

Employment Law Update - COVID-19 and the Workplace: An Employer's Quick Guide

With COVID-19 reaching pandemic status and the total number of cases in the United States surging, it has become critical that employers have a response strategy. Any response strategy to COVID-19 should consider the current and developing labor and employment laws implicated by the COVID-19 crisis along with the concerns that could arise outside the employment context, including potential tort and contract liability.

"A Workplace Free from Recognized Hazards:" The Employer's Duty to Minimize Risks

The critical focus, first and foremost, is employee safety. Employers should reexamine what their duties are to employees in light of the COVID-19 crisis – and because new developments with the virus seem to trickle in daily – employers face somewhat of a moving target when it comes to employment law compliance.

First, nearly all employers in the United States have a statutory duty to comply with the Occupational Safety and Health Act (OSHA). Section 5(a)(1), also known as the "general duty clause," requires employers to provide their employees with a workplace "free from recognized hazards ... likely to cause death or serious physical harm." This standard requires employers to take reasonable steps to ensure a safe and healthy work environment. Such reasonable steps could include providing information regarding the COVID-19 crisis to employees, developing a flexible and responsive safety and health policy, communicating with employees on the policy, and effectively enforcing it. Employers may wish to review OSHA's Guidance on Preparing Workplaces for COVID-19, found [here](#).

In addition to OSHA, employers must remain mindful of compliance with the Family and Medical Leave Act (FMLA) and the Americans with Disability Act (ADA). 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, or where complications arise that create a "serious health condition" as defined by the FMLA.

Developing Legislation and the Families First Coronavirus Response Act

Under normal circumstances, the FMLA does not require employers to provide paid leave to employees who are absent from work because they are sick with pandemic illness, have been exposed to someone with the pandemic illness, or are caring for someone with it. However, on March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act, temporarily changing the FMLA landscape. Effective April 2, 2020, the Act will provide immediate relief many full-time and part-time American workers – **requiring certain employers to allow as much as 12 weeks of FMLA leave and 2 weeks of emergency paid sick leave for COVID-19-related absence**. Importantly, the Act expressly accounts for parents/caregivers who are unable to work (either in-office or from home), because their children’s care facilities or schools are shut down due to the virus.

What exactly does the Families First Coronavirus Response Act mean for many employers? To summarize:

- The Act only extends to businesses with *fewer than 500 employees*. Covered employers must consider all employees – both full-time and part-time – as immediately eligible for benefits under the Act. **This supplants the FMLA’s requirement that an employee must have been on the employer’s payroll for at least 30 calendar days before eligibility.**
- The required pay structure under the Act is as follows: full-time employees are entitled to 80 hours at their regular pay rate if they themselves are sick with the virus; or two-thirds of their regular pay rate if they are caring for a sick family member. Part-time employees are entitled to regular pay for the average number of hours they work over a regular 2-week span. **This supplants the FMLA’s structure where the first 10 days of an eligible employee’s leave are unpaid unless the employee substitutes accrued paid leave.**
- Employers must permit employees to **take their emergency paid sick leave under the Act *first*, then** choose whether to use the paid leave they may have accrued under the employer’s policy. In other words, employers may not require that employees use their regular accrued leave before taking advantage of the Act’s emergency benefits.
- Finally, the Act grants covered employers a refundable tax credit for 100% of emergency leave wages paid under the Act.

While this provides a brief overview of relevant and changing federal regulations, continuing developments in the federal response to the COVID-19 pandemic will require constant monitoring to be alert to the most up-to-date information.

“What Now?” Practical Tips and Points of Caution for Employers

Employee safety is of utmost concern, but employers must remain cognizant of compliance with federal privacy regulations as well. The threat of close-contact spread may tempt employers to inquire deeply about their employees’ medical conditions – especially given the many uncertainties surrounding the virus. But as the U.S. Department of Health and Human Services (HHS) recently and sternly reminded, **the global health crisis does not in any way suspend federal privacy regulations**. Employers should thus be prepared to confront a delicate balancing act: keeping employees’ health information confidential, pursuant to the Americans with Disability Act (ADA) and/or the Health Insurance Portability and Accountability Act (HIPAA), while taking affirmative steps to minimize the risk of contagion in the workplace.

- **What can employers ask regarding employees’ health symptoms and travel?**

The Equal Employment Opportunity Commission (EEOC) has weighed in on when employers can ask about an employee’s health symptoms while remaining ADA-compliant. The ADA already provides stringent protections;

however, the classification of the coronavirus as a global pandemic triggers new rules for employers. For example, during a pandemic, ADA-covered employers may ask employees if they are experiencing symptoms of the pandemic virus. Further, under normal circumstances, taking an employee's temperature would be considered a "medical examination" under the ADA and therefore would not be permitted. However, because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature and exclude employees with fever over 100.4 degrees F.

Similarly, during a pandemic, the ADA permits employers to ask questions about potential exposure during an employee's travel – even if the trip was personal. The ADA does not consider such inquiries "disability-related," and permits employers to: (1) ask whether employees are returning from or passing through locations that are heavily impacted by the virus; and (2) require employees who visited specific locations remain home for a period of time until it becomes clear that they are asymptomatic.

Nevertheless, employers must be careful to apply all travel-related restrictions **uniformly** and should remind employees that any discrimination on this basis will not be tolerated. To this end, employers may wish to recirculate their anti-discrimination policy to ensure workplace inquiries and comments about possible exposure do not target specific employees.

- **What information can employers share if an employee tests positive?**

When disseminating notifications to employees to warn of possible exposure at work, the key is to craft an adequate disclosure. The ADA mandates that businesses keep employees' medical data confidential, but neither HHS nor the EEOC has directly addressed the extent of what employers may share with other employees when one reports a positive diagnosis. The message to employees should contain sufficient detail to apprise workers of probable exposure, without publicizing the affected employee's identity or the particulars of her private medical information.

- **How can employers mitigate liability for bodily injury claims brought by their own employees?**

Even beyond regulatory compliance, employers who fail to take seriously the transmission of coronavirus in the workplace could face considerable consequences. While employers are generally immune from employee lawsuits for work-related illness under workers compensation laws, there are exceptions. For example, employers may be faced with claims by employees that the employer knowingly failed to protect against the spread of infection. Employers should, therefore, revisit their state's laws regarding potential tort liability, as many states consider businesses liable for negligently exposing workers and/or visitors to contagious disease.

In the workers compensation realm, there is some uncertainty over whether COVID-19 is compensable. Workers compensation generally covers "occupational diseases" that arise in the course of employment, although many states recognize an exclusion for "ordinary diseases of life" like the flu. Whether absence from work during self-quarantined recovery is considered a "temporary disability" within the meaning of workers compensation statutes will vary state to state.

As a practical measure, HR staff should be proactive and flexible when helping employees navigate their health and leave benefits. If possible, employers should: (1) attempt to be lenient in requiring employees to take FMLA leave or PTO; (2) follow the CDC's advice of "flexible sick leave policies;" (3) encourage remote-able employees to work from

home during the height of the crisis; and (4) for those employees not able to work remotely, consider temporarily suspending or relaxing any requirement of a doctor's note to substantiate an employee's absence.

Other Legal Concerns Triggered by COVID-19: Contract Considerations and Force Majeure

Finally, the COVID-19 pandemic has also impacted the ability of businesses around the globe to maintain operations and fulfill existing contractual obligations. As a result, it is vital for employers to examine their contracts to determine the applicability of force majeure clauses. Generally, force majeure clauses excuse a party's nonperformance under a contract when extraordinary events prevent a party from fulfilling its contractual obligations. In considering the applicability of force majeure, courts look to whether: (1) the event qualifies as force majeure under the contract; (2) the risk of nonperformance was foreseeable; and (3) performance is truly impossible.

Recent government regulations intended to contain the pandemic may similarly make it easier to invoke a force majeure clause not previously triggered by the virus. For example, businesses may be able to invoke force majeure provisions to excuse any contractual nonperformance resulting from government measures if the clauses at issue enumerate governmental orders or regulations that make performance impossible.

In general, force majeure scenarios will be very fact sensitive and highly dependent on the wording of the relevant contract. Thus, employers are highly encouraged to review any commercial contract obligations in light of the COVID-19 pandemic.

Takeaways

In short, despite the uncertainty and fear amid the COVID-19 outbreak, employers can take practical measures to lessen the blow to business. Employers should start by updating and communicating a clear plan of action, reassuring employees that their safety is a top priority. Employers should also take care to stay abreast of developing legislation and CDC/WHO recommendations to minimize the spread of the virus. And finally, now more than ever, employers should seek and rely on the advice of trusted counsel to help navigate the changing landscape of employment law and policy compliance.

Learn more about FormanWatkins' Labor & Employment team [here](#).

U.S. Employment Law Links Related to COVID-19

1. OSHA's Guidance on Preparing Workplaces for COVID-19
2. EEOC Pandemic Preparedness in the Workplace and the Americans with Disabilities Act
3. CDC's Community Guidance Business Responses [here](#) and [here](#)
4. DOL's Coronavirus Resource Page
5. Small Business Administration Resource Page