or to explain that remote work was allowed during the shutdown, but it was not effective (e.g., problems with technology, decreased productivity, etc.)

Considerations for Teleworking



Consider updating telework
policies now!



FMLA Insights

Guidance & Solutions for Employers

Can Employees Be Disciplined When They Exceed the Frequency on Their FMLA Medical Certification? A Court Finally May Have Given Us an Answer

By Jeff Nowak on October 28, 2019

POSTED IN [ABUSE OF FMLA LEAVE](#), [MEDICAL CERTIFICATION](#)

Can an employer discipline an employee for exceeding the frequency of expected absences indicated on an FMLA medical certification?

I'm actually going to answer this question tomorrow during a [free](#) webinar sponsored by the [Disability Management Employer Coalition](#)

(DMEC), where we will cover key FMLA and ADA cases from 2019. I hope you can attend. [Use the code 19COMPLIANCE4]

In the webinar, I will share the story of Tori, an executive assistant for an alarm monitoring company, who suffered from reactive arthritis. Because of this condition, she needed to be absent from her job for treatment and flare ups. Her doctor signed off on certification indicating she would need FMLA leave up to two days per month for flare ups and four hours, twice per month, for treatment.

Like many employers, Tori's employer had an attendance point system in which employees were assessed points for unexcused absences. At 10 attendance points



ABOUT JEFF



Jeff Nowak is a shareholder at Littler Mendelson P.C., the world's largest

employment and

labor law practice representing employers. Jeff has two decades of experience advising and litigating on behalf of employers on a wide range of complex employment law matters and is a recognized leader on FMLA and ADA issues, helping employers develop comprehensive strategies to achieve compliance with employee leave and accommodation issues.

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- Subject matter expertise
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- Case databases

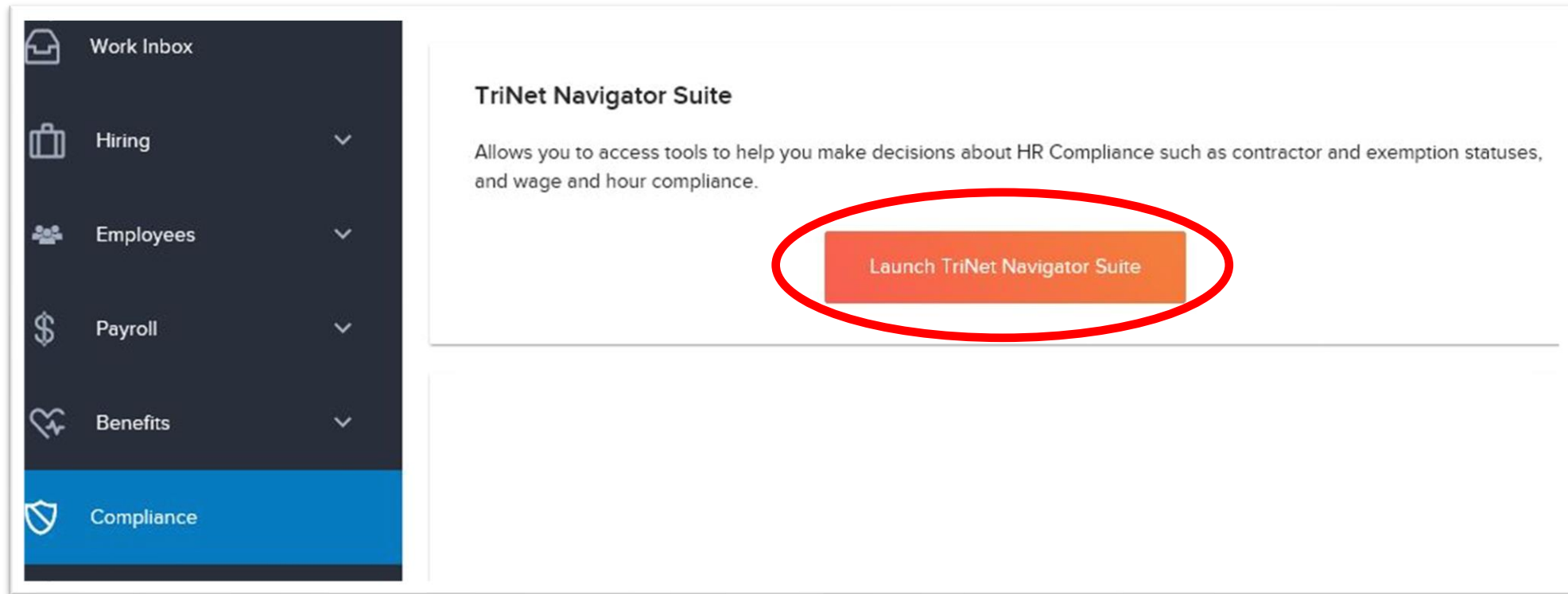
OUR VISION

Delivering expert guidance in a fraction of time and cost as traditional methods

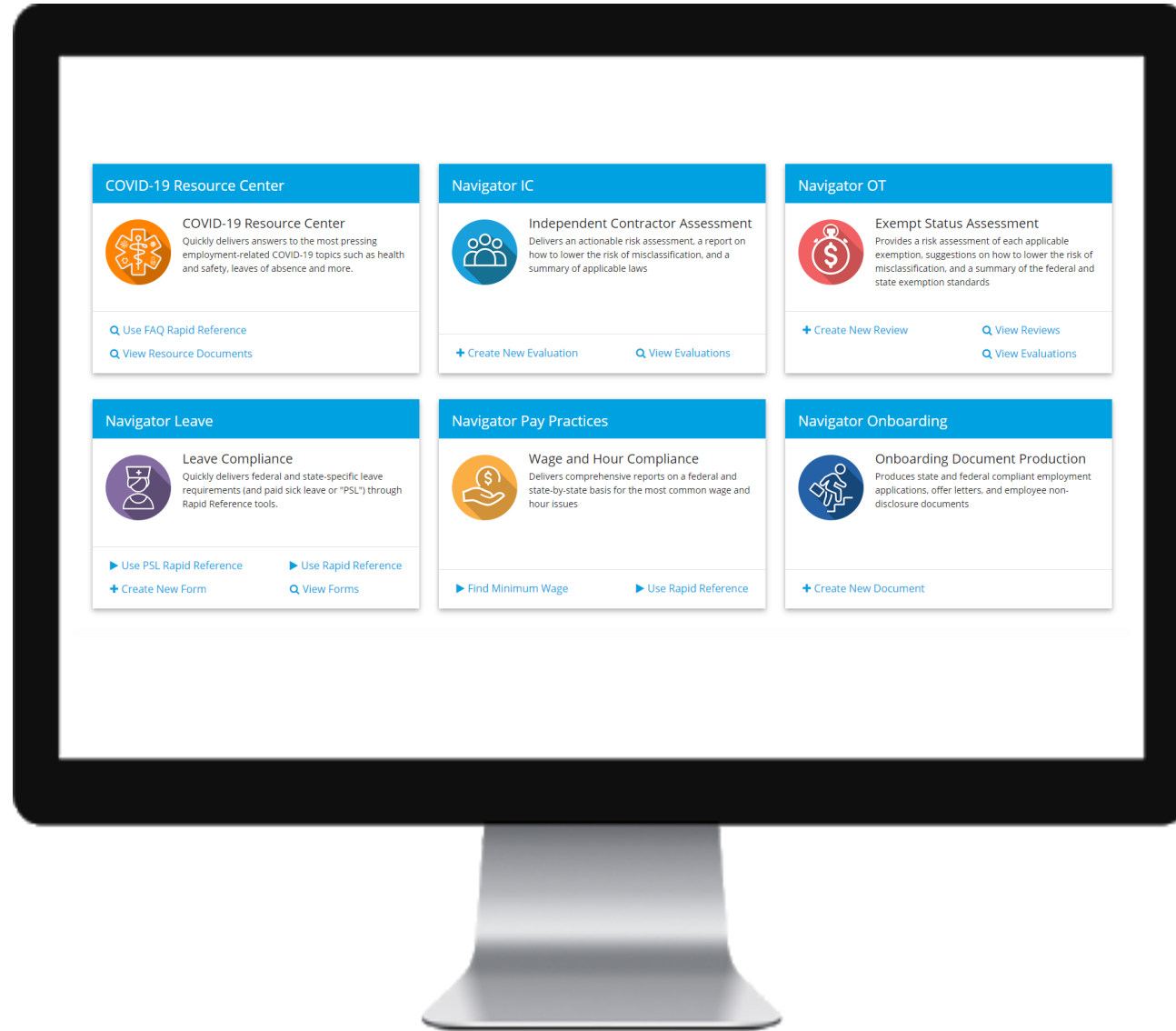
Accessing Navigator Suite

Beginning in the TriNet platform (login.trinet.com), TriNet clients navigate to the **Admin View**, then the **Compliance** section to locate the Navigator Suite.

To access this tool, you clients must have the HR Authorizer role in the TriNet platform.



Meet The Navigator Suite



Over 20 federal & state employee life-cycle management applications

Covers compliance in all 50 states & jurisdictions

Comprehensive engine of 10,000+ cases and federal & state regulations

11,000+ users and clients including Fortune 50 companies



The COVID-19 Resource Center

- Helps employers keep up with COVID-19 federal, state and local regulations and requirements
- Answers the most pressing COVID-19 employment related questions and provides accurate guidance surrounding new and novel employment-related issues including:
 - Health and Safety
 - Leaves of Absence
 - Wage and Hour
 - WARN
 - Discrimination, Travel, and More

COVID-19 Resource Center

COVID-19 Compliance References

This application is **updated regularly** with key documents and a compiled list of useful links. Because of the current importance of having a compliant **Return to Work** process, you will see those references in a separate section below.

Return to Work References

 COVID-19 Health Screening Requirements
Updated on August 17, 2020

 COVID-19 Reopening Orders and State Plans
Updated on August 21, 2020

Frequently Asked Questions

This application is updated regularly with the most commonly asked COVID-19 questions. The list below is sorted by the date each entry was added or updated. Click an entry to read the answer, and use the filters at the top to see responses about a specific topic.

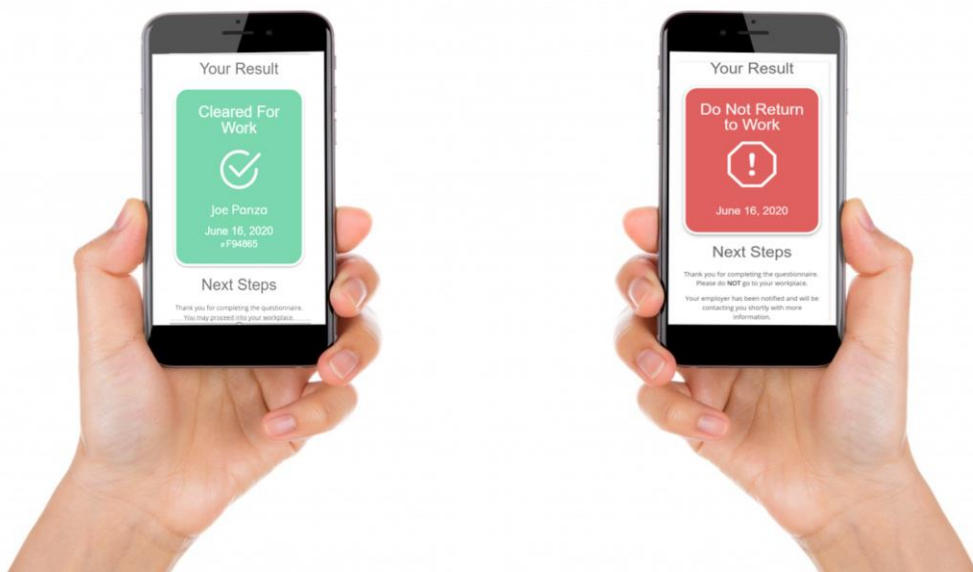
Topics

- Show All
- ADA Considerations
- Discrimination/Harassment
- Health & Safety
- Leaves of Absence
- Privacy/HIPAA
- Quarantine/Isolation
- Return to Work
- Travel
- Wage & Hour
- Workers' Compensation



ComplianceHR *SmartScreen*™

- A paperless, mobile-friendly COVID-19 symptom checker for safely returning employees to work
- Sends jurisdiction-specific screening questionnaires for select employees to complete before they come into the office each day
- Instantly deployable and updated as changes occur
- Easy, Dashboard driven workflow
- Maintains privacy





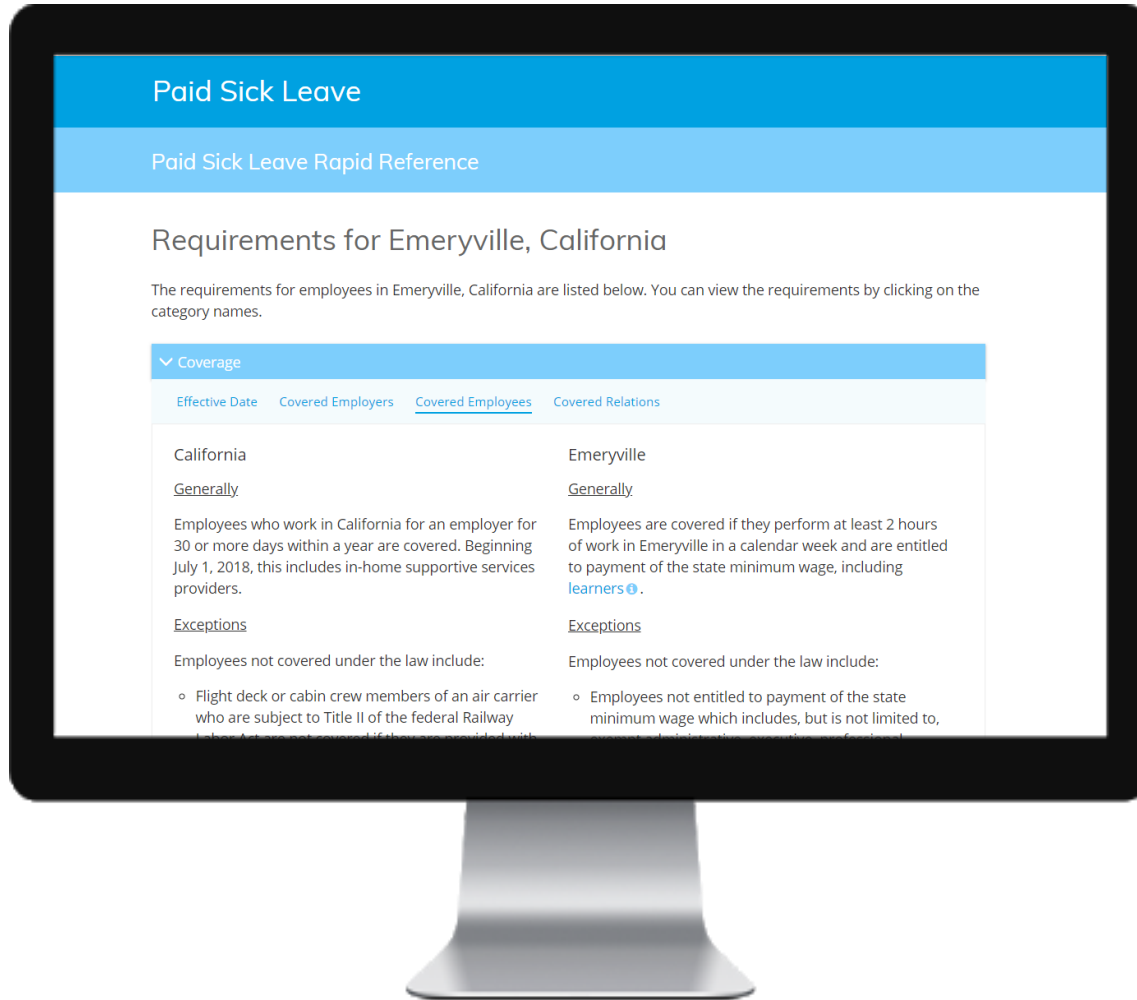
Navigator Onboarding

The image displays three overlapping screenshots of the Navigator Onboarding questionnaire interface. The top-left screenshot, titled "Additional Information", shows a section for "Will Nicole Smith's employment be subject to any of the following (check all that apply):" with options like "Code of Conduct", "Employee Handbook", and "None of the Above". It also includes a field for "By position title, describe who in ABC Corp can alter the at-will relationship" with "CEO" entered. The top-right screenshot, titled "Prospective Employee Details", shows fields for "First Name" (Nicole) and "Last Name" (Smith), and a section for "Enter the prospective employee's address:" with fields for "Street Address 1" (250 W 72nd St), "Street Address 2" (Apt. 14E), "City" (New York), "State" (NY), and "Zip Code" (10023). The bottom screenshot shows a confirmation message: "You have completed the questionnaire. Use the links below to access your Offer Letter:" followed by links for "Offer Letter" and "Offer Letter", and a link to "Click to learn what this report does not cover". At the bottom are "< Back" and "Start Over" buttons.

- Produces onboarding documents within minutes
- Federal and state compliant
- Applications include:
 - **Navigator Offer:** Instantly produce a customized offer letter
 - **Navigator Employ:** Quickly generate a state compliant employment application
 - **Navigator NDA:** Create a compliant employee non-disclosure agreement for any state



Navigator Leave



- Access the rapid reference tool for FMLA and paid sick leave, and a summary of employer rights and obligations surrounding state-specific leave laws
- Instant custom federal and state-compliant forms
- Immediate access to visual workflow guidance
- Tailored deadline reminders
- Insight and guidance on topics like coverage, permitted use, accrual, and carry over



Navigator Pay Practices

- Provides State-by-State Reports about the Most Common Wage and Hour Issues
- Addresses the ten most common compliance challenges employers face when handling employee pay practices
- Applications include:
 - **Navigator Minimum Wage:** Determine MW requirements for non-exempt employees.
 - **Navigator Meal & Rest:** Assess M&R break obligations.
 - **Navigator Travel:** Confirm compensation requirements for travel time.
 - **Navigator On-Call:** Determine payment requirements for on-call time.
 - **Navigator Final Pay:** Assess what is owed, and when

The screenshot displays the 'Navigator Pay Practices' interface. The top section is titled 'Employee Work State' and prompts the user to 'Select the employee's primary work state' from a dropdown menu. Below this is a map of the United States. A red 'Next' button is visible. The bottom section shows a preview of the 'Minimum Wage Requirements' report for Colorado, which includes sections for Federal Requirements, Local Requirements in Colorado, and Future Rate Increases.

Minimum Wage Requirements

Below are the minimum wage requirements for non-exempt employees in the selected location.

Federal Requirements

Minimum Wage
The federal Fair Labor Standards Act requires employers to pay employees at least \$7.25 per hour for employees working in the state or locality. Employees must be paid the highest minimum wage applicable to them.

Tip Credit under the FLSA
Tip credits are permitted under the FLSA. The required minimum cash wage is \$2.13 and the maximum tip credit is \$5.12. Tips received by the employee must be retained by the employee, with the exception of any tips received by the employee that are not retained by the employee.

Local Requirements in Colorado

Minimum Wage
A non-exempt employee must be paid no less than \$11.10 per hour for all hours worked, which is the minimum wage for non-exempt employees in Colorado.

Tip Credit
[Local Tip Definition](#)
Tip credits are permitted in Colorado. The required minimum cash wage is \$8.08 and maximum tip credit is \$3.02 (for tips actually received). A tip credit is permissible for any employee engaged in an occupation in which the individual customarily and regularly receives more than \$30 a month in tips.

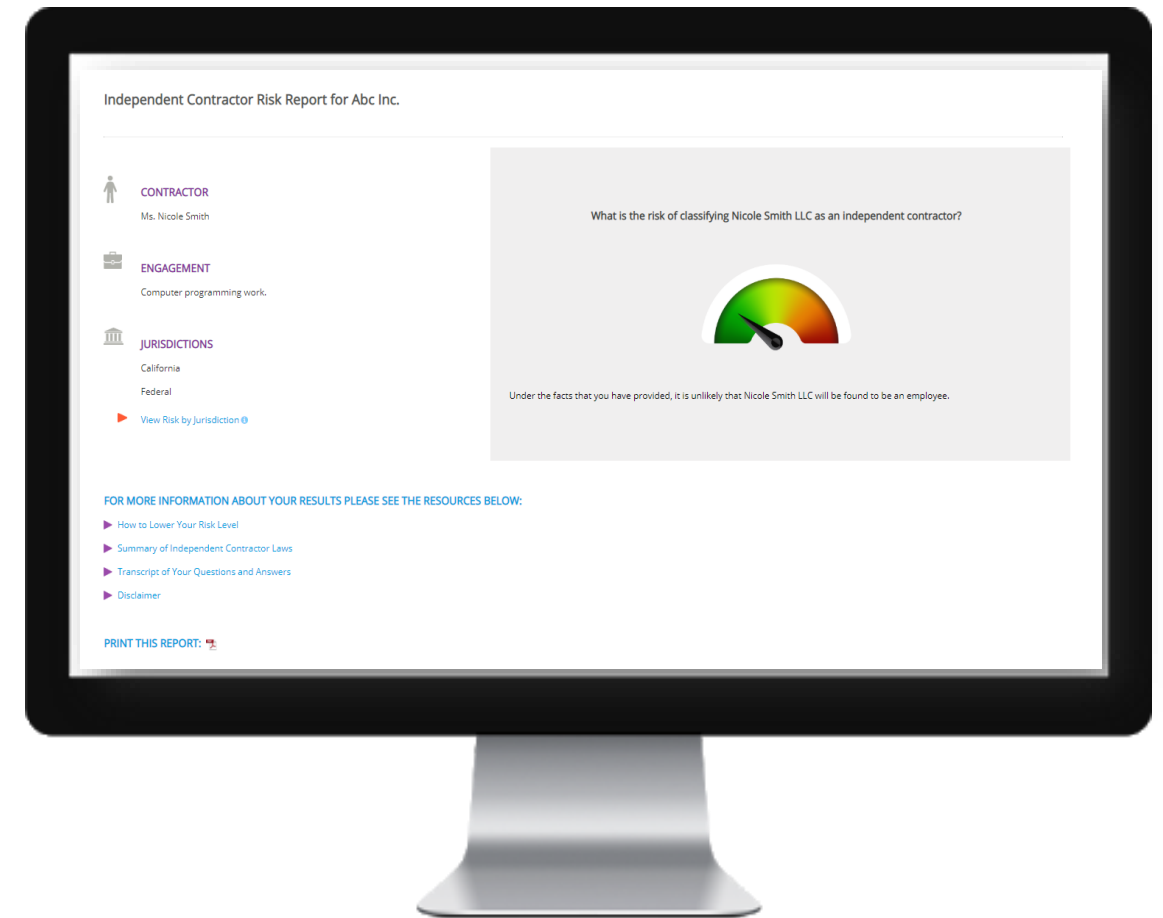
Future Rate Increases
If a future state-level or city-level minimum wage is not listed, it likely means that either a future increase has not been contemplated or the amount of the increase has not yet been determined by the regulatory authority.

	Minimum Wage	Minimum Cash Wage	Maximum Tip Credit
January 1, 2020	\$12.00	\$8.98	\$3.02
January 1, 2021	Annual future adjustments will be based on cost of living	TBD	\$3.02



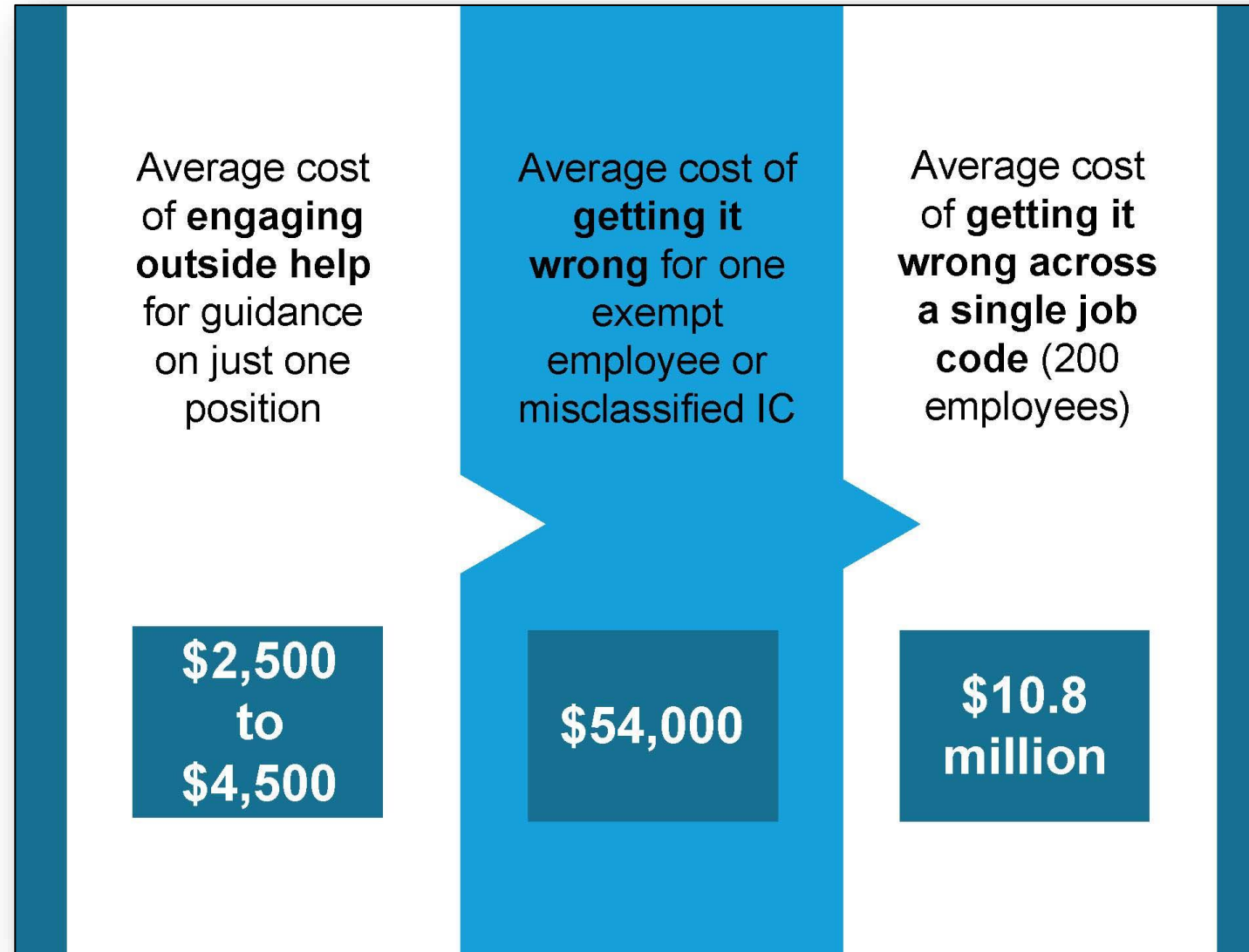
Navigator IC

- Determines employee or independent contractor status
- Draws from a proprietary engine of **1,900 reported court decisions** and DOL opinion letters
- Analyzes individual fact patterns under all applicable federal and state regulations
- Delivers an actionable risk assessment, a report on how to lower the risk of misclassification, a summary of applicable laws, and a transcript of questionnaire answers



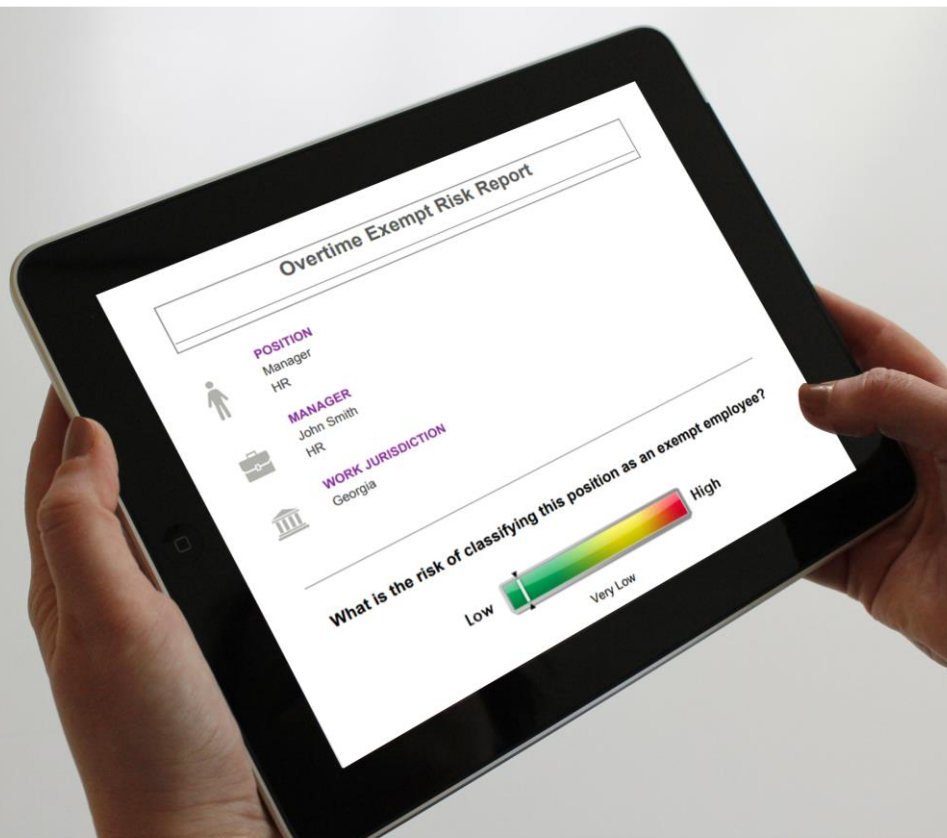


Cost Avoidance





Navigator OT



- Determines employee as exempt or non exempt
- Applies all applicable federal and state tests
- Draws from a proprietary engine of **2,400+ reported court decisions** and DOL opinion letters
- Delivers reasoned suggestions on how to lower the risk of misclassification
- Provides the risk result, a summary of relevant federal and state exemption standards, and a transcript of answers

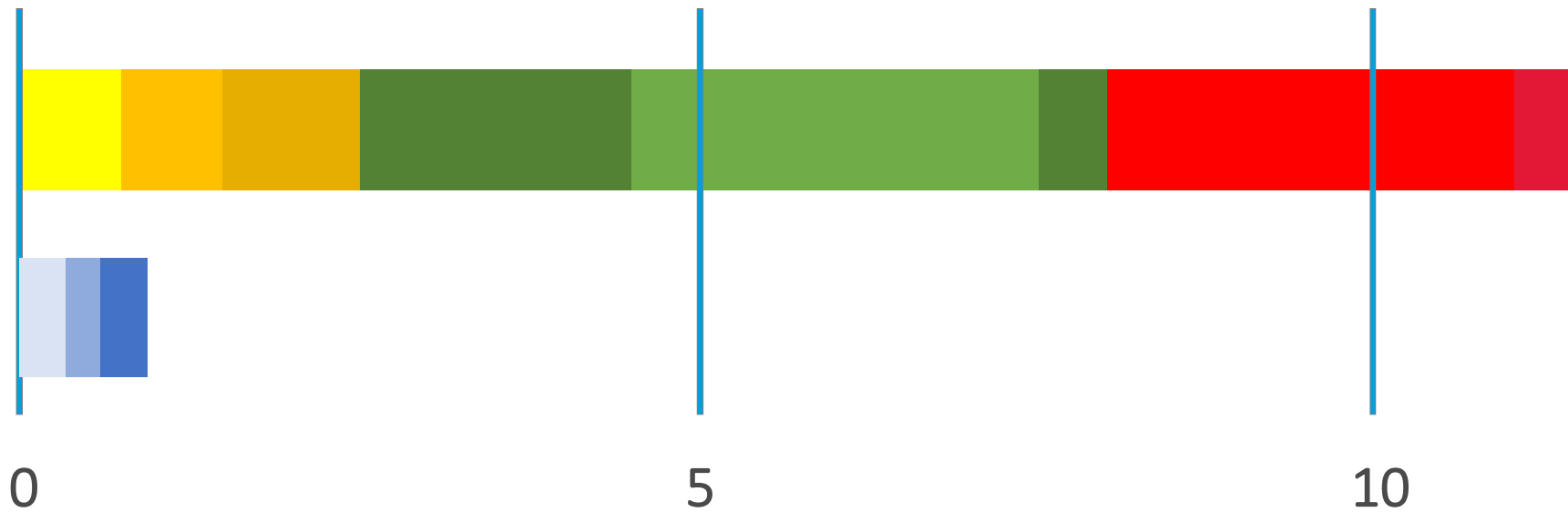


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Navigator OT: 55 min (Total)



Questions?





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