Employers Confront Their Obligations as Coronavirus (COVID-19) Spreads

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This article provides practical guidance regarding how employers should address legal issues raised by the coronavirus (also known as COVID-19). As the coronavirus spreads around the globe and cases are rapidly appearing in the United States, employers must confront issues in the workplace concerning risks to their employees.

For more information on legal issues relating to the coronavirus, see Coronavirus (COVID-19) Resource Kit.

Families First Coronavirus Response Act (Including Emergency FMLA Expansion and Emergency Paid Sick Leave)

President Trump signed The Families First Coronavirus Response Act (FFCRA) into law on March 18, 2020. It includes two major overhauls to leave programs for employers—an expansion to the Family and Medical Leave Act (FMLA) via the Emergency Family and Medical Leave Expansion Act, and newly provided Emergency Paid Sick Leave.

According to guidance issued by the U.S. Department of Labor (DOL) on March 24, 2020, both laws go into effect on April 1, 2020, and run through December 31, 2020. That guidance confirmed that neither of the new leave programs are retroactive (i.e., they apply to leave taken between April 1, 2020, and December 31, 2020).

For more information on the FMLA, see COVID-19 or Other Public Health Emergencies and the Family and Medical Leave Act Questions and Answers and FMLA Leave: Guidance for Employers and Employees.

For more information on paid sick leave, see Paid Sick Leave State and Local Law Survey (Private Employers) and Paid Sick Leave Policies Checklist (Best Drafting Practices for Employers).

Emergency Family and Medical Leave Expansion Act

The main component of the Emergency Family and Medical Leave Expansion Act portion of the FFCRA is the addition of Public Health Emergency Leave, with certain job protection requirements and paid and unpaid leave for certain eligible employees.

Public Health Emergency Leave applies to all employers with fewer than 500 employees. This criteria is different from the FMLA's usual coverage threshold (i.e., a 50-employee minimum). Employees on leave, temporary employees jointly employed by one or more companies (regardless of where the jointly-employed employees are housed for payroll purposes), and day laborers supplied by a temporary agency are also counted toward the leave coverage limit.

A corporation, including its separate establishments or divisions, is considered to be a single employer and its employees should be each counted toward the 500-employee threshold. Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers as defined in the Fair Labor Standards Act (FLSA) regarding certain employees. If two entities are deemed joint employers, all of their common employees must be counted in determining whether Public Health Emergency Leave applies. If two or more entities satisfy the integrated employer test under the FMLA, then all employees of all entities making up the integrated employer will be counted in determining employer coverage for Public Health Emergency Leave. For more information on joint employment under the FLSA and other statutes, see Joint Employment Relationships: Best Practices and Risks.

Employers that are signatories to multi-employer collective bargaining agreements may find some relief from this amendment if they make contributions to a multiemployer fund, plan, or program based on the paid leave entitlements to which employees would otherwise be entitled.

There is also some relief possible for smaller employers and employers in the health care industry. The amended FMLA, as it relates to Public Health Emergency Leave, allows the Secretary of Labor to issue good-cause regulations to exclude certain health care providers and emergency responders from eligibility.

The amended FMLA also allows the Secretary of Labor to issue regulations that exempt small businesses with fewer than 50 employees if the obligations would jeopardize the viability of the business as a going concern. The U.S. Internal Revenue Service (IRS), DOL, and Department of Treasury issued a joint press release on March 20, 2020, stating that this small business exemption would be enacted, at least as to leave requirements relating to school closings or child care unavailability, where the requirements would jeopardize the ability of the business to continue.

Notably, the Emergency Family and Medical Leave Expansion Act portion contains a "Special Rule for Certain Employers." It provides that an employer, as defined by the Emergency Family and Medical Leave Expansion Act (i.e., fewer than 500 employees), will not be subject to section 107(a) of the FMLA (29 U.S.C. § 2617) (i.e., its section that allows employees to bring an enforcement action) for a violation based on the Emergency Family and Medical Leave Expansion Act unless that employer also meets the traditional definition of employer under the FMLA (i.e., 50 or more employees).

The March 20, 2020, joint press release by the IRS, DOL, and the Department of Treasury states that the DOL will be issuing a temporary non-enforcement policy that provides a period of time for employers to come into compliance with the Act. Under this policy, the DOL will not bring an enforcement action against any employer for violations of the FFCRA if the employer has acted reasonably and in good faith to comply with the Act.

Relaxed Eligibility Requirements for Employees

Ordinarily, employees must work at least 1,250 hours and at least 12 consecutive months to be eligible for FMLA leave. Public Health Emergency Leave coverage is more expansive. Employees who have been employed for at least 30 days are eligible for this leave from that employer.

To qualify for Public Health Emergency Leave, an employee must have a qualifying need related to an emergency declared by a federal, state, or local authority regarding COVID-19. To establish a qualifying need, the employee must be unable to work (or telework) because he or she needs to care for his or her minor child if the child's elementary or secondary school or place of care has been closed, or if the child's regular paid care provider is unavailable, because of an emergency declared by a federal, state, or local authority regarding the coronavirus. Additionally, employers of health care providers or emergency responders may decline to offer Public Health Emergency Leave to those employees.

No Additional FMLA Time

Employees who take Public Health Emergency Leave are eligible for the same amount of FMLA leave (twelve weeks) as employees who take leave for other FMLA-covered reasons. Unlike typical FMLA leave, however, Public Health Emergency Leave also provides paid leave for any eligible leave taken after the first 10 days. Additionally, employers in states like California, with their own state equivalents of the FMLA, face the potential of leave covered by the amended FMLA that does not exhaust leave under their state's FMLA equivalent law, unless those state laws also are amended. Thus, it is possible that an employee in a state like California could be entitled to up to 12 weeks of Public Health Emergency Leave in addition to up to 12 weeks of leave under the California Family Rights Act (CFRA), assuming qualifying reasons for both. See Leave Law (CA) — Family and Medical Leave and Flexible Leave.

Job Protection

In keeping with traditional FMLA leave, employers must restore employees to their same or a similar position upon their return from Public Health Emergency Leave. Smaller employers (25 or fewer employees) are exempt from this job protection requirement, however, if:

- The position held by the employee does not exist due to economic conditions or other changes in operating conditions that affect employment and are caused by a coronavirus-related emergency declared by a federal, state, or local authority
- The employer makes reasonable efforts to restore the employee to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment –and–
- After those reasonable efforts fail, the employer makes reasonable efforts to contact the employee about an equivalent position, if one becomes available, for one year following the

conclusion of the coronavirus-related emergency or the conclusion of the twelve weeks of coronavirus-related leave taken by the employee, whichever is earlier

Pay Requirements for Public Health Emergency Leave

Employers need not pay employees who take Public Health Emergency Leave for the first 10 days of leave. Employees may opt to use (substitute) any accrued paid time off, vacation time, sick leave, or other paid leave during this initial period (including sick leave under the Emergency Paid Sick Leave Act below).

After the first 10 days of Public Health Emergency Leave, employers must pay employees on such leave at a rate of two-thirds the employees' regular rate of pay (as determined under the FLSA) and for the number of hours the employee would normally be scheduled to work. In no event, however, will the employee's paid leave exceed $200 per day and $10,000 in the aggregate.

For employees with variable work schedules, employers are to average the employee's hours worked per day over the previous six months or, if the employee has not worked during that period of time, the average daily hours the employee would have been reasonably expected to be scheduled to work when hired. Though it is unclear from the statute, it appears an employee may be able to substitute paid leave for lost pay during this portion of Public Health Emergency Leave.

Tax Credit

Recognizing the fiscal impact of the Public Health Emergency Leave, the FFCRA provides a payroll tax credit for covered employers to cover the cost of the paid leave.

The March 20, 2020, joint press release by the IRS, DOL, and Department of Treasury indicates that under the anticipated guidance, employers who pay qualifying sick or child-care leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying leave that they paid, rather than deposit those amounts with the U.S. Internal Revenue Services (IRS) under the traditional scheme. The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes concerning all employees. Notably, if there are not sufficient payroll taxes to cover the cost of qualified sick and child-care leave paid, employers will be able to file a request for an accelerated payment from the IRS. The IRS expects to process those requests in two weeks or less.

According to that joint press release, additional guidance is expected by the IRS before March 27, 2020.

Emergency Paid Sick Leave Act

Like the Emergency Family and Medical Leave Expansion Act, the Emergency Paid Sick Leave Act goes into effect on April 1, 2020, and runs through December 31, 2020.

Coverage of Sick Leave Act

Like the Emergency Family and Medical Leave Expansion Act, the Emergency Paid Sick Leave Act only applies to private employers to the extent they have fewer than 500 employees. This count includes employees on leave, temporary employees jointly employed by one or more companies

(regardless of where the jointly-employed employees are maintained for payroll purposes), and day laborers supplied by a temporary agency.

Also, similarly, smaller employers and employers in the health care industry receive a break. The Secretary of Labor is authorized to issue good-cause regulations to exempt from coverage certain health care providers and emergency responders.

Moreover, the Act also authorizes the Secretary of Labor to issue good cause regulations that exempt small businesses (under 50 employees) from providing paid sick leave to employees who seek leave to care for their child when the child's school or place of care has been closed, or the child's care provider is unavailable, due to COVID-19 precautions. That narrow exemption would only apply, however, where providing paid sick leave for that reason would jeopardize the viability of the business as a going concern. According to the March 20, 2020, joint press release by the DOL, IRS, and Department of Treasury, this exemption will be enacted and supported by emergency guidance and rulemaking to be issued by the DOL.

Finally, the Secretary of Labor is authorized to issue good cause regulations as necessary to carry out the purposes of the Emergency Paid Sick Leave Act, including to ensure consistency with the amended FMLA and the tax credit provisions of the FFCRA.

A corporation, including its separate establishments or divisions, is considered to be a single employer and its employees should be each counted toward the 500-employee threshold. Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers under the FLSA with respect to certain employees. If two entities are deemed joint employers, all of their common employees must be counted in determining whether the Emergency Paid Sick Leave Act applies. See Joint Employment Relationships: Best Practices and Risks.

Qualifying Events for Sick Leave

The Emergency Paid Sick Leave Act provides leave for several reasons arising out of the COVID-19 pandemic, including to:

- Self-isolate or seek medical diagnosis or treatment following diagnosis or exhibition of symptoms
- Follow health care or public official recommendations or orders –or–
- Care for family members who are self-isolating or seeking medical diagnosis or treatment, or to care for children following school closures or unavailability of childcare

The Emergency Paid Sick Leave Act has a wider breadth of coverage than the Public Health Emergency Leave in the FFCRA. It does not, however, have the same job protection requirements. Still, employers should tread carefully in taking adverse action against those on paid leave other than in group terminations or furloughs or other cost-saving measures.

Many states and localities have issued shelter in place orders for their communities. Currently, there is no official guidance determinative on the issue of whether this qualifies as an order for quarantine or isolation for paid sick leave.

Number of Sick Leave Hours Provided

Full-time employees are entitled to 80 hours of paid sick leave, and part-time employees are entitled to sick leave equivalent to those hours the employee works, on average, over a two-week period.

Where the employee takes leave for his or her own self-isolation, medical diagnosis, or treatment, the employee is entitled to paid leave at 100% of his or her regular rate of pay. However, where the employee takes leave to care for a family member or child, employers only need to provide leave at two-thirds the employee's regular rate of pay.

The Act imposes a cap on daily and aggregate sick leave pay, dictating that in no event is paid sick leave to exceed $511 per day and $5,110 in the aggregate for an employee's self-isolation, medical diagnosis, or treatment. Additionally, a cap of $200 per day and $2,000 in the aggregate applies to any sick leave that an employee takes to care for a family member or child.

For those employees paid under atypical or unusual arrangements, employers must calculate average daily hours worked in the same manner as the amended FMLA. Additionally, employers can expect the DOL to publish guidance by April 2, 2020, to assist in calculating employee hours and pay.

Notably, Section 5107 of the Emergency Paid Sick Leave Act states that nothing in the Act will be construed to diminish rights or benefits to which an employee is already entitled under any other federal, state, or local law; collective bargaining agreement; or existing employer policy. Thus, you should caution employers that if they currently have a paid time off/vacation policy and/or if they are in a state or locality that requires paid sick leave, such as California or the City of Los Angeles, the employer must provide paid sick leave benefits under the FFCRA **in addition to** those already-existing benefits. See Paid Sick Leave State and Local Law Survey (Private Employers).

Furthermore, Section 5102(e)(2)(B) states that an employer may not require employees to use other paid leave before he or she may use the paid sick leave entitlements afforded under this law. This also tends to suggest that employers cannot retroactively apply this paid sick leave. For example, an employer cannot deduct from this paid sick leave allotment paid time that was afforded to the employee prior to the date the law went into effect.

Penalties for Noncompliance

The Emergency Paid Sick Leave Act prohibits any employer from discharging, disciplining, or in any other manner discriminating against any employee who takes leave in accordance with the Act or who has filed a complaint or who has caused a proceeding to be instituted under the Act or who provides testimony in any such proceeding. Any employer who willfully violates this prohibition is deemed in violation of the FLSA and is subject to penalties.

Employers that violate the terms of the Emergency Paid Sick Leave Act by not paying employees for the leave will be considered to have failed to pay minimum wage in violation of the FLSA, and be subject to penalties under the FLSA.

The March 20, 2020 joint press release from the IRS, DOL, and Department of Treasury states that the DOL will not bring an enforcement action against any employer for violations of the FFCRA so long as the employer has acted reasonably and in good faith to comply with the Act.

Tax Credit

Similar to the tax credit afforded to employers for Public Health Emergency Leave, the Emergency Paid Sick Leave Act also provides a payroll tax credit for the Emergency Paid Sick Leave Act to cover the cost of the paid leave.

The March 20, 2020, joint press release by the IRS, DOL, and Department of Treasury indicates that under the anticipated guidance, employers who pay qualifying sick or child-care leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying leave that they paid, rather than deposit those amounts with the IRS under the traditional scheme. The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes concerning all employees. Notably, if there are not sufficient payroll taxes to cover the cost of qualified sick and child-care leave paid, employers will be able to file a request for an accelerated payment from the IRS. The IRS expects to process those requests in two weeks or less. According to the press release, additional guidance is expected before March 27, 2020.

Health and Safety Policies

This section provides guidance to employers on handling key workplace health and safety issues regarding the coronavirus.

Preventing and Responding to Coronavirus Outbreaks in the Workplace

In general, employers should establish clear policies for dealing with health issues related to the coronavirus. The Centers for Disease Control and Prevention (CDC) has convenient question and answer sheets for this purpose that employers can post prominently so that employees have accurate information about COVID-19. See What you need to know about coronavirus disease 2019 (COVID-19) and What to do if you are sick with coronavirus disease 2019 (COVID-19).

The Occupational Safety and Health Administration (OSHA) has issued non-mandatory coronavirus guidance encouraging employers to, among other things:

- Develop an infectious disease preparedness and response plan (e.g., identifying potential sources of infection in and outside of the workplace, identifying and implementing controls to reduce exposure, such as use of personal protective equipment, preparing for increased absenteeism and supply chain disruptions, and considering downsizing or closing operations)
- Prepare and implement basic infection prevention measures (promoting hand washing, covering coughs and sneezes, and "social distancing," and encouraging employees to stay home if they are ill)
- Develop procedures for prompt identification and isolation of ill employees/visitors
- Consider and implement flexible work arrangements, such as working from home, reduced hours, alternating schedules –and–
- Follow existing OSHA standards, particularly taking additional measures to maintain a clean and sanitary workplace

See Guidance on Preparing Workplaces for COVID-19. See also OSHA's COVID-19 webpage and Prevent Worker Exposure to Coronavirus (COVID-19).

The risk of work-related infection will vary based on the nature of each work environment. For example, employees in hospital or other healthcare settings may be at increased risk of infection if the employer cannot provide appropriate personal protective equipment or otherwise take steps to mitigate the risk. Moreover, these employers must ensure compliance with standards that are unique to these work environments, such as OSHA's bloodborne pathogen standard. See 29 C.F.R. § 1910.1030. On the other hand, employees in a manufacturing setting may have little contact with each other on a daily basis, in which case practicing proper hygiene and "social distancing" may suffice.

If an employer confirms that an employee tested positive for COVID-19, it should consider whether to record the exposure on the OSHA 300 log. For information on OSHA 300 logs and OSHA recordkeeping requirements, see OSH Act Requirements, Inspections, Citations, and Defenses. Generally, a COVID-19 case will be a recordable illness if the employee contracted the infection as a result of performing his or her work-related duties. Employers must analyze each exposure on a case-by-case basis in light of each employee's job duties and the resulting effects of the infection (e.g., medical treatment received, days away from work, and restriction posed by the infection). In many cases, it will not be possible to determine whether an employee contracted COVID-19 at work.

What if Employees Are Hesitant to Come to Work?

Employers should anticipate that, under certain circumstances, employees may refuse to work based on concerns over COVID-19. If the employee's concern for his or her safety or well-being is reasonable and raised in good faith, the Occupational Health and Safety Act protects the employee from retaliatory actions. See the section entitled "Requirement 4: Anti-retaliation Provisions" in OSH Act Requirements, Inspections, Citations, and Defenses. Determining whether the employee's concern is reasonable will require careful consideration of the circumstances of his or her job requirements. For example, if the employee will need to travel by airplane or other mass transit for work or if the work would require working in large groups, then his or her fear of contracting the virus might be reasonable based on the latest CDC guidance. Employers should consider alternatives and any administrative or engineering controls that may reduce or eliminate the risk altogether.

Can Employers Prevent Employees from Coming to Work?

Absent an agreement with an employee or a collective bargaining agreement that restricts the employer's authority to dictate hours of work, levels of production, or similar issues, an employer is typically free to send employees home from work. To the extent that employees can work remotely, OSHA encourages employers to allow telecommuting, working from home, alternating schedules, reducing work hours, or similar measures to reduce the risk of spreading COVID-19.

If an employee is diagnosed with COVID-19, an employer should prohibit that employee from coming into the workplace, consistent with the latest guidelines from public health authorities like the CDC. If the employee can work remotely, the employer should allow the employee to do so. Moreover, for employees who may display symptoms of COVID-19, employers should consider taking similar actions, provided that they account for other employment laws, including the American with Disabilities Act. See Americans with Disabilities Act: Guidance for Employers. To the extent an

employee who is confirmed or presumptively diagnosed with COVID-19 has been in close contact with coworkers, the employer may inform those coworkers of their potential exposure, but the employer must not disclose the employee's identity without his or her written consent.

Americans with Disabilities Act (ADA) Issues

Even during a pandemic such as COVID-19, employers should still be conscious of their obligations to their employees and to the public so as not to impede on rights, including those related to public accommodations and employee health.

In light of the ongoing COVID-19 pandemic, the U.S. Equal Employment Opportunity Commission (EEOC) has offered guidance on the relaxing of certain requirements related to the Americans with Disabilities Act (ADA) and the Rehabilitation Act. See What You Should Know About the ADA, the Rehabilitation Act, and COVID-19.

Many employers have begun taking body temperatures of employees and on-site visitors. Because the U.S. Center for Disease Control and Prevention (CDC) and other state/local health authorities have acknowledged community spread of the coronavirus and have issued attendant precautions, employers may measure body temperatures of employees and visitors. Similarly, employers may screen applicants for symptoms of COVID-19 after making a conditional job offer and may take an applicant's temperature as part of a post-offer pre-employment medical exam. Employers should be cautious, however, as many infected individuals do not exhibit symptoms such as a fever.

Employers that are dealing with sick employees during the coronavirus pandemic may ask employees if they are experiencing symptoms of COVID-19 such as fever, chills, cough, shortness of breath, or sore throat. Similarly, employers may require employees returning to work following an illness to provide a fitness for duty certification from a physician, though the EEOC recommends that employers evaluate new approaches given that many medical facilities and doctors are inundated with cases. Employers must maintain all information about employee illness as part of a confidential medical record in compliance with the ADA.

Before visitors come on site, employers may want to evaluate whether it is feasible to have those visitors complete a questionnaire before coming on site, including questions on the individual's recent travel, contact with individuals exposed to COVID-19, or whether he or she is currently showing symptoms of, awaiting test results for, or is diagnosed with the coronavirus.

Employers should also be cautious not to run afoul of any state-equivalent statutes to the ADA, such as California's Fair Employment and Housing Act, which may have stricter or different requirements or considerations. See Disability Comparison Chart for ADA and FEHA (CA) and Discrimination, Harassment, and Retaliation State Practice Notes Chart. Additionally, employers should also consider whether they must make disclosures under privacy acts such as the California Consumer Privacy Act (CCPA) about the collection of any information from employees or visitors, including temperatures or other information. See California Consumer Privacy Act (CCPA) Overview and California Consumer Privacy Act (CCPA) Resource Kit.

Wage and Hour Issues

Federal and state wage and hour laws have not changed in the COVID-19 environment. However, wage and hour laws may impact a number of actions employers may consider today in reaction to the coronavirus outbreak.

Employers considering temporary or permanent layoffs must consider any state-specific requirements related to payment of final wages, bonuses, commissions, and accrued but unused vacation time. The timing of these payments and what must be included in them or may be excluded from them varies from one state to another. For example, employers in California and Massachusetts must generally pay final wages to a terminated employee immediately upon termination, whereas an employer in Texas must generally pay final wages to a terminated employee no later than the sixth day after the date of termination. See the Pay Timing, Frequency, Methods, and Deductions column of Wage and Hour State Practice Notes Chart.

Similarly, employers considering other cost-saving measures, like reduced work hours, wage/salary reductions and furloughs, may help reduce labor costs, but they are not risk-free propositions. For example, reducing employee's work hours by more than 50% over the course of several months can trigger the notice requirements under the Worker Adjustment and Retraining Notification Act (WARN). The selection of employees for reduced schedules or other cost-saving measures also can create the potential for disparate treatment and/or disparate impact claims. Employers should use objective selection criteria to reduce these risks. See Reductions in Force and WARN Compliance.

Likewise, a furlough or reduced work schedule may jeopardize the exempt status of salaried exempt employees under the Fair Labor Standards Act (FLSA), which could then trigger minimum wage and overtime pay requirements. See Reduction in Force (RIF) Alternatives. Employers should instead consider the following measures to reduce risk of non-compliance with the FLSA.

- **Full-week shutdowns.** A full-week shutdown avoids improper salary deductions and complies with the FLSA because employers must only pay exempt employees their salary for weeks in which they perform work. If an exempt employee performs no work during an entire workweek, the employee is not entitled to a salary for that workweek. Employers that implement this option also must prohibit exempt employees from performing any work during the shutdown and should consider eliminating an employee's ability to work remotely (e.g., by eliminating email access or remote connectivity). If an employee nevertheless performs work, the employer must pay the corresponding salary but may discipline the employee for violating the no-work directive.
- **Reduced workweek and pay.** A prospective reduced workweek coupled with a reduction in salary may avoid violations of the salary basis test under the FLSA, provided the salary reduction is a bona fide change reflecting long-term business needs. Before implementing any changes, employers considering this option should, at least one week in advance, notify affected employees in writing of the reduced workweek and salary plan. Employers should also keep in mind potential notice requirements under state or local law, as well as potential issues in eligibility for health care coverage for employers utilizing an Affordable Care Act lookback measurement period method for variable hour employees.

- **Reduced pay without a reduced workweek.** Unless prohibited by an agreement or state or local law, an employer is typically free to set salary/wage rates at any level (subject to minimum wage and salary requirements). A prospective reduction in employee salaries generally does not violate the FLSA if it is a bona fide change reflecting long-term business needs. However, employers should be mindful of employment agreements or other contracts providing, for example, that a reduction in salary/compensation may trigger resignations "for good reason," which require the payment of severance benefits.
- **Requiring use of vacation time.** The FLSA does not address use of vacation or paid time off, so employers generally are free to require use of paid time off in accordance with their policies or practices. However, some states impose restrictions on mandatory use of vacation or paid time off. So employers should consider any such requirements before requiring use of vacation or paid time off as a cost-saving measure. Moreover, practically speaking, this option likely does not lead to immediate cost savings; employees are simply substituting paid time off for actual work.

Employers that sponsor foreign workers should also consider whether they must report furloughs or reductions in hours or pay to the United States Citizenship and Immigration Services (USCIS) or Department of Labor (DOL). In some instances, these employers cannot change the essential terms and conditions of a foreign worker's employment without first notifying USCIS and/or the DOL.

Employers must always consider whether any state wage and hour laws limit their ability to impose a desired cost-saving measure. See Wage and Hour State Practice Notes Chart.

Telecommuting Employees

Under the current COVID-19 circumstances, and even more generally, employers may require employees to work from home. However, there are numerous aspects of employment laws and regulations which employers cannot ignore when it comes to remote employees.

First, employers may not discriminate regarding any protected category when they assign employees to work remotely. Second, various state and federal laws still apply. In fact, legal and practical implications applicable to telecommuting employees may surpass those applicable to in-office employees. For example, an employee who works from home may need additional or other resources not available in his or her office location, such as ergonomic chairs or work stations that allow the employee to stand while working. Provided it does not present the business with undue hardship, employers will need to accommodate workers with those sorts of needs. It should be noted that the EEOC has indicated delays in providing accommodations may be excusable.

Also, the Occupational Safety and Health Act (OSHA) continues to apply to employees who work remotely. While OSHA authorities indicate it will not inspect home work locations and will not hold employers responsible for accidents and injuries which occur there, nonetheless employers must still abide by OSHA reporting requirements, such as 300 logs.

In addition, with regard to employees working remotely, employers must continue to comply with other aspects of the law already applicable to all of their employees. For example, employees who work remotely remain entitled to statutory and regulatory meal and rest breaks as well as the benefits of overtime pay. See Wage and Hour task page.

Employers also need to pay attention to cybersecurity issues attendant to telecommuting employees.

Finally, all employers need to understand that the current circumstances and legal implications are in flux and changing daily, if not hourly. Employers need to monitor closely legal developments and consult with counsel as they arise.

For more guidance on telecommuting employees, see Telecommuting Employees: Best Practices Checklist.

Business Travel

Employers should consider suspending all nonessential business travel to China, Italy, and other places with the greatest number of coronavirus cases. For employees who cannot avoid business trips, employers must make certain that their workers understand all possible risks involved. Furthermore, if a worker has a health condition and informs the employer of it, there is a risk that the employer will violate the Americans with Disabilities Act (ADA), 104 Stat. 327, if they force the employee to go on the trip.

When workers return from stays in or trips to China, Italy, or other places with high numbers of coronavirus cases, employers should generally ask them to work from home for at least the 14-day incubation period of the disease. This is particularly easy to do for white collar businesses, such as finance, tech, and insurance.

For businesses that do this, it is advisable to create a paper trail clearly explaining why this was necessary. Otherwise, other employees whose jobs require them to be onsite and for whom travel is not a part of their jobs might later file a claim under the ADA that they were not offered telework opportunities due to the coronavirus outbreak. The paper trail for employees who traveled will serve as clear evidence supporting the necessity of telework for the employees who went to areas where coronavirus exposure was a strong possibility.

Privacy Issues

A potential pitfall for employers is the protection of employees' health information. Naturally, workers are going to be concerned about working in proximity of others who have been travelling to places affected by coronavirus. HR officials who are trying to quell their fears must take care not to single out any particular person and say anything like, "We're going to have him screened," and instead, assure people that all steps will be taken to ensure safety with anyone who travels. If a worker is diagnosed with the coronavirus, employers should not involve themselves in the medical care or condition of other employees. It is likely that the department of public health or the CDC will come in and assess the possibility of exposure.

Related Content

Practice Notes

- OSH Act Compliance, Employee Health, and Workplace Security State Practice Notes Chart
- Workplace Safety Policies: Key Drafting Tips

- Emergency Procedure Policies: Key Drafting Tips
- HIPAA Privacy, Security, Breach Notification, and Other Administrative Simplification Rules

Checklists

- Telecommuting Employees: Best Practices Checklist

Forms

- Workplace Safety Policy
- Emergency Response Procedures
- Injury & Illness Prevention Model Program for Workplace Safety (California)

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