Latest Advice Regarding Employers’ Rights and Responsibilities in Light of COVID-19 Coronavirus

March 18, 2020
What is COVID-19?
- Not a flu, but a pneumonia-like infection
- Spreads person to person.

- Can be spread by touching items, such as an elevator button, that have come into contact with an infected person.
- Touching an infected item or object and then touching one’s face, nose, eyes, etc., can spread the virus.
COVID-19

• How serious is COVID-19
  – World Health Organization has officially labeled COVID-19 as a “pandemic.”
    • Most recent pandemic declaration was the H1N1 outbreak in 2009
  – Symptoms:
    • Fever, coughing, difficulty breathing.
    • Keep an eye out for employees who display any of these symptoms.
KEEP CALM AND CALL YOUR LAWYER
Workplace Safety

- Can I tell an employee to stay home or leave work if they exhibit symptoms of COVID-19?
  - Yes
  - Per EEOC, advising workers to go home is not disability-related, if exhibiting symptoms of COVID-19.
What do you do if an employee tests positive for COVID-19?

- Send home infected employee and any employee who had close contact with them for 14 days.
- Find out from infected employee all persons they may have come in contact with.
- Send any persons who have been exposed home as well.
Workplace Safety

- What do I do if an employee has a suspected but unconfirmed case of COVID-19?
  - Treat it as if it was confirmed.
  - Send home infected employee and others in contact as you would if there was a confirmed case.
Workplace Safety

• What do you do if an employee has had contact with a client prior to discovering they have been exposed to the virus?
  – Follow same steps as discussed above.
  – Contact client or other third party to inform.
Workplace Safety

• Do you have an obligation to report cases of COVID-19 to the Center for Disease Control (CDC).
  – No.
  – Responsibility of healthcare provider.
Workplace Safety

- Do I need to have written infectious disease preparedness and response plan?
  - Not required by law.
  - Good idea to have one.
    - Strongly recommended by OSHA.
    - Example of such a plan can be found here:
      - [https://www.osha.gov/Publications/OSHA3990.pdf](https://www.osha.gov/Publications/OSHA3990.pdf)
Employee Refusal

• Can an employee refuse to come to work because of fear of infection?
  – Depends.
  – Must be an “imminent danger”
    • Threat of death or serious physical harm.
  – Public relations concerns.
• Can an employee refuse to come to work because of fear of infection?
  – NLRA protection of concerted activity.
• Concerted refusal to work in unsafe conditions?
  – Could be a NLRA protected activity if workers act in concert to refuse to work based upon fear of infection or dangerous work conditions.
  – Consult with counsel.
  – Can depend on type of work employee does.
OSHA Reporting

• Does COVID-19 constitute a recordable illness for purposes of OSHA reporting?
  – Yes
    • If contracted while on the job.
    • No need to report if not contracted while working.
Traveling Workforce

- Is the employee returning from a restricted country?
  - Check CDC guidelines
    - List of restricted countries continues to evolve.
    - Employee will need to quarantine for 14 days if returning from restricted country.
Remote Work

• Should we institute a remote work policy?
  – Depends
    • Organizational circumstances/location of workers.
    • Remote work capabilities?
      – Tested?
    • Infrastructure in place?
Confidentiality Issues

- Does the COVID-19 emergency trump confidentiality requirements?
  - No.
  - Treat all health information as confidential.
  - HIPAA restrictions remain in place.
Health Insurance

• Are our employees still covered under group health plan coverage if they are not working?
  – Not necessarily.
  – Check with your health plan provider.
• What happens if employees are unable to pay their share of health plan premiums?

  – Normally, coverage would cease without timely payment.
  
  – Insurers may agree to continue coverage during crisis.

• Check with your individual health plan providers.
Health Insurance

- Is COVID-19 testing covered by our group health plan?
  - It depends.
    - Contact your individual health plan provider.
  - Developing Situation:
    - Proposed litigation
      - Would require health care plans to cover COVID-19 testing.
Wage and Hour Issues

- Do we have to keep paying employees who are not working?
  - Generally, no.
Wage and Hour Issues

• “White Collar” vs. Hourly Employee
  – FLSA minimum-wage and overtime requirements only attach to hours worked in a workweek.
    • Employees who are not working are typically not entitled to the wages the FLSA requires.
  – If a salaried employee performs at least some work during a work week, salary rules require they be paid the entire salary for that work week.
    • Exceptions if employee chooses to stay home for the day and performs no work.
Wage and Hour Issues

• Other Concerns:
  – Contractual obligations
    • Collective bargaining agreements
    • Employment contracts
      – There may be contractual agreements that require an employer to pay employees who are not working.
  – Public relations concerns
    • Media reaction?
      – Refusing to pay employees during this crisis could lead to negative media attention.
    • Reputational damage?
Wage and Hour Issues

• Can we charge missed time to vacation and leave balances?
  – FLSA generally does not regulate accumulation of vacation and leave time.
  • Might be affected by:
    – Contractual agreements
    – Collective bargaining agreements
      » Consult any of these agreements before making decisions.
  – Public relations issues
    • Important to consider potential public blowback of forcing employees to use up vacation time during this crisis.
Wage and Hour Issues

• Does the Family and Medical Leave Act (FMLA) apply to this situation?
  – Possibly.
    • FMLA could apply assuming employee otherwise meets the FMLA-eligibility requirements.
  – Generally cannot be used to avoid getting sick.
    • Can apply to someone who has contracted COVID-19 and otherwise meets eligibility requirements.
  – Be careful before refusing unusual requests.
    • Consult with counsel.
Wage and Hour Issues

• Does contraction of COVID-19 implicate the Americans with Disabilities Act (ADA)?
  — Generally, no.
  • Transitory condition – not permanent.
  • Could still be implicated if virus substantially limits a major life activity.
    — Case by case analysis.
Wage and Hour Issues

• Can I send employees home if they exhibit symptoms of contagious illnesses while at work?
  – Yes.
  • You should send home any employee who exhibits symptoms of COVID-19 or who has had exposure to any infected person.
• Do I have to pay for employee sick leave?
  – Possibly.
  – Families First Coronavirus Response Act
    • Passed United States Senate on March 18th.
    • President Trump is expected to sign the bill into law.
  – Next slides will discuss the bill and its impact on paid sick leave and other issues.
• Families First Coronavirus Response Act
  – The current employee threshold for FMLA coverage would change from only covering employers with 50 or more employees to instead covering those employers with fewer than 500 employees.
  – It also lowers the eligibility requirement such that any employee who has worked for the employer for at least 30 days prior to the designated leave may be eligible to receive paid family and medical leave.
  – Small businesses with fewer than 50 employees are exempt if the required leave would jeopardize the viability of their business.
Job Protected Leave

• Families First Coronavirus Response Act:
  – Any individual employed by the employer for at least 30 days (before the first day of leave) may take up to **12 weeks of job-protected leave** to allow an employee, who is unable to work or telework, to care for the employee’s child (under 18 years of age) if the child’s school or place of care is closed or the childcare provider is unavailable due to a public health emergency.
Paid Sick Leave

• Families First Coronavirus Response Act
  – The first 10 days (rather than 14 days) of Emergency FMLA may be unpaid. During this 10-day period, an employee may elect to substitute any accrued paid leave (like vacation or sick leave) to cover some or all of the 10-day unpaid period.
  – After the 10-day period, the employer generally must pay full-time employees at two-thirds the employee’s regular rate for the number of hours the employee would otherwise be normally scheduled.

• The new Act now limits this pay entitlement to $200 per day and $10,000 in the aggregate per employee.
Paid Sick Leave

- Families First Coronavirus Response Act
  - This Act now allows an eligible employee to take paid sick leave because the employee is:
    - subject to a federal, state or local quarantine or isolation order related to COVID-19;
    - advised by a health care provider to self-quarantine due to COVID-19 concerns;
    - experiencing COVID-19 symptoms and seeking medical diagnosis;
Paid Sick Leave

• Families First Coronavirus Response Act
  – Continued:
    • caring for an individual subject to a federal, state or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns;
      – “an individual” does not necessarily have to be a family member.
    • caring for the employee’s child if the child’s school or place of care is closed or the child’s care provider is unavailable due to public health emergency; or
    • experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.
Paid Sick Leave

• Families First Coronavirus Response Act
  – Eligibility – This provision requires employers with fewer than 500 employees to provide full-time employees (regardless of the employee’s duration of employment prior to leave) with 80 hours of paid sick leave at the employee’s regular rate (or two-thirds the employee’s regular rate to care for qualifying reasons 4, 5, or 6 listed above). An important change to this section provides an exception for employers who are healthcare providers or emergency responders at their election.
Paid Sick Leave

• Families First Coronavirus Response Act

  – Cap on Paid Sick Leave Wages – Another significant change to this Act places limits on paid sick leave. Specifically, paid sick leave wages are limited to $511 per day up to $5,110 total per employee for their own use and to $200 per day up to $2,000 total to care for others and any other substantially similar condition.
Paid Sick Leave

- Families First Coronavirus Response Act
  - **Carryover and Interaction with Other Paid Leave**
    - This paid sick leave will **not** carry over to the following year and may be in addition to any paid sick leave currently provided by employers.
Paid Sick Leave

• Families First Coronavirus Response Act
  – **Calculating Rate of Pay** – Employees who work a part-time or irregular schedule are entitled to be paid based on the average number of hours the employee worked for the six months prior to taking paid sick leave.
  – Employees who have worked for less than six months prior to leave are entitled to the average number of hours the employee would normally be scheduled to work over a two-week period.
  – A business employing fewer than 500 employees is required, at the request of the employee, to pay a full-time employee for 80 hours of mandated emergency paid sick leave instead of the initial 10 days of unpaid leave permitted by the Emergency Family and Medical Leave Expansion Act.
Paid Sick Leave

- Families First Coronavirus Response Act
  - **Effective Date and Expiration** – This program will become effective 15 days after it is enacted by President Trump and remain in effect until December 31, 2020.
Paid Sick Leave

- Families First Coronavirus Response Act
  - New Requirements:
    - Once the bill is enacted, employers with fewer than 500 employees will not only need to adhere to the above leave requirements within 15 days, but such employers will also be required to provide notice to their employees through postings and policies.
Paid Sick Leave

• Families First Coronavirus Response Act
  – Employers are entitled to a refundable tax credit equal to 100% of the qualified sick leave wages paid by employers for each calendar quarter in adherence with the Emergency Paid Sick Leave Act.
  – The qualified sick leave wages are capped at $511 per day ($200 per day if the leave is for caring for a family member or child) for up to 10 days per employee in each calendar quarter.
Paid Sick Leave

• Families First Coronavirus Response Act
  – Similarly, employers are entitled to a refundable tax credit equal to 100% of the qualified family leave wages paid by employers for each calendar quarter in accordance with the Emergency Family and Medical Leave Expansion Act.
  – The qualified family leave wages are capped at $200 per day for each individual up to $10,000 total per calendar quarter.
  – Only those employers who are required to offer Emergency FMLA and Emergency Paid Sick Leave may receive these credits.
Paid Sick Leave

• Important to remember this is a constantly evolving issue.
  – Pay close attention to announcements made by Federal, State and Local officials.
  • Many states, such as New York, are taking their own action to pass legislation regarding paid leave.
Discrimination

• Does COVID-19 present any concerns about discrimination or equal employment issues?
  – Potentially, yes.
  – Possible discrimination against employees of Asian descent.
Can I make changes to unionized employees work schedules or duties in response to COVID-19?

- Exercise caution
- Unilateral changes
  - Could lead to unfair labor practice charges.
- Check collective bargaining agreement
  - Allow for flexibility?
  - Consult with counsel.
Labor Relations

- Do I need to give notice to the Union before making changes to a contract?
  - Law requires “adequate notice”
  - Need for prompt change?
    - Short notice period might be appropriate.
    - Depends on circumstances.
Force Majeure

• Is the COVID-19 outbreak covered by a force majeure clause?
  – Possibly
  • Depends on the particular circumstances and will vary significantly with each employer.
A force majeure clauses relieves parties from performing their contractual obligations when performance of those obligations become impractical, illegal or impossible.

- Must be caused by circumstances beyond your control, or “acts of god.”
- Could potentially apply in this scenario.
- Case by case analysis.
• Do we need to provide notice to suspend operations due to COVID-19?
  – Yes, if you are covered by the WARN Act.
    • Applies to employers with 100 or more full time employees.
    • Generally, must give 60-day notice of plant closing or mass layoff.
      – Does not apply if laid off for less than six months.
      – Notice is still best practice.
Workers’ Compensation

- Is an employee entitled to Workers’ Compensation benefits if they contract COVID-19 while on the job?
  - Possibly.
    - Likely yes if a health care worker or first responder
    - Less clear for other categories of employees.
      - Would require a case by case analysis.
Does COVID-19 qualify as an “occupational disease”

- Must have contracted in the course of employment
- Caused by conditions peculiar to the work and creates a risk of contracting virus greater than the risk to the public generally.

General test will be whether the employee was involved in some activity where they were benefitting the employer and were exposed to the virus.
Workers’ Compensation

- Is an employee who contracted COVID-19 while traveling eligible for Workers’ Compensation?
  - Again, it depends.
    - Very fact specific.
    - Some states differentiate between exposures that occur while “working” and those that occur during “down time.”
The COVID-19 response is evolving minute by minute.
- Follow guidance of federal, state and local officials.
- Check CDC and OSHA guidelines and updates.
  - [https://www.osha.gov/SLTC/covid-19/standards.html](https://www.osha.gov/SLTC/covid-19/standards.html)
Questions ?
Thank You

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