COVID-19 Labor & Employment Frequently Asked Questions

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Coronavirus Legal Advisory

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As the COVID-19 pandemic expands, disrupting lives of everyone around the globe, employers should keep a few guiding principles in mind.

- Keep up with and follow the best public health advice available. The Centers for Disease Control and Prevention (CDC) has guidance for businesses here; state and local authorities have their own websites that employers should bookmark and periodically review;
- Keep the safety of the community and of the people in your organization paramount by following federal and state guidelines;
- Employers can and should make adjustments to normal policies without being overly worried about setting binding precedent.

With these principles in mind, here are some frequently asked labor and employment law-related questions concerning COVID-19. Click the links below to see FAQs on the following subjects:

Duty to Provide a Safe Workplace
Pay for Employees
FMLA
WARN Act
Labor Union Issues

Duty to Provide a Safe Workplace

The federal Occupational Safety and Health Act (OSH Act) and the laws of most states require employers generally to provide a safe workplace for their employees. This obligation is sometimes in tension with other laws related to employee privacy and non-discrimination. The rapidly changing COVID-19 atmosphere is highlighting some of those tensions, and employers need to calibrate responses as the situation changes.

[NEW March 20, 2020] Q. What are an employer's workplace safety obligations?

A. Employers have an obligation to provide a safe workplace under the Occupational Safety and Health Act (OSH Act) and the safety standards of the Occupational Safety and Health Administration (OSHA) or applicable approved state occupational safety and health plans.

[NEW April 23, 2020] Q. Are there specific state level safety requirements that relate to COVID-19?

A. Many states have released COVID-19 specific guidance or standards for businesses that are operating as essential businesses during the shutdown. Such guidelines are evolving and often updated. Examples of such guidance in the Northeast are:

- Massachusetts
- Connecticut
- New York
- New Jersey

[NEW March 20, 2020] Q. What OSHA standards apply to workplace exposure to COVID-19?

A. While there are no specific OSHA standards for COVID-19, some existing OSHA standards may be applicable. The OSHA standards that are most likely relevant are the personal protective equipment (PPE) standard, the injury and illness recordkeeping and reporting requirements, and OSHA's general duty clause. The general duty clause serves as a "catch all" provision and requires an employer to take preventive measures to protect employees even though a specific OSHA standard does not apply to the situation. It requires an employer to provide its employees with "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees."

[NEW May 21, 2020] Q. When must an employee's COVID-19 illness be recorded on the OSHA 300 log?

A. COVID-19 is a recordable illness if the employee's case (a) is a confirmed case as defined by the CDC; (b) is work-related (the employee was infected as a result of performing their work-related duties); and (c) meets one of the recording criteria (death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness, or involves a significant injury or illness diagnosed by a healthcare provider).

Once an employee's COVID-19 case is confirmed, the employer must investigate whether the illness is work-related. While this will be challenging in most cases given the community spread of COVID-19, an employer is still required to make this assessment. Under its current guidance, OSHA recognizes that there are employee privacy concerns with employers conducting an extensive medical inquiry and most employers lack expertise in this area, but OSHA still expects employers to engage in a reasonable investigation into the work-relatedness. While the reasonableness of the investigation will likely be fact-specific, an employer should undertake a good faith investigation of the available evidence while keeping employee privacy concerns in mind. This should include an interview of the employee, to ask the employee how they believe they acquired COVID-19, and discuss the employee's activities that may have led to the employee contracting COVID-19. The employer should also review the employee's work environment for potential exposure, including other instances of employees contracting COVID-19. OSHA guidance provides the following examples of types of evidence that may weigh in favor of a work-relatedness determination:

- COVID-19 illnesses are likely work-related when several cases develop among workers who work closely together and there is no alternative explanation.
- An employee's COVID-19 illness is likely work-related if it is contracted shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case of COVID-19 and there is no alternative explanation.
- An employee's COVID-19 illness is likely work-related if his job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation.

OSHA's examples of evidence that weigh against a work-relatedness determination are:

- An employee's COVID-19 illness is likely not work-related if she is the only worker to contract COVID-19 in her vicinity and her job duties do not include having frequent contact with the general public, regardless of the rate of community spread.
- An employee's COVID-19 illness is likely not work-related if he, outside the workplace, closely and frequently associates with someone (e.g., a family member, significant other, or close friend) who (1) has COVID-19; (2) is not a coworker, and (3) exposes the employee during the period in which the individual is likely infectious.

If at the end of its investigation the employer concludes that it is more likely than not that the employee's work exposure played a causal role, the employer must then determine whether the illness meets one of the recording criteria.

Q. What is an employer's obligation to identify employees who may be sick and may infect other employees or customers?

A. With such a rapidly changing landscape, the employer's duty is to act reasonably under the circumstances. Because in many people COVID-19 presents as relatively mild, and because widespread and rapid testing is as yet unavailable, it is hard to identify people who may be ill. Employers should take the steps they think best for their businesses and be prepared at some later date to explain the steps taken. Direct employer liability under the general duty clause, or under similar state laws, for not doing enough to prevent infection is very unlikely in these circumstances. The business interests of the employer are to do what is reasonable and possible to slow the rate of infection through the society and through a particular workplace. Vigilance, coupled with employee self-identification, remains the best way to know who prudently should be excluded from the workplace.

[NEW April 20, 2020] Q. When must an employee's COVID-19 illness be recorded on the OSHA 300 log?

A. COVID-19 is a recordable illness if the employee's case (a) is a confirmed case as defined by the CDC; (b) is work-related (the employee was infected as a result of performing their work-related duties); and (c) meets one of the recording criteria (death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness, or involves a significant injury or illness diagnosed by a healthcare provider). Most employers with 10 or fewer employees, or in low risk industries identified by OSHA, are exempt from these recordkeeping requirements, unless instructed otherwise by the government.

For employers that are not exempt from these recordkeeping requirements, OSHA has issued enforcement guidance on when to record an employee's COVID-19 illness. Employers with workers in healthcare, first responders (emergency medical, firefighting, and law enforcement), and correctional institutions must continue to make the work-related assessment and record an employee's COVID-19 illness on its OSHA 300 log. Other employers only need to make the work-relatedness determination where: 1) there is objective evidence that the employee's COVID-19 illness may be work-related; and (2) that evidence was reasonably available to the employer. OSHA's enforcement guidance memorandum is available here.

[NEW March 20, 2020] Q. When must an employer report an employee's COVID-19 illness to OSHA?

A. All employers are required to report work-related deaths within eight hours, and work-related in-patient hospitalizations that involve care or treatment within 24 hours. The details on making reports can be found here.

Q. Are employers required to allow employees to work remotely?

A. Every company and every job is different; there is no generalized obligation to allow employees to work from home. However, employers should make every effort to allow and encourage employees to work remotely if possible in order to slow the spread of the disease and maintain a viable workforce for the duration of the pandemic.

Q. May an employer establish and enforce a policy requiring certain employees to stay away from the workplace?

A. Yes. An employer is free to shut down some or all of its operations and to require that employees not show up to the workplace. As with all policies, any such requirement must not be related to race, sex, age, national origin, disability, or other protected categories.

Q. I understand that older individuals are more at risk from COVID-19 than younger people, particularly those with underlying medical conditions. May I have different policies for older employees?

A. The Age Discrimination in Employment Act and its state law counterparts prevent employers from discriminating against older employees in the absence of a "bona fide occupational qualification." A blanket policy that prohibits employees over a certain age from working would be unlawful. A policy that allows employees in particularly susceptible populations to voluntarily stay home or have priority to telecommute would not be illegal.

Q. I understand that individuals with certain medical conditions are in more danger from COVID-19 than are others. May I have different policies for people with these medical conditions?

A. The Americans with Disabilities Act and comparable state laws require employers not to discriminate against people with disabilities. A blanket policy that prohibits employees with certain medical conditions from working would be unlawful unless the employer could prove that doing so would pose a direct threat of substantial harm to the employee or to others. A policy that allows employees in particularly susceptible populations to voluntarily stay home or have priority to telecommute would not be illegal.

Q. If an employee reports being diagnosed with COVID-19, may I alert the rest of the workforce?

A. The Americans with Disabilities Act and various state laws mandate privacy of employee medical information under most circumstances. The CDC advises that "if an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (ADA)." An employer may ask for the consent of an infected employee to let his or her co-workers know of the diagnosis in order to take appropriate steps to contain infection. In the absence of employee consent, the employer should simply inform other employees that a co-worker is believed to have contracted COVID-19, and for that reason, appropriate protective measures should be taken, including permitting temporary voluntary leave.

Q. May an employer take employees' temperatures before allowing them to enter the workplace?

A. Taking employees' temperatures is, according to the Equal Employment Opportunity Commission (EEOC), a medical examination and therefore may only be conducted for current employees if it is "job related and consistent with business necessity." Obviously there has been no litigation over this statutory provision in the context of COVID-19. However, in 2009 in response to concerns about the H1N1 virus, the EEOC issued technical guidance on pandemic preparedness in the workplace in view of the Americans with Disabilities Act. The EEOC's 2009 guidance noted that if pandemic influence became widespread in the community as assessed by state health authorities or the CDC—which is now the case with

COVID-19—"then employers may measure employees' body temperature." If an employer makes a specific determination that such testing is warranted in its workplace, then the reasoning and supporting facts and materials—such as CDC guidance or industry-specific alerts or recommendations—should be documented and preserved.

[NEW APRIL 24, 2020] Q. May an employer require that employees take a COVID-19 test?

A. Yes, so long as the test is "accurate and reliable" and is administered in a manner consistent with business necessity. On April 23, 2020, the Equal Employment Opportunity Commission (EEOC) updated its COVID-19 guidance (Part A.6) That guidance provides that employers may, without violating the Americans with Disabilities Act, require employees to submit to a test to detect the presence of the COVID-19 virus before entering the workplace because an individual with COVID-19 virus would pose a direct threat to the health and safety of others.

[NEW APRIL 24, 2020] Q. What should employers consider when deciding whether to require employees to take a COVID-19 test?

A. The EEOC cautioned that an employer considering COVID-19 testing of employees should frequently review information from the Centers for Disease Control (CDC) and other agencies as to the accuracy and effect of such tests. In particular, the EEOC pointed out the instances of false positives and false negatives inherent in such tests. Employers should also consider how quickly test results become available – the EEOC noted that a negative test does not mean that the employee may not acquire the virus at some time in the future (perhaps between the time the test is administered and the time the results become available).

[NEW APRIL 24, 2020] Q. May employers require some, but not all, employees to submit to a test for COVID-19 virus?

A. Employers who wish to require some, but not all, employees to submit to a test for COVID-19 virus should ensure that such selection is based on legitimate non-discriminatory factors.

[NEW APRIL 24, 2020] Q. Can testing substitute for other means of preventing the spread of COVID-19?

A. No. The EEOC emphasized in this guidance that "employers should still require – to the greatest extent possible – that employees observe infection control practices (such as social distancing, regular handwashing, and other measures) in the workplace to prevent transmission of COVID-19."

Q. May an employer require a medical release before allowing employees to return to work after being out with COVID-19?

A. Generally, employers may require such a medical release if it is uniformly required. Given the expected strain on health care providers during the pandemic, employers may consider temporarily dispensing with such a requirement and allowing employees to self-certify that they have been cleared to return to duty or that they have completed the treatment prescribed by their medical provider. Or, as suggested by the EEOC in its 2009 guidance, an employer may act in "reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus."

[UPDATED April 8, 2020] Q. What does the personal protective equipment (PPE) standard require?

A. The PPE standard requires the use of appropriate protective equipment such as gloves, gowns, eye and face protections, and respiratory protection. When respirators are called for, employers must have a respiratory protection program that complies with OSHA's respiratory protection standard. Both the PPE and respiratory protection standards require employers to assess the hazards to which their employees may be exposed. OSHA has issued temporary guidance related to its enforcement of the respirator annual fit-testing requirements for

healthcare during the COVID-19 outbreak, which are available here. OSHA has also issued enforcement guidance for employers that traditionally use N95 filtering facepiece respirators given the shortage of those devices, which is available here.

Pay for Employees

State and federal wage and hour laws require that employers pay at least minimum wage to employees and that they generally pay nonexempt employees time and one half their regular rate for hours worked in excess of forty hours in a workweek.

[UPDATED April 8, 2020] Q. If an exempt salaried employee is absent from work for sickness, how must he or she be paid?

A. To maintain the exemption from state and federal overtime payment requirements, an exempt salaried employee must receive the same amount of salary for each work week in which he or she performs any work. The salary may be maintained by using paid sick leave policies and, for employers with fewer than 500 employees, pay under the Emergency Paid Sick Leave Act (see our related Alerts here and here). If the employee has exhausted the benefits of a bona fide sick leave plan, then absences of a full day or more for the employee's illness may be, but is not required to be, deducted from pay without impacting the employee's exempt status.

[UPDATED April 8, 2020] Q. What about paid sick leave under the new federal law?

A. Effective April 1, 2020, the Emergency Paid Sick Leave Act provides federally subsidized sick leave pay for certain qualifying COVID-19 absences for employers with fewer than 500 employees. Learn more here. The U.S. Department of Labor has also issued its own Q&A guidance (located here) and regulations (discussed in our Alert here) on the Families First Coronavirus Response Act of which the Emergency Paid Sick Leave Act is a part.

[NEW March 26, 2020] Q. Where can I get a copy of the required posting that describes the Emergency Paid Sick Leave and the Emergency Family Medical Leave Expansion laws?

A. Right here. Each covered employer must post a notice of the Families First Coronavirus Response Act (FFCRA) requirements in a conspicuous place on its premises. An employer may satisfy this requirement by emailing or direct mailing this notice to employees, or posting this notice on an employee information internal or external website. Note that the effective date of the FFCRA has been moved up to April 1 from April 2.

[UPDATED April 8, 2020] Q. If an exempt salaried employee has used up all available paid sick time and is absent from work during part of a workweek due to self-quarantine or to care for another without the employee having any actual illness, how must he or she be paid?

A. The ability to make deductions from salary for absences of a full day or more after using up available paid sick time is limited to absences "because of sickness or disability." If the employee is absent for any other reason, then he or she must be paid the full salary for any week in which he or she performs work to maintain the exemption from overtime.

Q. What about non-exempt hourly employees?

A. Non-exempt hourly employees are to be paid for all time actually worked. However, employers may choose to pay non-exempt employees for some time not worked.

Q. How do paid sick day policies and laws play into all of this?

A. The general rule is that employers should at least follow their policies. If you are in a state that mandates paid sick days, then by following your policy, you should already be in compliance with the law.

[UPDATED April 8, 2020] **Q. What about "no-fault" attendance policies?**

A. Employers should give serious consideration to the application of any "no-fault" attendance policies during the pandemic. As long as absences protected by specific laws such as the Family and Medical Leave Act (FMLA), state paid sick leave laws, and the new federal legislation on Emergency Paid Sick Leave and Emergency Family Medical Leave Expansion are excluded, there is no legal requirement to suspend no-fault attendance policies. However, given the public health recommendations concerning social distancing, employers should strongly consider suspending such policies for the time being. Larger employers that are not covered by the Emergency Paid Sick Leave Act and the Emergency Expanded Family Medical Leave Expansion Act should strongly consider mirroring the reasons for absences under those laws to slow or prevent the spread of COVID-19 in the workforce.

Q. Can an employer reduce pay of employees to save costs during the pandemic?

A. Generally, an employer may make a prospective cut to wages or salaries, but there are several items to check before doing so:

- Are the wages or salaries covered by an individual contract or a collective bargaining agreement? If so, you need to follow the terms of the contract or agreement;
- Remember not to go below the minimum wage for your state or locality;
- For salaried exempt employees, to remain exempt from overtime under the Fair Labor Standards Act, the weekly salary must be at least $684. The U.S. Department of Labor (USDOL) has instructed that "[a]n employer is not prohibited from prospectively reducing the predetermined salary amount to be paid regularly to [an exempt employee] during a business or economic slowdown, provided the change is bona fide and not used as a device to evade the salary basis requirements." On the other hand, the USDOL cautions that the salary basis requirement would be violated if an employer reduces an exempt employee's salary based on day-to-day or week-to-week determinations of the business's operating requirements. Also, keep in mind that the salary threshold for the white collar overtime exemptions may be higher under state law—for example, the weekly salary threshold for New York state law overtime exemptions is currently $1,125 for employers in New York City.

FMLA

The federal Family and Medical Leave Act (FMLA) provides for unpaid job protection for absences of up to 12 weeks if they are related to the employee's own serious health condition or for the employee's need to care for a family member with a serious health condition. However, the FMLA does not apply to every employer or employee. For purposes of being covered by the FMLA, an employer must have 50 or more employees and an employee's eligibility for FMLA leave hinges on whether he or she has worked for the employer for at least 12 months, has worked at least 1,250 hours during the 12 months preceding the start of the leave, and has been employed at a worksite where the employer has at least 50 employees within 75 miles. Below are some questions and answers concerning the federal FMLA. We will continue to add responses regarding some state FMLAs.

Q. Is time spent self-quarantining without symptoms protected by the FMLA?

A. Generally, FMLA coverage is available for a serious health condition. Therefore, an employee who is not sick and does not have a sick family member but is self-quarantining is not protected by the FMLA and time spent in such self-quarantine does not count against the FMLA entitlement.

[UPDATED March 30, 2020] Q. How has the new federal law changed the FMLA for COVID-19 issues?

A. Beginning April 1, 2020, the FMLA has been expanded to address certain COVID-19-related issues not previously covered by the FMLA for employers with fewer than 500 employees. Learn more here. The U.S. Department of Labor has also issued its own Q&A guidance (located here) on the Families First Coronavirus Response Act, which has expanded FMLA coverage.

[NEW March 30, 2020] Q. Where can I get a copy of the required posting that describes the Emergency Paid Sick Leave and the Emergency Family Medical Leave Expansion laws?

A. Right here. Each covered employer must post a notice of the Families First Coronavirus Response Act (FFCRA) requirements in a conspicuous place on its premises. An employer may satisfy this requirement by emailing or direct mailing this notice to employees, or posting this notice on an employee information internal or external website. Note that the effective date of the FFCRA has been moved up to April 1 from April 2.

WARN Act

The federal Worker Adjustment Retraining and Notification (WARN) Act requires that employers with more than 100 employees provide 60 days' notice in the event of a plant closing or mass layoff. Below is a question related to the federal WARN Act. We will continue to add content concerning state WARN Acts.

Q. If COVID-19 causes my company to suspend operations, am I required to give the WARN Act notice?

A. The federal WARN Act contains exceptions for "unforeseeable business circumstances" and "natural disasters." As long as employers give employees notice as soon as practicable, then a mass layoff or plant closure that is directly caused by the COVID-19 pandemic should not trigger federal WARN Act liability.

Labor Union Issues

Q. Some of my workforce is unionized. Does that change anything?

A. If a union represents your employees, then you are not allowed to unilaterally change terms and conditions of employment without first bargaining with the union. This does not mean that you cannot move swiftly. If your collective bargaining agreement has a broad management rights provision, you may have the right to make many rule changes without formally bargaining, as long as they are not violating express terms of the collective bargaining agreement. If not, then your bargaining obligation can be satisfied by notifying the union of the proposed change, explaining the urgency of such a change (if there is urgency), and being available for reasonable discussions. Even if you believe that your management rights provision allows for particular changes, consultation with the union representing employees is important because their cooperation and the cooperation of their members is critical.