

CORONAVIRUS IN THE WORKPLACE- NEW CHALLENGES FOR EMPLOYERS

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AGENDA

- Understanding Coronavirus
- Work Rules
- FMLA, Sick Leave and other Leaves of Absences
- HIPAA and Healthcare Issues
- Contract and Agreement Issues
- Other Issues
- Action Plans
- Questions

UNDERSTANDING CORONAVIRUS

UNDERSTANDING CORONAVIRUS

What is Coronavirus?

- Coronavirus is a new respiratory virus that originated in Wuhan, China.
- The virus is contagious and potentially fatal.
- It is suspected that it is transmitted through coughing and sneezing by infected individuals.
- At the present time, there is no vaccine, cure or specific treatment.

UNDERSTANDING CORONAVIRUS

How is Coronavirus spread?

- Health authorities have not confirmed how coronavirus is transmitted but suspect it is spread person-to-person.
- There is also evidence that the virus has been spread by animal sources, including individuals with links to seafood or animal markets.
- They do not believe you can get it from air, water or food.

UNDERSTANDING CORONAVIRUS

What are the signs and symptoms of Coronavirus?

- Individuals infected with Coronavirus have displayed the following symptoms:
 - Mild to severe respiratory illness
 - Fever
 - Cough.
 - Difficulty breathing
 - Death

UNDERSTANDING CORONAVIRUS

How infectious is Coronavirus?

- Virus transmission may happen on a spectrum, and authorities are not sure if the virus is highly contagious or less so.
- For person-to-person transmission, health authorities suspect the virus is spread through coughing and sneezing, similar to how influenza and other respiratory pathogens are spread.
- The incubation period, or the time interval from infection to onset of symptoms, is from two to 14 days.
- During this period, an individual can be infected and spreading the disease although they may not be experiencing the signs and symptoms of the virus.

UNDERSTANDING CORONAVIRUS

How can an individual protect themselves?

- Because there is currently no vaccine to prevent infection, the best way to protect yourself is to avoid being exposed to this virus.
- The CDC recommends the following additional steps:
 - Wash your hands often with soap and water for at least 20 seconds.
 - Use an alcohol-based hand sanitizer that contains at least 60 percent alcohol if soap and water are not available.
 - Avoid touching your eyes, nose and mouth with unwashed hands.
 - Avoid close contact with people who are sick.
 - Stay home when you are sick.
 - Cover your cough or sneeze with a tissue, then throw the tissue in the trash.
 - Clean and disinfect frequently touched objects and surfaces.

UNDERSTANDING CORONAVIRUS

What happens if I suspect I or someone I know has coronavirus?

- If an individual exhibit symptoms of Coronavirus, he or she should contact a health care professional ASAP.
- If an individual has had close contact with someone exhibiting Coronavirus symptoms, he or she should call ahead to a health care professional and mention his or her close contact.
- A health care professional will work with a state's public health department and CDC to determine if he or she needs to be tested for Coronavirus.

UNDERSTANDING CORONAVIRUS

What is the current state of the virus?

Coronavirus: U.S. at a Glance*

Total cases: 33,404

Total deaths: 400

Jurisdictions reporting cases: 54 (50 states, District of Columbia, Puerto Rico, Guam, and US Virgin Islands)

* Data include both confirmed and presumptive positive cases of COVID-19 reported to CDC or tested at CDC since January 21, 2020, with the exception of testing results for persons repatriated to the United States from Wuhan, China and Japan. State and local public health departments are now testing and publicly reporting their cases. In the event of a discrepancy between CDC cases and cases reported by state and local public health officials, data reported by states should be considered the most up to date.

WORK RULES

WORK RULES

How can an employer prepare for a local outbreak of Coronavirus?

- Create an outbreak response plan now to ensure the continuity of the employer's operations and involve its employees in that process.
- An employer should anticipate increased employee absences, as employees and their family members may become ill and their children's schools and childcare providers may close.
- It would be advisable to determine which positions or functions are critical to its operations and plan for operating with reduced staff, which may involve cross-training employees to perform other duties or allowing employees to work from home (if possible).

WORK RULES

- Review your human resources policies and practices to ensure that they are flexible and comply with applicable laws and public health recommendations, as well as develop a communications plan for sharing critical information with employees.
- In advance of any outbreak, an employer should remind employees of its sick leave policies, including their rights under applicable laws, and share details of your response plan.
- Review with IT department the need if employees are working remotely.

WORK RULES

Can an employer ask employees to stay home if it suspects they may have Coronavirus or have been exposed to Coronavirus?

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- Employers are obligated to protect their employees from known hazards, which may include Coronavirus.
- However, employers should tread very carefully if employees do not voluntarily divulge that they have the Coronavirus and employers are acting on mere suspicion.
- To contain the spread of Coronavirus, an employer should actively encourage sick employees to stay home and remind sick employees of any rights that they may have to paid time off when they are sick or caring for an ill family member.
- If employees have symptoms of an acute respiratory illness (e.g., fever, cough, shortness of breath), you can ask them not to return to work until they no longer have a fever for at least 24 hours.

WORK RULES

Do employees need clearance to return to work? Can an employer request documentation?

- Currently, there is no formal clearance process for employees to return to work from Coronavirus.
- However, employers may request documentation under certain circumstances.
- For example, under some state and local leave laws, if an employee has been absent for more than three consecutive workdays, an employer may request a doctor's note from a licensed healthcare provider.
- If the employee did not have any fever, cough or shortness of breath during these 14 days, there is no medical reason to exclude that employee from the workplace and the employer should allow him or her to return to work.
- As a reminder, all medical documentation should be maintained confidentially and separately from the employee's personnel file.

WORK RULES

What does an employer do if an employee arrives at work presenting symptoms of Coronavirus?

- If an employee arrives at work displaying symptoms of respiratory illness, an employer should immediately separate the employee from the other employees and send him or her home.
- An employer cannot subject the employee at issue to medical examinations to determine if he or she is sick (taking an employee's temperature is considered by the EEOC to be a "medical examination").
- It can be if doing so must be job-related and consistent with business necessity.
- That evaluation should be made on objective evidence and not simply general news reports, personal experience, fear or assumptions.
- Even if the employee does not perform any work on the date in question, the employer should be mindful of any legal requirements to provide the employee sent home with call-in pay.

WORK RULES

- **How can an employer prevent Coronavirus from spreading to its workplace?**
- An employer should:
 - encourage employees to stay home and seek medical care when they are sick.
 - encourage employees to partake in good hygiene by washing their hands often with soap and water (for at least 20 seconds) and covering their mouths and noses with a tissue (or their sleeve) when coughing or sneezing.
 - make alcohol-based hand sanitizer and disposable cleaning wipes available, provide tissues and no-touch trashcans and disinfect frequently touched surfaces such as doorknobs, countertops and workstations.

WORK RULES

Can an employer prohibit employees from wearing medical masks or respirators?

- Under most circumstances, an employer can prohibit employees, particularly customer-facing positions, from wearing medical masks or respirators.
- Further, the current consensus is that masks are not necessary to protect the health of most employees and are needed only if a person is treating someone infected with the coronavirus.
- Therefore, unless an employee has a disability requiring the use of a mask or works directly with individuals affected by the coronavirus, an employer likely can prohibit employees from wearing masks at work.

WORK RULES

Can we impose travel restrictions on our employees?

- Employers may require employees to limit all non-essential business travel to CDC-designated countries and strongly encourage employees to limit all non-essential personal travel to CDC-designated countries.
- In constructing such a policy, employers are advised not to impose a ban on all travel or a ban on travel to only one of the several CDC-designated countries (e.g., banning travel to China, but not banning travel to Iran, Italy, Japan and South Korea).
- Additionally, employers should be mindful that certain state and local laws prohibit discrimination against employees based on their lawful off-duty conduct (including legal recreational activities), and, if it is lawful to travel to CDC-designated countries, then there may be legal concerns with prohibiting employees from personal travel to those areas.

WORK RULES

If a vaccine for Coronavirus becomes available, can an employer require our employees to get it?

- No, you cannot require employees to be vaccinated for the coronavirus if a vaccine becomes available.
- However, if a vaccine becomes available, you can educate employees about the vaccine, consider making it available at no cost to employees, and consider offering employees leave to obtain the vaccination.

WORK RULES

- An employer should be very careful in taking any action, particularly if its beliefs are mere suspicion, because it is against the law to deny a person entry to your establishment and refuse service based on a person's actual or perceived race, ethnicity, national origin or disability.
- Thus, an employer cannot treat persons differently if, for example, they are Chinese or Italian because those countries have areas with widespread or sustained community transmission of Coronavirus.

WORK RULES

What should an employer do if a client or customer makes inquires about whether any employees have Coronavirus or recently traveled to a CDC-designated area?

- An employer must maintain the confidentiality of any employee's medical information.
- However, in response to a client or customer inquiry, you should inform them that client or customer as to whether any employees recently traveled to a CDC-designated area and/or have been diagnosed Coronavirus.
- The employer should inform the client or customer of the precautions that you have taken to minimize the risk of transmission to any person who enters the establishment.

WORK RULES

Must An employer keep paying employees who are not working?

- Under the Fair Labor Standards Act (FLSA), for the most part the answer is “no.”
- FLSA minimum-wage and overtime requirements attach to hours worked in a workweek, so employees who are not working are typically not entitled to the wages the FLSA requires.
- One possible difference relates to employees treated as exempt FLSA “white collar” employees whose exempt status requires that they be paid on a salary basis.
- Generally speaking, if such an employee performs at least some work in the employee's designated seven-day workweek, the salary basis rules require that they be paid the entire salary for that particular workweek.
- There can be exceptions, such as might be the case when the employer is open for business but the employee decides to stay home for the day and performs no work.

WORK RULES

- Also, non-exempt employees paid on a “fluctuating-workweek” basis under the FLSA normally must be paid their full fluctuating-workweek salaries for every workweek in which they perform any work.
- There are a few exceptions, but these are even more-limited than the ones for exempt “salary basis” employees.
- Of course, an employer might have a legal obligation to keep paying employees because of, for instance, an employment contract, a collective bargaining agreement, or some policy or practice that is enforceable as a contract or under a state wage law.

WORK RULES

- Finally, caution employers to consider the public relations aspect of not paying employees who may not be working if they have contracted or are avoiding the COVID-19 coronavirus.
- Given the publicity surrounding this outbreak, it is possible that situations involving these kinds of issues could reach the media and damage your reputation and employee morale.
- Consider the big picture perspective when making decisions regarding paying or not paying your employees.

WORK RULES

Can an employer charge time missed to vacation and leave balances?

- The FLSA generally does not regulate the accumulation and use of vacation and leave.
- The salary requirements for exempt “white collar” employees can implicate time-off allotments under various circumstances.
- Again, however, what an employer may, must, or cannot do where paid leave is concerned might be affected by an employment contract, a collective bargaining agreement, or some policy or practice that is enforceable as a contract or under a state wage law.

WORK RULES

Can an employee refuse to come to work because of fear of infection?

- Employees are only entitled to refuse to work if they believe they are in imminent danger.
- Section 13(a) of the Occupational Safety and Health Act (OSH Act) defines “imminent danger” to include “any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.”
- OSHA discusses imminent danger as where there is “threat of death or serious physical harm,” or “a reasonable expectation that toxic substances or other health hazards are present, and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency.”

WORK RULES

What can an employer do to prepare for a possible remote work scenario?

- Take an inventory of the types of equipment its workers would need to get their job done and ensure they have access to them.
- This could include laptops, desktop computers, monitors, phones, printers, chargers, office supplies, and similar materials.
- Encourage its employees to prepare for the possibility of an immediate instruction to work at home.
- They may want to develop a “ready bag” that they take home with them at the end of each day that would allow them to begin working remotely at a moment’s notice.
- This would obviously include laptops, smartphones, and other related technology, but could also include physical items (such as binders, documents, materials).
- Will IT staffing be enough or available for the need?

WORK RULES

- Make sure the employer considers and clearly communicate with its workers about which physical items are acceptable to be taken from the workplace and which need to stay in the employer's location at all times.
- You might want to take the time now to digitize any relevant physical materials to make remote working easier.
- The employer will also want to communicate with its workforce about whether they can or should take digital photos of physical calendars, whiteboards, Kanban boards with stickie notes, or similar items, or whether they are prohibited from doing so.
- But perhaps the most important thing an employer should do is take the time to develop a remote work policy if the employer do not have one in place, or review and update your existing policy as it relates to this specific situation.

WORK RULES

What should be included in a remote work policy?

- The employer 's policy should lay out the expectations it has have for its workers as the embark on their temporary remote work routines.
- The number one item the employer should convey to them is that its expect them to help its organization maintain normal business operations during this period of time to the extent possible.
- Consider all aspects of their work and make sure they understand what is expected of them.
- How strict will the policy be?
- Are its workers simply encouraged to work at home or absolutely barred from coming to the office?
- Will there be exemptions for “essential” personnel that need to be at a certain physical location?

WORK RULES

- **Will they need to be available at all times during working hours, or will remote meetings and appointments be scheduled ahead of time?**
- (Take into account that your workers' lives may be disrupted in other ways because of the COVID-19 outbreak, and therefore they may not be able to maintain normal working hours during this time or may be somewhat distracted by family or medical obligations during certain times of the day.)
- Will remote meetings take place online, over the phone, or on camera?
- Will the employer prohibit employees from meeting together in person during this period?
- Will the employer only restrict in-person meetings of a certain size (no more than three or five workers)?

WORK RULES

- Will the employer prohibit employees from meeting with third parties while doing company business during this period of time?
- Will you prohibit workers from performing work outside of their homes (coffee shops, libraries, etc.) because of security concerns?
- If this kind of work is permitted, do you have sufficient security infrastructure in place (encryption, password-protection, log-out/lock requirements, etc.) and are your workers aware of your requirements to prevent data breaches or other loss?
- Can workers perform work on their own devices, and if so, do you have a comprehensive BYOD (bring your own device) policy in place?
- The employer should include an anticipated end date in your remote work announcement, and/or inform your employees that you will provide weekly updates regarding the status of the remote work period.

WORK RULES

Based on CDC advice that older people as well as those with serious chronic medical conditions stay home as much as possible if coronavirus is spreading in their communities, should employers require all employees age 60 or older to work remotely (if at all) in areas where coronavirus cases are being reported?

- We do not recommend taking that action based on federal, state and local protections against age discrimination as well as disability discrimination laws intended to provide equal employment opportunities to the disabled.
- These disability discrimination laws generally do not allow employers to remove employees from situations based on a medical condition for preventive purposes unless and until the situation poses a direct threat to the employee's health and safety that cannot be effectively alleviated through other measures.
- Circumstances could conceivably rise to that level at some point, but as things stand now, presence in most workplaces would not rise to that "direct threat" standard.

FMLA, SICK TIME & LEAVES OF ABSENCE

FMLA, SICK TIME & LEAVES OF ABSENCE

Under what situation will an employer need to provide paid sick leave to its employees?

Employers with fewer than 500 employees and public agencies with at least one employee must provide paid sick leave.

- Full-time employees can be provided with up to 80 hours of paid leave and part-time employees with a number of hours that would equal the hours that such employee works over a 2-week period.
- Employees are allowed to immediately use such leave, regardless of how long they have been employed by the employer.

FMLA, SICK TIME & LEAVES OF ABSENCE

What are the qualifying reasons for the leave?

- Qualifying reasons for this paid sick leave include:
 1. The employee is subject to a federal, state, or local quarantine or isolation order related to Coronavirus
 2. The employee has been advised by a health care provider to self-quarantine due to concerns related to Coronavirus.
 3. The employee is experiencing symptoms of coronavirus and seeking a medical diagnosis.
 4. The employee is caring for an individual who is subject to either number 1 or 2 above.
 5. The employee is caring for his or her son or daughter if the school or place of care of the son or daughter has been closed, or the childcare provider of such son or daughter is unavailable, due to Coronavirus precautions.
 6. The employee is 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.

FMLA, SICK TIME & LEAVES OF ABSENCE

What are the pay requirements?

- Paid sick leave must be paid at the employee's regular rate of pay, or minimum wage, whichever is greater, for leave taken for reasons 1-3 above.
- An Employee taking leave for reasons 4-6 may be compensated at two-thirds of his or her regular rate of pay, or minimum wage, whichever is greater.

FMLA, SICK TIME & LEAVES OF ABSENCE

Are there any limitations on the amount of pay provided?

- For an employee who is unable to work because of Coronavirus quarantine or self-quarantine or has Coronavirus symptoms and is seeking a medical diagnosis, eligible employers may receive a refundable sick leave credit for sick leave at the employee's regular rate of pay, up to \$511 per day and \$5,110 in the aggregate, for a total of 10 days.
- For an employee who is caring for someone with Coronavirus, or is caring for a child because the child's school or child care facility is closed, or the child care provider is unavailable due to the Coronavirus, eligible employers may claim a credit for two-thirds of the employee's regular rate of pay, up to \$200 per day and \$2,000 in the aggregate, for up to 10 days.
- Eligible employers are entitled to an additional tax credit determined based on costs to maintain health insurance coverage for the eligible employee during the leave period.

FMLA, SICK TIME & LEAVES OF ABSENCE

What if the employee has other paid leave available from the employer?

- An employer may not require an employee to use other types of paid leave provided by the employer before the employee uses the paid sick time available under this law.

FMLA, SICK TIME & LEAVES OF ABSENCE

When does employer have to comply?

- Immediately
- 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, DOL will not bring an enforcement action against any employer for violations of the Act so long as the employer has acted reasonably and in good faith to comply with the Act.
- DOL will instead focus on compliance assistance during the 30-day period.

FMLA, SICK TIME & LEAVES OF ABSENCE

Are there any exceptions to providing paid sick leave?

- DOL will issue rules to exempt small businesses with fewer than 50 employees from the requirements of providing paid leave to care for a child who is out of school (#5 on the above list of permitted purposes) when the imposition of such requirements would jeopardize the viability of the business as a going concern.

FMLA, SICK TIME & LEAVES OF ABSENCE

- **Does an employer need to pay employees who are being quarantined, self-monitoring at home or are otherwise ill with the coronavirus or caring for a family member with the coronavirus?**
- Initially, an employer would be required to pay employees who are absent from work for these reasons if they have accrued paid time off pursuant to any paid safe/sick leave law.
- Additionally, employees may be entitled to paid leave benefits pursuant to state or local leave laws if the employees are caring for a family member with the coronavirus.
- However, after employees exhaust any paid safe/sick leave, the obligation to pay them depends on whether they are classified as exempt or non-exempt employees and whether you are requiring them to be absent from work.

FMLA, SICK TIME & LEAVES OF ABSENCE

- Generally, an employer is only required to pay non-exempt employees for the actual hours that they work.
- Therefore, legally, an employer do not have to pay these employees if they are unable to return to work after they exhaust any applicable paid leave entitlement.
- However, an employer likely would be required to grant them an unpaid leave of absence.
- As for exempt employees, an employer is required to pay them their full weekly salary if they perform any work during a given week.

FMLA, SICK TIME & LEAVES OF ABSENCE

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- As for exempt employees, an employer is required to pay them their full weekly salary if they perform any work during a given week.

FMLA, SICK TIME, & LEAVES OF ABSENCE

What are an employer obligations for offering an employee a leave of absence related to Coronavirus?

- If an employee requires time off from work, you should engage in a cooperative dialogue and interactive process with that employee regarding his or her individual situation and consider granting that employee an unpaid leave of absence (after exhausting any paid leave to which the employee may be entitled) until the employee is able to return to work.
- An unpaid leave of absence should be considered regardless of whether the employee is eligible for leave pursuant to the Family and Medical Leave Act (FMLA).
- Employers that are covered by the FMLA should determine whether employees who are out of work due to Coronavirus qualify for FMLA leave for their own serious health condition or the serious health condition of a covered family member.
- The employer also should extend the protections of any state or local leave laws to any eligible employees suffering from coronavirus or taking leave to care for an infected family member or other qualifying dependent.

FMLA, SICK TIME & LEAVES OF ABSENCE

Can an employee stay home under FMLA leave to avoid getting pandemic influenza?

- The FMLA protects eligible employees who are incapacitated by a serious health condition, as may be the case with the flu where complications arise, or who are needed to care for covered family members who are incapacitated by a serious health condition.
- Leave taken by an employee for the purpose of avoiding exposure to the flu would not be protected under the FMLA.
- Employers should encourage employees who are ill with pandemic influenza or are exposed to ill family members to stay home and should consider flexible leave policies for their employees in these circumstances.

FMLA, SICK TIME & LEAVES OF ABSENCE

What legal responsibility do employers have to allow parents or care givers time off from work to care for the sick or children who have been dismissed from school?

- Covered employers must abide by the FMLA as well as any applicable state FMLA laws.
- An employee who is sick, or whose family members are sick, may be entitled to leave under the FMLA.
- The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave in a designated 12-month leave year for specified family and medical reasons which may include the flu where complications arise that create a “serious health condition” as defined by the FMLA.

FMLA, SICK TIME & LEAVES OF ABSENCE

Can an employee take FMLA leave if children are home because school is closed or child care is closed?

- Yes The Emergency Family and Medical Leave Expansion Act amends the current Family and Medical Leave Act (FMLA), allowing leave for eligible employees who can't work (or telework) because their minor child's school or childcare service is closed due to a COVID-19 emergency declared by a federal, state or local authority.

FMLA, SICK TIME & LEAVES OF ABSENCE

- **Who is eligible?**

Eligible employees include employees who work for an employer with fewer than 500 employees and who have been on the payroll for at least 30 calendar days.

FMLA, SICK TIME & LEAVES OF ABSENCE

Is this FMLA leave paid?

- The first 10 days of this leave may be unpaid; however, employees may elect to substitute available paid time off, such as vacation, personal or sick leave, during this time.
- After the initial 10 days, employers must pay eligible employees at least two-thirds of the employees' regular rate of pay (as defined under the Fair Labor Standards Act) based on the number of hours the employees would otherwise have been scheduled to work.
- These paid-family-leave benefits are capped at \$200 a day (or \$10,000 total).

FMLA, SICK TIME & LEAVES OF ABSENCE

Are there exceptions for not offering this leave?

- An employee working for a health care provider or an emergency responder can be excluded from these requirements by his or her employer.
- A small employer with fewer than 25 employees is not obligated to reinstate an employee at the end of his or her leave if the employee's position has been eliminated due to economic conditions or other changes in operating conditions of the employer caused by Coronavirus, and the employer is unable to reinstate the employee to an equivalent position.
- DOL has the authority to issue regulations exempting small businesses with fewer than 50 employees from these requirements when imposition of such requirements would jeopardize the viability of the business as a going concern.

FMLA, SICK TIME & LEAVES OF ABSENCE

Will the employer receive assistance to pay for paid sick leave and paid FMLA?

- A tax credit is created for each calendar quarter for an amount equal to 100 percent of the qualified sick leave wages and qualified family leave wages paid by an employer during the calendar quarter, including some costs associated with providing and maintaining a group health plan during such paid leaves.
- Eligible 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 sick and child care leave that they paid, rather than deposit them with the IRS.
- 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 with respect to all employees.

FMLA, SICK TIME & LEAVES OF ABSENCE

What types of policy options do employers have for preventing abuse of leave?

- Both the FMLA and the Americans with Disabilities Act affect the provision of leave.
- Under the FMLA, employees seeking to use FMLA leave are required to provide 30-day advance notice of the need to take FMLA leave when the need is foreseeable and such notice is practicable. In addition, employers may require employees to provide:
 - medical certification supporting the need for leave due to a serious health condition affecting the employee or a spouse, son, daughter or parent, including periodic re-certification;
 - second or third medical opinions (at the employer's expense);
 - periodic reports during FMLA leave regarding the employee's status and intent to return to work; and
 - consistent with a uniformly-applied policy or practice for similarly-situated employees, a fitness for duty certification.

FMLA, SICK TIME & LEAVES OF ABSENCE

- The FMLA also allows the employee to elect or the employer to require the substitution of paid sick and paid vacation/personal leave in some circumstances.
- Under the Americans with Disabilities Act, qualified individuals with disabilities may be entitled to unscheduled leave, unpaid leave, or modifications to the employer sick leave policies as “reasonable accommodations.”
- These are modifications or adjustments to jobs, work environments, or workplace policies that enable qualified employees with disabilities to perform the essential functions (i.e., fundamental duties) of their jobs and have equal opportunities to receive the benefits available to employees without disabilities.

FMLA, SICK TIME, & LEAVES OF ABSENCE

Do employer-instituted quarantines or temporary shutdowns or mass layoffs entitle workers to unemployment benefits?

- Yes, workers are generally entitled to unemployment insurance if they are furloughed when a business temporarily shuts down and all other unemployment requirements are met.
- Depending on the size and length of the temporary shutdown, the jurisdiction may require notification to the applicable unemployment department as a mass separation.

HIPAA AND HEALTHCARE ISSUES

HIPAA AND HEALTHCARE ISSUES

- **Does the Coronavirus emergency override HIPAA privacy rules?**
- No, the government recently sent a stern reminder to all employers, especially those involved in providing healthcare, that they must still comply with the protections contained in the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule during the COVID-19 coronavirus outbreak.
- The Office for Civil Rights of the U.S. Department of Health and Human Services (HHS) issued a reminder after the WHO declared a global health emergency.
- In fact, the Rule includes provisions that are directly applicable to the current circumstances.

HIPAA AND HEALTHCARE ISSUES

What are our obligations under the HIPAA privacy rules if we are contacted by officials asking for emergency personal health information about one of our employees?

- The privacy restrictions mandated by HIPAA only apply to “covered entities” such as medical providers or employer-sponsored group health plans, and then only in connection with individually identifiable health information.
- Employers are not covered entities, so if you have medical information in your employment records, it is not subject to HIPAA restrictions.
- Nevertheless, disclosures should be made only to authorized personnel, and care should be taken even in disclosures to government personnel or other groups such as the Red Cross.
- Further, an employer should be careful not to release information to someone until you have properly identified them.

HIPAA AND HEALTHCARE ISSUES

How should an employer treat medical information?

- It is recommended that employer treat all medical information as confidential and afford it the same protections as those granted by HIPAA in connection with your group health plan.
- In certain circumstances, if an employer has health plan information, it can share it with government officials acting in their official capacity, and with health care providers or officially chartered organizations such as the Red Cross.
- For example, an employer can share protected health information with providers to help in treatment, or with emergency relief workers to help coordinate services.
- In addition, an employer can share the information with providers or government officials as necessary to locate, identify, or notify family members, guardians, or anyone else responsible for an individual's care, of the individual's location, general condition, or death.
- In such case, if at all possible, an employer should obtain the individual's written or verbal permission to disclose.

HIPAA AND HEALTHCARE ISSUES

- However, if the person is unconscious or incapacitated, or cannot be located, information can be shared if doing so would be in the person's best interests.
- In addition, information can be shared with organizations like the Red Cross, which is authorized by law to assist in disaster relief efforts, even without a person's permission, if providing the information is necessary for the relief organization to respond to an emergency.
- Finally, information can be disclosed to authorized personnel without permission of the person whose records are being disclosed if disclosure is necessary to prevent or lessen a serious and imminent threat to the health and safety of a person or the public.

HIPAA AND HEALTHCARE ISSUES

May covered entities share protected health information with public health authorities?

- When there is a legitimate need to share information with public health authorities and others responsible for ensuring public health and safety, covered entities may share PHI to enable them to carry out their public health responsibilities.
- This may arise with the current outbreak of COVID-19.
- The key, as always, is to limit disclosures to the minimum necessary to the purpose, strictly in accordance with these parameters.
- For example, covered entities may share information as necessary with the Centers for CDC, as well as health departments authorized by law to receive such information, to prevent or control disease or injury.
- An employer may even disclose PHI to foreign government agencies that are working with authorized public health authorities.

HIPAA AND HEALTHCARE ISSUES

If employees are no longer working, are they still entitled to group health plan coverage?

- Not necessarily. An employer will need to check your group health plan document (or certificate of coverage if your plan is fully insured) to determine how long employees who are not actively working may remain covered by your group health plan.
- Once this period expires, active employee coverage must be terminated (unless the insurance carrier or self-funded plan sponsor otherwise agrees to temporarily waive applicable eligibility provisions), and a COBRA notice must be sent.
- If the health plan is self-funded and you would like to waive applicable plan eligibility provisions, you should first make sure that any stop-loss coverage insurance carriers agree to cover claims relating to participants who would otherwise be ineligible for coverage.

HIPAA AND HEALTHCARE ISSUES

What happens to group health plan coverage if employees are not working and unable to pay their share of premiums?

- In the normal course of events, group health plan coverage will cease when an employee's share of premiums is not timely paid.
- However, several actions might be taken that could allow coverage to continue.
- First, the insurance carrier providing the health coverage may voluntarily continue the coverage while the disaster is sorted out and until an employer reopens its doors.
- More likely, the employer may make an arrangement with the insurance carrier providing health coverage to pay the employees' share of premiums to keep coverage in place (at least temporarily) and possibly until the employer can reopen its doors.
- Each situation will be different, depending upon the insurance carrier and the relationship between the employer and the insurance carrier.
- Therefore, each factual situation will need to be individually assessed.

CONTRACT & AGREEMENT ISSUES

CONTRACT & AGREEMENT ISSUES

- **If an employer's workforce is unionized, can it make changes to unionized employees work schedules or duties in response to Coronavirus?**
- The NLRA imposes on employers the duty to bargain in good faith over mandatory subjects of bargaining such as wages, hours, and terms and conditions of employment.
- Generally speaking, employers who make unilateral changes to these facets of employment may be subject to unfair labor practice charges that would apply even in emergency situations such as this one, unless your collective bargaining agreement provides otherwise.
- Many collective bargaining agreements contain provisions that allow for employer flexibility in determining work assignments, scheduling, and layoffs.
- The first authority for determining your rights and obligations is your own collective bargaining agreement.

CONTRACT & AGREEMENT ISSUES

An Employer has a “force majeure” clause in my contract. Does it cover an outbreak such as Coronavirus?

- Possibly.
- A “force majeure” clause is a contract provision that relieves the parties from performing their contractual obligations when certain circumstances beyond their control arise, making performance inadvisable, commercially impracticable, illegal, or impossible.
- Whether an outbreak like Coronavirus triggers the force majeure clause in a contract, and the effect of that clause on the provisions of the contract, will vary significantly with each employer.

CONTRACT AND AGREEMENT ISSUES

There is no force majeure clause in a contract. Does that mean an employer still have to abide by all of the contract provisions during the outbreak?

- The general duty to bargain over changes in contractual terms may be suspended where compelling economic exigencies compel prompt action.
- The law views “compelling economic exigencies” as extraordinary, unforeseen events having a major economic effect that requires the employer to take immediate action and make a unilateral change.
- Although an outbreak like the Coronavirus would seem to fit the description of a “compelling economic exigency,” realize that its effect will be different for every employer.
- That is, while it may suspend the duty to bargain for one employer whose only facility was infected, it will likely not suspend the duty for an employer that has lost significant accounts or contracts as a result of the outbreak.
- In practice, the safest course of action (and the one most likely to avoid future litigation) is to notify the union in all cases, even if you believe that your particular situation fits into the “compelling economic exigency” category.

OTHER ISSUES

OTHER ISSUES

If an employee alleges that they contracted Coronavirus while at work, will this result in a compensable workers' compensation claim?

- It depends.
- If the employee is a health care worker or first responder, the answer is likely yes (subject to variations in state law).
- For other categories of employees, a compensable workers' compensation claim is possible, but the analysis would be very fact-specific.
- It is important to note that the workers' compensation system is a no-fault system, meaning that an employee claiming a work-related injury does not need to prove negligence on the part of the employer.
- Instead, the employee need only prove that the injury occurred at work and was proximately caused by their employment.

OTHER ISSUES

If an employee alleges that they contracted Coronavirus while at work, will this result in a compensable workers' compensation claim?

- Additionally, the virus is not an “injury” but is instead analyzed under state law to determine if it is an “occupational disease.”
- To be an occupational disease (again subject to state law variations), an employee must generally show two things:
 - the illness or disease must be “occupational,” meaning that it arose out of and was in the course of employment; and
 - the illness or disease must arise out of or be caused by conditions peculiar to the work and creates a risk of contracting the disease in a greater degree and in a different manner than in the public generally.
- The general test in determining whether an injury “arises out of and in the course of employment” is whether the employee was involved in some activity where they were benefiting the employer and was exposed to the virus.

OTHER ISSUES

Do employers have any EEO concerns related to Coronavirus?

- Employers cannot select employees for disparate treatment based on national origin. The CDC recently warned: "Do not show prejudice to people of Asian descent, because of fear of this new virus. Do not assume that someone of Asian descent is more likely to have COVID-19."
- Employers will need to closely monitor any concerns that employees of Asian descent are being subjected to disparate treatment or harassed in the workplace because of national origin.
- This may include employees avoiding other employees because of their national origin.
- An employer may not base a decision to bar an employee from the workplace on the employee's national origin.
- However, if an employee, regardless of their race or national origin, was recently in China and has symptoms of the COVID-19 coronavirus, you may have a legitimate reason to bar that employee from the workplace.

OTHER ISSUES

Do Employers have an obligation to provide notice under the WARN Act if it is forced to suspend operations on account of the coronavirus and its aftermath?

- Yes, if the employer is covered by the Worker Adjustment and Retraining Notification (WARN) Act.
- The federal WARN Act imposes a notice obligation on covered employers (those with 100 or more full-time employees) who implement a “plant closing” or “mass layoff” in certain situations, even when they are forced to do so for economic reasons.
- It is important to keep in mind that these quoted terms are defined extensively under WARN's regulations, and that they are not intended to cover every single layoff or plant closing.

ACTION PLANS

RECOMMENDED ACTIONS

- Start planning now for a possible partial or full shutdown
- Actively encourage sick employees to stay home
- Separate sick employees
- Emphasize staying home when sick, respiratory etiquette and hand hygiene by all employees
- Perform routine environmental cleaning
- Advise employees before traveling to take certain steps
- Additional Measures in Response to Currently Occurring Sporadic Importations of the Coronavirus

RECOMMENDED ACTIONS

- Educate employee on the Corona virus
- Review sick leave and leave of absence policies
- Restrict travel plans for the next 3 months
- Limit attendance at any large meetings
- Require employees to report contact with sick family members or friends
- Speak to insurance broker or TPAs regard to changes that can be made to coverages
- Review all service agreements

QUESTIONS??????????

CONTACT INFORMATION

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