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FAQ's for Employers Dealing with the Coronavirus Pandemic

The global coronavirus pandemic has greatly impacted all facets of business and the employment relationship. Employers are being confronted with many questions about whether and how to keep their businesses going and the related issues of how to protect their employees. These are some of the most common questions that employers are asking and guidance on possible responses. This is a rapidly developing situation, but this is where things stand at present.

1. **Can employers require that sick employees stay home?** Under OSHA and related state laws, employers have an obligation to provide a safe workplace and not put their workers in situations or expose them to hazards that may result in death or serious physical harm. Accordingly, employers can require that sick employees stay home. Relatedly, employers should consider taking a more proactive role and restrict work travel to infected areas and permit employees to work from home if that is an option.

2. **Can employers take an employee's temperature or require the employee to undergo medical testing to see if they are sick?** Generally, employers cannot and should not demand that employees prove they are healthy. Such requirements likely violate the Americans with Disabilities Act ("ADA"). However, the EEOC has just issued guidance that given the pandemic, employers are permitted to take the temperatures of their employees. Alternatively, employers may suggest to employees that they take their own temperature before coming to work and stay home if they are sick. In rare situations under the ADA, an employer can require an employee to pass a medical examination if they are a "direct threat" or if the test is job-related and a business necessity, but this is high standard for employers to meet.

3. **Can employers ask employees if they have the coronavirus?** No, employers should not ask such a direct question about whether an employee has a virus, as this may violate the ADA if the virus constitutes a disability under the ADA. An employer may be able to ask about whether an employee has a specific symptom, such as a fever or shortness of breath, that may be associated with a virus.

4. **Can an employer inform its workforce if an employee is diagnosed with the coronavirus or otherwise quarantined?** Employers may inform their employees that they may have been exposed to the virus in the workplace, but they should not provide the identity of the employee who has been diagnosed with the virus. The identity of the infected employee is protected under the ADA and other state privacy laws.

5. **Are employees infected with the coronavirus entitled to protected leave?** Under the FMLA or corollary states leave acts, an infected employee may be entitled to 12 weeks of unpaid leave if the virus constitutes a serious health condition under the FMLA. Employees who suffer serious to moderate symptoms that require hospitalization or inpatient care or multiple doctor visits and prescription medication will likely be covered by the FMLA. Employees who have only minor symptoms may not be covered under the FMLA even though they are prohibited from going to work. A similar analysis would apply to the question of whether an employee can use the FMLA to take a leave to care for a family member who contracts the coronavirus. Even if the employee does not qualify for leave under the FMLA, the illness could trigger leave and protection under the ADA if the illness impairs a major life activity. If ADA protections are triggered, the employer will need to engage in the interactive process and discuss possible accommodations with the employee, like working from home.

6. **Are infected employees entitled to paid sick time off?** This will depend on whether the employee works in a jurisdiction that mandates paid sick leave and what type of paid time off (or “PTO”) policy the employer has in place. If a PTO policy governs, the sick employee may be entitled to use any accrued and available sick time for themselves or to care for a covered family member who is sick. The question of whether or how to pay a sick employee may also depend on other applicable employment policies and union contracts. This is an evolving area of law triggered by the coronavirus pandemic and there has been federal legislation just passed that will require some employers to provide paid sick leave or family and medical leave for those afflicted by the coronavirus.

7. **How does the recently enacted Families First Coronavirus Response Act impact employers?** The Act, just passed by Congress and signed by President Trump on March 18, 2020, goes into effect on April 2, 2020, and will remain in effect through the end of the year. The Act will provide for emergency paid time off and expanded FMLA protections.

Emergency Paid Time Off. All employees of employers with fewer than 500 employees, regardless of the length of their tenure with their employer, are eligible for paid sick leave under the Act. There are exceptions. Employees with large employers (with 500 or more employees) will have to rely on the PTO policies already in place at many large employers. Employers with fewer than 50 employees may be eligible for exemption from the Secretary of Labor from the Act’s coverage. An eligible employee under the Act may take paid sick leave if he or she is unable to work (including working from home) because:

- i. The employee is subject to a federal, state or local quarantine or isolation due to the coronavirus.
- ii. A healthcare provider advised the employee to self-quarantine due to concerns related to the coronavirus.
- iii. The employee is experiencing symptoms of coronavirus and seeking a medical diagnosis.
- iv. The employee is caring for an individual who is either subject to a federal, state or local quarantine or isolation due to the coronavirus or who has been advised to self-quarantine due to concerns related to the coronavirus.
- v. The employee is caring for the employee’s child whose school has been closed or place of care is unavailable due to coronavirus precautions.
- vi. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretaries of Treasury and Labor.

Full time employees will receive 80 hours of paid sick leave and part-time employees will receive the equivalent of the number of hours they would work, on average, during a two-week period. Eligible employees will receive paid sick leave at their regular rate with a limit on the amount paid of \$511 per day and \$5,110 in total, for their own leave (under the first three (3) qualifying reasons above). If the employee is caring for others (under the last three (3) qualifying reasons above), the eligible employee will receive paid sick leave at two-thirds of their regular rate with a limit on the amount paid of \$200 per day and \$2,000 in total.

The paid sick leave can be used starting on April 2. Employers may require “reasonable notice” from an employee upon eligibility for this paid sick leave. Employers may not require eligible employees to first use other paid leave provided by the employer before using paid sick leave under the Act – this leave is in addition to any PTO currently provided by the employer. Employers can seek reimbursement for paid sick leave to employees through federal payroll tax credits. The Secretary of Labor is required to issue guidelines to assist employers and create a notice for employees, which employers will have to post.

Expanded FMLA protections. Starting April 2, 2020, the FMLA’s protections and application are expanded to cover all employers with fewer than 500 employees (whether on a full or part time basis and regardless of how many hours are worked in a week), and the definition of a covered employee is expanded to include all employees who have worked for covered employers (those with less than 500 employees) for at least 30 days. The Secretary of Labor has the authority to exempt small employers with less than 50 employees if the Act would jeopardize a business’ viability.

Under the expanded FMLA protections, an eligible employee may take up to 12 weeks of leave if he or she is unable to work, including working from home, because the employee must care for his or her child who is under age 18 and whose school or place of care has closed due to the coronavirus. The initial 10 days of this leave are unpaid, but the employee may use PTO or paid vacation days during this period. The emergency paid time off explained above may also cover payment in the first two weeks. After the initial 10 day period, an employee is entitled to receive from the employer two-thirds of his or her normal wages for the number of hours he or she is regularly scheduled to work, up to a maximum of \$200 per day and \$10,000 in total for the remainder of the leave. Employers are provided with payroll tax credits on wages paid for this purpose.

Following an eligible leave, for employers with 25 or more employees, an employee is entitled to reinstatement to the same or equivalent position. For employers with less than 25 employees, a returning employee is entitled to reinstatement to the position held by the employee when the leave commenced unless that position does not exist due to economic conditions or other changes caused by the coronavirus pandemic. In such case, the employer must make reasonable efforts to restore the employee to an equivalent position, and if those efforts fail, make reasonable efforts for at least a year to contact the employee if an equivalent position becomes available.

8. If an employer decides to implement a temporary shutdown or mass layoff are employees entitled to unemployment compensation? Yes, employees are generally entitled to unemployment compensation benefits if they are laid off or furloughed due to a temporary business shutdown. Notification to the federal and state departments of labor may be necessary if the size and length of the shutdown trigger certain thresholds under federal or state WARN acts.

9. If an employee gets sick with the coronavirus are they entitled to workers’ compensation? The answer depends on whether the employee became sick at work or while traveling for work. While it may be difficult for an employee to establish where or how they became sick, if the circumstances suggest that an employee traveled for work to an area with an increased risk of the disease, it is more likely the employee will be entitled to workers’ compensation benefits. Likewise, if the nature of the workplace presents an increased risk of catching the disease, such as in the health care field, an illness is more likely to be deemed a compensable workplace injury.

The above is provided for informational purposes only. We recommend contacting our firm or another legal professional to obtain legal advice or an opinion specific to your company or situation.

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