Legal FAQs – COVID-19

FIRST UPDATE: CURRENT THROUGH MARCH 25, 2020

Can employees be required to work as scheduled even when there is a risk of COVID-19 exposure?

The Occupational Safety and Health Act ("OSHA") recommends employers follow Center for Disease Control ("CDC") guidance in taking cautionary measures at the workplace. CDC has complied guidance for employers in response to the COVID-19 crisis at https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html. All employers should follow OSHA requirements and review and implement CDC guidance in their workplaces.

If your office is open to all patients or only for emergencies employees are obligated to work as scheduled. The employer must take all reasonable and legally required measures to protect its employees from exposure. Employees who refuse to work as scheduled are subject to discipline up to and including termination in accordance with the employer’s discipline policies.

Do I have an obligation to continue to pay employees who are off work temporarily?

The U.S. Department of Labor has issued guidance addressing this and many similar issues at: https://www.dol.gov/agencies/whd/flsa/pandemic. Generally:

- The Fair Labor Standards Act ("FLSA") provides that hourly employees must only be paid (1) for the hours they work and (2) when they elect to use paid time off.
- The FLSA requires that salaried employees must be paid their full salary for any week in which they perform any work. Even if one day or part of a day is worked by a salaried employee, he/she must be paid their full salary for that entire week. A salaried employee not working at all during a week and therefore not being paid may elect to use available paid time off to be paid.
- Employees who are paid based on production are only obligated to be paid the amount resulting from the compensation formula. If this includes a minimum
amount per day the employee should be paid that amount for any day any work is performed (unless the contract provides for half or other partial day amounts to be paid when less than a full day is worked).

An employer cannot require an employee to use paid time off unless the employer has an existing policy allowing it to do so.

On March 18, 2020 President Trump signed into law the Families First Coronavirus Response Act (“FFCRA”). The FFCRA provides that it will take effect no more than 15 days after date of enactment – April 2, 2020. No effective date has been announced. The FFCRA authorizes the Secretary of Labor to issue regulations to exempt small businesses with less than 50 employees, certain health care providers and emergency responders from its requirements. No such regulations have been issued.

If FFCRA becomes applicable to an employer, the employer will have new obligations to provide paid sick time. FFCRA would require employers to provide paid sick time for all employees, regardless of how long employed by the employer, that:

1. Are subject to a Federal, State or local quarantine or isolation order related to COVID-19.
2. Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
4. Are caring for an individual subject to 1 or 2 above.
5. Are caring for a son or daughter if the school or place of care has been closed or is unavailable due to COVID-19 precautions.
6. Experiencing any other substantially similar conditions specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

The amount of required paid sick time will generally be based on the employee’s regular rate of pay times the number of hours that that the employee would otherwise normally be scheduled to work. For part time employees with varying schedules, the number of hours will be based on average number of hours the employee had over the previous 6-month period.

For employees being provided paid sick time due to situations 1, 2 or 3 the required amount to be paid will be 100% of their hours times their rate up to $511 per day and $5,110 in total. For employees being provided with paid sick time due to situations 4, 5, or 6, the required amount to be paid will be their hours times 2/3 of their rate up to $200 per day and $2,000 in total. The amounts an employer pays pursuant to the FFCRA would not be considered “wages” and therefore not be subject to the 6.2% FICA taxes paid by employers and employees (these amounts would be subject to the 1.45% Medicare tax). MARCH 25, 2020 – UPDATE – Income taxes are required to be paid/withheld on the amount of these benefits.
The FFCRA provides a payroll tax credit to employers cover the cost of providing the required paid sick time. If the amount of an employer’s required paid sick time exceeds the employer’s payroll taxes for the quarter the excess amount is refundable.

These provisions would be effective though December 31, 2020.

**Does the FFCRA change Family and Medical Leave Act (“FMLA”) requirements?**

Yes, if the FFCRA is applicable (i.e. no applicable exemption from the requirements is issued - see above). The FFCRA would expand FMLA by requiring all employers with less than 500 employees to provide up to 12 weeks of leave to those employees that have been employed for 30 days and are unable to work (or telework) due to the need to care for a son or daughter under the age of 18 years old whose school or place of care has been closed due to a public health emergency with respect to COVID-19 declared by a Federal, State or local authority. Such employees must be paid at the rate prescribed for situation 5, described above.

The first 10 days may consist of unpaid leave. However, the employee may elect to use any accrued vacation, personal, medical or sick leave in lieu of unpaid leave. After 10 days, the amount required to be paid will generally be based on 2/3 of the employee’s regular rate of pay times the number of hours that that the employee would otherwise normally be scheduled to work. For part time employees with varying schedules, the number of hours will be based on the average number of hours the employee had over the previous 6-month period. However, the amount to be paid to an employee shall not exceed $200 per day and not exceed $10,000 in total.

**MARCH 25, 2020 UPDATE** – The expanded FMLA leave made available by FFCRA is in addition to any paid time off an employer makes available to an employee. An employer cannot require an employee to use employer provided paid time off unless there is an existing policy allowing the employer to do so.

**MARCH 25, 2020 UPDATE** – The tax treatment of amounts paid for expanded FMLA leave provided by the FFCRA are the same as described for the amounts paid for the paid sick time provided by the FFCRA, described above.

**Will the employer’s account be charged for unemployment benefits paid to employees who are off work temporarily due to COVID-19?**
The ability to obtain unemployment benefits was expanded by Executive Order 2020-10. That Executive Order also provided that, until April 14, 2020 at 11:59 pm, an employer’s account must not be charged for benefits paid due to “an executive order requiring them to close or limit operations.” On March 20, 2020 Executive Order 2020-17 was issued which required employers providing dental procedures to postpone “non-essential” procedures. Therefore, benefits paid to employees due to a cessation of non-essential procedures will not be charged to the employer’s account beginning on March 20, 2020 and continuing until April 14, 2020.

**Can an employer use seniority to determine which employees will be laid off?**

Yes. When deciding who to lay off an employer must take care to avoid discrimination claims. These decisions cannot be made based on sex, race, age, etc.

**What should an employer do when an employee has tested positive for the COVID-19 virus, has been in contact with someone who has tested positive for the COVID-19 virus or has symptoms and suspects they may have the COVID-19 virus.**

OHSA and CDC guidance recommends employers take the following precautions:

- Ask the affected employee to leave the office and encourage him/her to seek medical attention or self-quarantine.
- Obtain a list of other employees the affected person interacted with in the preceding 14 days and encourage those employees to self-quarantine for 14 days.

The employer should notify employees of suspected and confirmed cases of the COVID-19 virus in the office. Due to HIPAA and other privacy laws an employer cannot mention the name of an affected employee.

OSHA regulations require employers with 10 or more employees to make a record of employees who miss work due to COVID-19 infection. OSHA further requires these employers to evaluate the infected employee’s work duties and environment to decide whether exposures at work either caused or contributed to the illness.

Finally, an employer with knowledge that the office has been visited by someone with the COVID-19 virus should have the office disinfected, especially the areas known to have been in contact with the infected person.

**Can an employee sue me alleging he/she contracted the COVID-19 virus while working for me?**
Yes. An employee’s claim may be brought under the OSHA general duty clause or be for ordinary negligence. The success or failure of such any such claim cannot be predicted and would depend on several factors including:

- Liability – This would depend on whether the risk of infection was a reasonably foreseeable, what preventative measures were/could have been taken, what information was given to the employee, what consent/waivers/releases are involved, what screening of patients was being performed before the determination was made that they could be safely treated, what symptoms were/should have been observed by those in the office, etc.
- Causation – Can the employee prove that the infection was caused by exposure at work v. another location?
- Contributory Negligence – Did the employee wear gloves, a mask (the right kind), wash hands, wipe down their work area properly/timely and do all else he/she was supposed to be doing?
- Damages - Has the employee lost wages, incurred uncovered medical expenses, etc. as a direct result of becoming infected? Is the amount to be recovered worth the time and expense of pursuing the lawsuit?

Can employers test employees to determine if they have the COVID-19 virus?

The Americans with Disabilities Act (“ADA”) prohibits employers from making disability-related inquiries. However, there is an exception when the employer has a reasonable belief that an employee poses a “direct threat” to the health or safety of others which cannot be eliminated or reduced by a reasonable accommodation. No official guidance has been issued but it is reasonable to assume, given the pandemic and national emergency declarations, that the direct threat element would be satisfied in the case of the COVID-19 virus. Therefore, testing of employees would be allowed.

Some testing (e.g. taking temperatures) may not be determinative and instead only cause fear and stress in your workplace.

Any testing must be done in a nondiscriminatory manner. Employers who chose employees to be tested based on sex, age, pregnancy or other criteria that is discriminatory pursuant to federal and state law could be subject to liability.

Can an employer impose new conditions of employment or work rules in response to the COVID-19 pandemic?

Yes. Many employers are requiring employees that are returning from trips out of the U.S. to self-quarantine for 14 days before returning to work, are forcing employees known to be caring for a COVID-19 positive person to take a leave of absence, etc. No official guidance has been issued but it is reasonable to assume, given the pandemic and national emergency declarations, that the direct threat element (described above) would be satisfied in the case of the COVID-19
virus. Therefore, an employer should be able to implement these types of work rules and conditions of employment without violating the ADA. Any such work rules or conditions of employment must be implemented in a nondiscriminatory manner to avoid liability pursuant to federal and state discrimination laws.