

Client Advisory Regarding Coronavirus Disease 2019 (COVID-19) Legal Issues in the US

While the coronavirus disease 2019 (COVID-19), commonly referred to as the “coronavirus,” remains a developing situation, it has begun affecting the United States in major ways.

With cases now reported throughout the U.S., every organization should have a plan of action in place concerning the coronavirus. While every business faces unique considerations, the following guidance should be considered as organizations are working to address matters relating to employment, customer service, and other issues.

Familiarize yourself with state and local paid sick leave laws. Many US states and municipalities now require employers to provide paid time off to employees to address their own illnesses or that of their family members. If you have not done so already, be sure that your policies comply with any state and local requirements, and train managers on your paid sick leave policy in the event they receive calls from employees seeking treatment for themselves or family members infected with the virus, or missing work because their place of business or children’s schools or daycares are closed due to contagion, or because businesses are closed due to a declaration of public health emergency. However, these laws generally do not provide paid time off or job protection to employees staying home simply to avoid public places where they might contract the virus. Moreover, if many of your employees already have reached or exceeded accrued paid leave, it may be prudent to consider awarding a small additional pool of leave or temporarily implementing a more lenient remote working arrangement.

Remember the FMLA and similar state laws. US employers with 50 or more employees are required to provide eligible employees with up to 12 weeks off if they or a parent, spouse or child experiences a serious health condition. “Serious health condition” can include a period of inpatient care – such as a one-night stay in the hospital – or incapacity of three consecutive days requiring continuing treatment by a healthcare provider. Thus, the FMLA often would protect leave taken by an employee due to coronavirus exposure. Moreover, even when an employee or employer is not covered by the FMLA, many states have unique laws that track the FMLA, and that cover broader groups of employers and employees. Therefore, employers should be prepared to notify employees of their eligibility to take FMLA leave if infection with the virus results in inpatient treatment or extended illness of the employee or their spouse, parent or child – and even if the FMLA does not apply, employers should ensure they understand any other applicable laws that may create similar obligations.

Familiarize yourself with ADA limitations. Extended bouts of illness may constitute a disability under the Americans with Disabilities Act (ADA) if they substantially limit employees from performing a major life activity, such as respiration. Job restructuring or modification, or unpaid leaves of absence after paid leave periods are exhausted, may be required as a reasonable accommodation of an employee’s disability status. Although the ADA provides employers some discretion to assess whether an employee poses a direct threat to others, exercise caution before making blanket determinations that mildly symptomatic employees who have not been confirmed infected pose a serious safety risk warranting barring them from the workplace. Furthermore, beware of conducting health inquiries or examinations that may constitute prohibited medical examinations, such as taking employees’ temperatures to check for signs of fever and possible infection.

Review your wage payment obligations. Non-exempt employees must be paid for all hours worked and their pay can be docked for absences, but salaried, exempt employees ordinarily must be paid for all workweeks in which they perform any work. If employers close the place of business for a partial workweek because of fears of contagion, but employees are otherwise ready and available to work, exempt employees must nonetheless be paid for the full workweek. However, if an exempt employee fails to work for one or more full days out of fear of contagion (but does not utilize time provided under a *bona fide* sick leave or paid time off bank), the employer may take deductions from that exempt employee’s pay without losing the exemption. For employees already on travel who may be detained in foreign cities for screening, be sure to confirm whether that time is compensable.

Evaluate business travel needs and postpone non-essential travel. As of March 5, 2020, the Centers for Disease Control and Prevention (CDC) advised against non-essential travel to China, South Korea, Italy, and certain other countries. It also has recommended enhanced precautions against travel to several other areas, including Japan. In keeping with your obligations under the General Duty Clause of the Occupational Safety and Health Act (OSHA) to provide a safe workplace, postpone all non-essential business travel to these regions, and evaluate the necessity of all other travel until the virus is controlled. If an employee does report contracting the coronavirus while traveling for work, note that OSHA has deemed the coronavirus a recordable illness subject to reporting requirements.

Encourage wellness, including remaining at home when feeling unwell and reminders of important hygienic concepts. Employees should be encouraged to stay home when they are ill, regardless of the cause of the illness. If managers are reported to encourage employees to continue working even when sick, consider disciplinary steps. Post reminders to wash hands thoroughly, distribute hand sanitizer and reinforce appropriate hygiene measures to reduce the spread of all winter bugs. Consider adjusting your processes to avoid non-essential close contact between employees while they are performing day-to-day job duties.

Consider Industry Guidance. Regulatory bodies or similar organizations already have provided guidance concerning many industries as they prepare for the coronavirus. For example, the Centers for Medicare & Medicaid Services has provided guidance for [nursing homes](#) and [hospitals](#), and [the Centers for Disease Control and Prevention has provided detailed guidance with specific advice applying to a variety of industries \(including organizations engaging in retail, service and manufacturing\)](#). Although much of this guidance is nonbinding, organizations should strive to follow applicable government guidance, and a failure to do so could create potential third party liability in certain situations.

Telecommuting. Take steps to prepare for employees working remotely more often. For example, ensure that laptops are available for employees who may be able to use them to work remotely, encourage employees to take home each day any laptops or electronic devices that they need to work remotely (subject to applicable security protocols), and consider reminding employees about policies and procedures for remote working and remote access. If non-exempt employees are not accustomed to telework or telecommuting arrangements, be sure they understand how to record their work time to be properly compensated for all hours worked.

Carefully review collective bargaining agreements and federal and state notification requirements. If you employ a unionized workforce and plan to close facilities due to illness, review the collective bargaining agreements in place with the unionized workers to ensure that all contractual prerequisites have been satisfied. Likewise, if supply shortages due to slowing international imports cause you to conduct temporary layoffs, review any CBAs and federal and state laws regarding notifying employees, their representatives and/or government authorities about the workforce reductions.

Keep your sanity. Despite the global concern over the illness, there still are relatively few confirmed US cases of the coronavirus as compared to other illnesses. Employees exhibiting common cold symptoms are unlikely to be infected with the coronavirus, so be vigilant against improperly making disability-related inquiries or requiring medical examinations of employees, and against harassment or treatment of such employees as more seriously impaired (regarded as disabled) than they are. Because of the close connection between the illness and the region where it originated, also be alert to race- or national origin-based remarks that could be perceived as harassing. Be particularly cautious against overzealously removing job duties from employees or attempting to quarantine mildly symptomatic workers where there is no substantive reason to determine that they present a serious direct threat to others, particularly outside higher risk industries like healthcare, airlines and mortuary services. Consult with counsel before implementing any steps that could be perceived as adverse.

Employers have weathered similar storms during the H1N1 and MERS outbreaks and through many influenza strains. Principles employed in past (perceived) pandemics apply here as well.

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