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EMPLOYER GUIDANCE

COVID-19 And Legal Liability
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The number of confirmed cases of coronavirus disease 2019 (COVID-19) in the United States continues to rise, and confirmed cases have been reported in all 50 states. Employers are struggling to adapt to a rapidly changing business landscape, liquidity problems, supply-chain instability, workplace safety concerns and a variety of operational and legal uncertainties.

The Centers For Disease Control and Prevention issued guidance to employers based on what is currently known about COVID-19. The EEOC and OSHA also provide guidance in the time of a pandemic. To help our clients evaluate and manage emerging risks, we offer the following information to assist your management of the workplace.

What should employers be doing now in response to COVID-19?

- Regularly update employees on the CDC's COVID-19 guidance, including educating them on the signs and symptoms of the virus (fever, cough, shortness of breath), as well as any public health recommendations issued by applicable federal, state, or local authorities. Post notices at the workplace and on company intranet systems.

- Employees who can work at home should work at home. Tackle the IT problems with remote work immediately and often to maintain productivity. For those businesses that cannot function with remote working employees, provide a hygienic working environment and appoint a single responsible individual to oversee the company's commitment to a safe workplace (disinfectant, hand sanitizers, social distancing among employees, meetings conducted by phone and videoconference where possible) and promote employee mitigation efforts such as washing hands with soap and water for at least 20 seconds frequently.

- Send employees home immediately if they are experiencing symptoms of COVID-19. Iron out any uncertainties with the company's sick leave policies and benefits. Have a digital thermometer on hand in each workplace. Tell employees to stay home if they have symptoms or have been in contact with infected individuals.

- Minimize or cancel all non-essential travel. Require meetings and gatherings to be virtual, telephone and/or online if possible.

- Develop contingency plans for rapidly reducing expenses and overhead if needed in the face of falling revenue. Educate managers and stakeholders of those plans so that implementation, if required, will be immediate and effective.

I. HEALTH AND SAFETY OBLIGATIONS AND BEST PRACTICES

Does the Americans with Disabilities Act (ADA) restrict how I interact with my employees due to the coronavirus?

In a pandemic, employees can be required to undergo medical examinations when an employer has a reasonable belief that employees will pose a direct threat due to a medical condition. The World Health Organization raised its risk assessment of COVID-19 to its highest level on Feb. 28, 2020.

The CDC recommends *not* requiring a health care provider's note for employees who are sick with acute respiratory illness to validate their illness or to return to work. Health care provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely way.

Employees who have contracted the virus must be treated the same as noninfected employees, as long as the infected employees can perform their essential job functions. *If the employee poses a health or safety threat to the workforce*, the employer may place the employee on leave. It is our view that any employee infected with COVID-19 poses a direct threat to the workforce and may and should be placed on immediate leave.

May an employer require its employees to adopt infection-control practices, such as regular hand washing, at the workplace?

Yes. Requiring infection control practices, such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal, does not implicate the ADA.

May an employer require its employees to wear personal protective equipment (e.g., face masks, gloves, or gowns) designed to reduce the transmission of pandemic infection?

Yes. An employer may require employees to wear personal protective equipment during a pandemic. However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, or gowns designed for individuals who use wheelchairs), the employer should provide these, absent undue hardship.

May an ADA-covered employer send employees home if they display influenza-like symptoms during a pandemic?

Yes, according to the EEOC. Also, the CDC states that employees who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace. Advising such workers to go home is not a disability-related action. Additionally, the action would be permitted under the ADA if the illness were serious enough to pose a direct threat.

U.S. employers generally have the right to instruct visibly ill employees to stay away from the workplace, to prevent the spread of illness. In addition, or alternatively, employers may instruct employees to work remotely. Whether employees must be paid while out sick depends on federal, state, and local law, as well as the employer's policies, practices, and contracts. Employers may also, in some circumstances, require that employees provide fitness-for-duty certification before

they are allowed to return to work. We recommend, however, consulting with counsel before requiring employees to submit to any illness-related inquiries or medical examinations that are different from those required in the ordinary course, as employers will need to navigate disability discrimination laws if imposing any such requirements.

During a pandemic, how much information may an ADA-covered employer request from employees who report feeling ill at work or who call in sick?

ADA-covered employers may ask such employees if they are experiencing influenza-like symptoms, such as *fever or chills and a cough or sore throat*. Employers must maintain all information about employee illness as a *confidential medical record* in compliance with the ADA.

In a pandemic, these inquiries are not disability-related. If pandemic influenza becomes severe, the inquiries, even if disability-related, are justified by a reasonable belief based on objective evidence that the severe form of pandemic influenza poses a direct threat.

During a pandemic, may an ADA-covered employer ask employees who do not have symptoms to disclose whether they have a medical condition that the CDC says could make them especially vulnerable to complications?

Generally, **no**. However, if the pandemic becomes severe or serious according to local, state, or federal health officials, ADA-covered employers may have sufficient objective information to reasonably conclude that employees will face a direct threat if they contract COVID-19. Only then may ADA-covered employers make disability-related inquiries or require medical examinations of asymptomatic employees to determine which employees are at a higher risk of complications.

May an employer encourage employees to telework as an infection-control strategy?

Yes. The EEOC has opined that telework is an effective infection-control strategy. The EEOC has also stated that employees with disabilities that put them at high risk for complications of pandemic influenza may request telework as a reasonable accommodation to reduce their chances of infection during a pandemic.

During a pandemic, may an ADA-covered employer take its employees' temperatures to determine whether they have a fever?

Yes. Generally, measuring an employee's body temperature is a medical examination. In a pandemic, employers may measure employees' body temperature. However, employers should be aware that some people with influenza, including the COVID-19, do not have a fever.

When an employee returns from travel during a pandemic, must an employer wait until the employee develops influenza symptoms to ask questions about exposure to pandemic influenza during the trip?

No. These would not be disability-related inquiries. If the CDC or state or local public health officials recommend that people who visit specified locations remain at home for several days until it is clear they do not have pandemic influenza symptoms, an employer may ask whether employees are returning from these locations, even if the travel was personal.

During a pandemic, may an ADA-covered employer ask employees who do not have influenza symptoms to disclose whether they have a medical condition that the CDC says could make them especially vulnerable to influenza complications?

No. If pandemic influenza is like seasonal influenza or the H1N1 virus in the spring/summer of 2009, making disability-related inquiries or requiring medical examinations of employees without symptoms is prohibited by the ADA. However, under these conditions, employers should allow employees who experience flu-like symptoms to stay at home, which will benefit all employees including those who may be at increased risk of developing complications.

If an employee voluntarily discloses (without a disability-related inquiry) that he has a specific medical condition or disability that puts him or her at increased risk of influenza complications, the employer must keep this information confidential. The employer may ask him to describe the type of assistance he thinks will be needed (e.g. telework or leave for a medical appointment). Employers should not assume that all disabilities increase the risk of influenza complications. Many disabilities do not increase this risk (e.g. vision or mobility disabilities).

May an employer covered by the ADA and Title VII of the Civil Rights Act of 1964 compel all of its employees to take the influenza vaccine regardless of their medical conditions or their religious beliefs during a pandemic?

No. An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him from taking the influenza vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense). Similarly, under Title VII of the Civil Rights Act of 1964, once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents him from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII ("more than de minimis cost" to the operation of the employer's business, which is a lower standard than under the ADA).

Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it.

During a pandemic, must an employer continue to provide reasonable accommodations for employees with known disabilities that are unrelated to the pandemic, barring undue hardship?

Yes. An employer's ADA responsibilities to individuals with disabilities continue during an influenza pandemic. Only when an employer can demonstrate that a person with a disability poses a direct threat, even after reasonable accommodation, can it lawfully exclude him from employment or employment-related activities.

If an employee with a disability needs the same reasonable accommodation at a telework site that he had at the workplace, the employer should provide that accommodation, absent undue hardship. In the event of undue hardship, the employer and employee should cooperate to identify an alternative reasonable accommodation.

During a pandemic, may an employer ask an employee why he or she has been absent from work if the employer suspects it is for a medical reason?

Yes. Asking why an individual did not report to work is not a disability-related inquiry. An employer is always entitled to know why an employee has not reported for work.

> Example: During an influenza pandemic, an employer directs a supervisor to contact an employee who has not reported to work for five business days without explanation. The supervisor asks this employee why he is absent and when he will return to work. The supervisor's inquiry is not a disability-related inquiry under the ADA.

Has the Occupational Safety and Health Administration (OSHA) provided guidance on how to handle coronavirus?

OSHA has issued a fact sheet regarding protecting workers in the case of a global health emergency. Employers should train employees on the following:

- Differences between seasonal epidemics and worldwide pandemic disease outbreaks.
- Which job activities may put them at risk for exposure to sources of infection.
- What options may be available for working remotely, or how to utilize an employer's flexible leave policy when employees are sick.
- Social distancing strategies, including avoiding close physical contact (e.g., shaking hands) and large gatherings of people.
- Good hygiene and appropriate disinfection procedures.
- What personal protective equipment is available, and how to wear, use, clean and store it properly.
- What medical services (e.g., post-exposure medication) may be available to them.
- How supervisors will provide updated pandemic-related communications, and where employees should direct their questions.

Can OSHA cite an employer for exposing my workforce to coronavirus without protective measures?

Perhaps. OSHA regulates safety hazards through its **"general duty"** clause that applies to "recognized hazards" in the workplace. OSHA will look to the CDC as the authority when issuing such citations. The agency will determine whether the employer's industry knows that exposure to infected individuals in the workplace is a hazard. If so, the agency would expect the employer to take feasible measures to protect the employees and, if it not does not take such action, the employer could be subject to citation. Employers should conduct a hazard assessment for potential exposures and develop an action plan that includes hazard identification, hazard prevention procedures, employee training, medical monitoring surveillance and recordkeeping.

Should I ask for a doctor's note for an employee returning from a quarantine period who otherwise reports being asymptomatic?

The CDC recommends not requiring a health care provider's note even for employees who are sick with acute respiratory illness to validate their illness or to return to work. Health care provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely way, the CDC states.

Is there an obligation to accommodate employees who do not want to work in public-facing positions due to risk of infection?

There may be an obligation to accommodate such employees if there is some objective evidence that they could potentially be exposed to individuals who may have returned from China—for example, airport employees who deal with travelers from China. Employees should not be disciplined for refusing to work if they believe that there is a risk of infection because making such a complaint may be a protected activity. If the employer can establish that there is no basis for any exposure to the disease, the employee does not have to be paid during the time period the employee refuses to work.

II. REDUCTION IN HOURS, POSITION ELIMINATION, LAYOFFS

What is a layoff, RIF, furlough, etc.?

Employers may be forced to reduce hours, temporarily lay off employees, impose pay cuts, or terminate the employment of its workforce. Many employers in the United States have already begun some form of downsizing as a result of COVID-19.

A layoff is basically synonymous with discharge or termination. In some situations, employees are laid off temporarily, but remain active employee status on the company's payroll and have a date certain of their return to regular employment. Mostly, however, a layoff is a termination. Employees may be eligible for rehire when stability returns, but that is at the discretion of the employer. In union shops, of course, a collective bargaining agreement will control the order and eligibility for rehire of laid off employees.

A furlough can take many forms, including reduced hours or full days off. Furloughed employees may not maintain eligibility to participate in the company's benefit plans due to their reduced hours of work per week. Employers must carefully analyze the impact a furlough will have on employees, their benefit eligibility, legal rights under wage and hour laws, and paid leave protections implemented by state and federal legislation.

What is the effect of furloughs or reduced hours?

Employers generally can schedule *non-exempt* employees for fewer days or hours without liability concerns. Employers do not need to pay non-exempt employees for time not worked. A few states may require compensation if an employee reports to work and is sent home, but otherwise time off for non-exempt employee does not need to be compensated.

For *exempt* employees, furloughs or reduced hours involve much more complex legal obligations. Exempt employees must be paid a predetermined salary for each pay period. If an exempt employee performs any work during a workweek, that exempt employee must receive their entire salary that week. Failure to compensate an exempt employee for a week where any work is performed jeopardizes that employee's exempt status. If an employer furloughs an exempt employee for an entire workweek, however, then no salary is owed for that full week and the employee's status is not affected.

It may be possible to adjust exempt employees' salary and schedules prospectively during a business downturn. Consult your employment attorney before making these changes.

When employees are furloughed, employers should expect that they will not work, including checking email and voicemail. An exempt employee is entitled to pay for any workweek in which they perform any work. Employers should therefore inform employees that work is not authorized during the furlough period without advance written approval. Employers also should notify non-exempt employees about the same issue as non-exempt employees generally are entitled to compensation for performing work when not in the office. Employers should seriously consider a policy indicating the types of activities that require supervisor approval and the company's expectation for recording any time spent on such activities.

Are furloughed employees entitled to unemployment benefits?

Unemployment benefits will vary by state, and there may are also be waiting time periods in place before benefits are provided. Consider reviewing unemployment eligibility in the various states where operations will be impacted and including some sort of statement within the furlough notice. Employers should also consider whether "partial" unemployment claims are permitted where the workweek is changed for non-exempt employees. Employers may be able to structure furloughs to maximize unemployment benefits to employees. For example, some states have work-sharing programs that allow employees with reduced hours to receive unemployment benefits even if they do not meet the standard requirements for unemployment eligibility.

Are there advance notice requirements before implementing furlough or layoffs?

Possibly. When an employer places employees on furlough or conducts a layoff, Fed WARN and state mini-WARN statutes may require employers to provide advance notification (60 days or 90 days, depending on the jurisdiction) to employees and government officials in certain situations. Not all layoffs trigger these requirements, however, and exceptions may apply. Temporary layoffs of less than six months are not considered to be employment losses under Fed WARN, and the same is true under many, but not all, state mini-WARNs. The size of the layoff also matters. Fed WARN is not triggered unless, at a minimum, there are 50 employment losses at a single site of employment in a 90-day period. State mini-WARNs can be triggered at lower levels.

Are employees entitled to their regular compensation even if they cannot work due to closure, quarantine, or sickness?

A: *It depends*. Clearly, employees must be paid for all time actually worked, even if done remotely in a shutdown situation. In other circumstances, such as an exempt employee not being able to work in the office part of the week, or a non-exempt employee who shows up to work and

is sent home, state and federal wage laws dictate when pay is due. Consult an employment attorney to address these particular questions.

Further, even with respect to employees who are not entitled to paid time off, or have exhausted their paid time off allotments under company policy or state or local law, many employers are considering whether to provide some additional compensation for practical or business reasons. To that end, a number of employers have decided to provide at least some level of compensation to encourage people not to report to work if they are sick, or to lessen the burden on employees who find themselves suddenly and unexpectedly out of work due to circumstances beyond their control. Employers who decide to implement changes in their normal compensation or time-off polices should be clear to describe any such changes as limited to address unique exigencies caused by COVID-19.

III. FEDERAL LEGISLATION FOR COVID-19 BUSINESS DISRUPTION

What about the federal paid sick leave law recently enacted?

On March 18, 2020, the Families First Coronavirus Response Act (FFCRA) became law. Effective **April 2, 2020** and continuing through December 31, 2020, private employers with fewer than 500 employees and all government employers must provide *two weeks of paid sick leave to their employees (including part-time employees),* aka Emergency Paid Sick Leave ("EPSL").

The EPSL must be provided in instances where an employee:

1) Is either subject to a government-issued quarantine or isolation order related to COVID-19, has been advised by a health care provider to self-quarantine due to concerns related to COVID-19, or is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

2) Is caring for an individual who is subject to a quarantine order or has been advised to self-quarantine, caring for a child whose school or place of care has been closed, or is experiencing any other substantially similar condition.

EPSL is to be calculated based on the *greater* amount of the employee's regular rate of pay or the applicable minimum wage rate. There is a two-tiered pay rate:

- If the employee's sick leave is for reasons listed in number 1 above, the pay is calculated based on the full amount the employee would have been paid (capped at $511 per day).
- If the leave is for reasons listed in number 2 above, the pay rate is two-thirds of the full pay amount (capped at $200 per day).

Employees may not carry over EPSL from one year to the next and similar to many state paid sick leave laws, EPSL is not paid out at termination of employment. Further, the entitlement to any EPSL ends on the next scheduled shift following an employee's return to work after taking EPSL. To note, an employee may need to use additional leave for either the care of a family member or for his or her own eligible condition. It is unclear whether an employee would be eligible to use any remaining EPSL following a return to work if an additional need arose.

Employers may *not* require employees to use other forms of paid leave prior to use of EPSL. For employers with existing paid sick or other leave policies, EPSL is in addition to such paid leave. Covered employers are prohibited from modifying any paid leave policies to avoid being subject to this requirement. Like other leave laws, the EPSL provision of the FFCRA contains anti-retaliation provisions and imposes penalties for denial of EPSL in accordance with the FLSA.

Self-employed individuals are also eligible for paid sick leave, but the payment will be made through a tax credit.

Does the new law change the Family and Medical Leave Act?

Yes, the FFCRA also temporarily expands certain protections under the Family and Medical Leave Act (FMLA) from April 2, 2020 through December 31, 2020. The new law amends the FMLA to provide for Public Health Emergency Leave (PHEL) that extends eligibility for up to 12 weeks of job-protected leave in limited childcare-related circumstances. Specifically, PHEL may be taken only if the employee is unable to work (or telework) due to a need for leave to care for a son or daughter under 18 years of age if the child's school or place of care has been closed, or the childcare provider is unavailable due to a public health emergency. Importantly, all employers with less than 500 employees must provide PHEL to employees who have been on the job for at least 30 days.

The *first two weeks* of PHEL is unpaid. Employers may allow, but not require, employees to substitute vacation leave, personal leave, or sick leave for the first two weeks of PHEL. The remaining 10 weeks of PHEL must be paid at a rate of at least two-thirds of the employee's regular rate of pay (not to exceed $200 per day).

The FFCRA provides employers payroll tax credits to help defray the costs associated with providing paid sick leave and paid family and medical leave.