Guidance for Employers During the Evolving COVID-19 Pandemic

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Situation Summary

- WHO Declares the Coronavirus Outbreak a Pandemic (3/11/2020)
- U.S. Declares Coronavirus Pandemic a National Emergency (3/13/2020)
- CDC Situation Summary (3/17/2020)
  - White House announces "15 Days to Slow the Spread" effort, AKA social distancing (3/16/2020).
  - CDC recommends that organizers cancel or postpone in-person events of 50 or more for the next eight weeks (3/15/2020).
  - U.S. cases anticipated to peak in May 2020.
  - Immediate risk of exposure to virus is still low for most Americans, but will increase.
  - CDC has issued clinical guidance, deployed support to state health departments, developed disease testing, and recommended unprecedented travel restrictions.

Agenda

- Workplace safety
- Issues of paid and unpaid leave
- Policies and procedures for working remotely
- Responding to the economic downturn
- Addressing travel restrictions
- Health and Welfare Plan considerations
- Q&A
Workplace Safety: OSHA

- **The General Duty Clause**
  - Requires employers to provide to employees “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.”
  - Policies and procedures put in place must be proportionate to the risk imposed by the coronavirus.
- **Retaliation Against Whistleblowers Prohibited**
  - Prohibits employers from retaliating against workers for raising concerns about safety and health conditions.
  - OSHA also enforces the whistleblower protections of more than 20 industry-specific federal laws.

Workplace Safety: OSHA cont.

- **Protect From Exposure to Hazardous Chemicals**
  - Employers must protect their workers from exposure to hazardous chemicals used for cleaning and disinfection (common in many sanitizers and sterilizers).
  - When workers are exposed to hazardous chemicals, employers must comply with OSHA standards.
- **Personal Protective Equipment (PPE) Standard**
  - Requires the use of gloves, and eye, face and respiratory protection.
  - When respirators are necessary, employers must implement a comprehensive respiratory protection program.
- **OSHA-Approved State Plans**
  - There are twenty-eight OSHA-approved State Plans, which are required to have standards and enforcement programs at least as effective as OSHA’s.
  - Some State Plans may have different or stronger requirements.
Workplace Safety: OSHA Recording

• **OSHA Recordkeeping Requirements**
  • Employers must record certain work-related injuries and illnesses on their OSHA 300 log, and complete the OSHA form 301 (or equivalent).

• **OSHA also requires employers to report to OSHA any work-related illness that**
  • (1) results in a fatality, or
  • (2) results in the "in-patient" hospitalization of one or more employees

• **OSHA recordkeeping rules only apply to injuries or "illnesses"**
  • While OHSA has excluded the cold and flu, it has determined that COVID-19 is a reportable illness (confirmed/diagnosed cases).

Workplace Safety: OSHA Recording cont.

• **COVID-19 is a recordable illness if a worker is infected as a result of work-related duties.**

• **Employers are only responsible for recording COVID-19 case if:**
  • Confirmed diagnosis of COVID-19;
  • "Work-related" (Requires an individualized determination of whether event or exposure in the work environment either caused or contributed to the resulting condition, which will be challenging.); and
  • Involves one or more of the general recording criteria (e.g. medical treatment beyond first-aid, days away from work).

• **If an employee has a confirmed, work-related case of COVID-19, the employer needs to report if it results in fatality or "in-patient" hospitalization.**
  • Deaths must be reported within 8 hours.
  • In-patient hospitalization must be reported within 24 hours.
  • Reporting obligation is time-limited. (Fatality after 30 days or hospitalization after 24 hours from workplace incident need not be reported.)
Workplace Safety: Cleaning and Disinfecting

- The coronavirus mostly spreads via respiratory droplets among close contacts (6 feet).
- Virus *may* remain viable for hours or days on surfaces.
- CDC recommends cleaning and disinfecting visibly dirty surfaces in the workplace:
  - **Cleaning**: removal of dirt and impurities, including germs
  - **Disinfecting**: use of chemicals to kill germs
- Employers should provide disposable wipes and perform routine environmental cleaning on all frequently touched surfaces (*i.e.* countertops, doorknobs, etc.)
- Employers should educate workers performing cleaning, laundry, and trash pick-up to recognize the symptoms.
- Employers should provide training on how to use PPE.

Workplace Safety: Isolating Sick or Exposed Employees and Social Distancing

- CDC recommends "social distancing": Creating ways to increase distance between people in settings like the workplace.
- **Employers should:**
  - Require symptomatic employees to stay home
  - Emphasize respiratory etiquette and hand hygiene
  - Limit number of participants at live meetings
  - Perform routine environmental cleaning
  - Limit/cancel business travel
  - Advise employees before traveling to take certain steps
  - Inform employees of any likely exposure (*e.g.*, a co-employee's confirmed diagnosis)
Workplace Safety: Isolating Sick or Exposed Employees and Social Distancing cont.

• **Discretion to bar employees from the workplace**
  - Diagnosis of confirmed COVID-19 or suspected exposure awaiting confirmation
  - Close contact with the above
    - Member of household
    - Intimate partner
    - Caregiver
    - Coworker in close proximity
  - Symptoms consistent with COVID-19: fever, flu-like symptoms such as coughing, sore throat and fatigue, shortness of breath
  - Recent travel (14 days) to what was a hotspot or concern at any time during an employee’s visit
    - Scope is discretionary: limited (just Level 3 countries, currently South Korea) to more expansive (all international, cruises and other hot spots). Risk in expanding to all travel at this point.
    - Good middle ground: international, cruise, any state or locality experiencing widespread community transmission
    - Any list created is as of a point in time and will likely expand due to spread.

• **Conditions to return to work depend on:**
  - Asymptomatic for 14 days after return from travel/close contact exposure to confirmed COVID-19
  - Free of symptoms for at least 24 hours, without the use of any fever or other symptom reducers/maskers (in the case of no positive test)
    - While permissible, realistically unlikely to be able to require medical fitness for duty if COVID-19 not confirmed
  - Can require employees to certify they meet above criteria subject to discipline for falsification
  - Medical fitness for duty if COVID-19 confirmed
  - Detailed, specific guidance for healthcare employers

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Workplace Safety: Workers' Compensation

• An employee who contracts the coronavirus may be entitled to workers' compensation if:
  • Employee was exposed to the virus while he or she was traveling for business;
  • Employee was exposed to the virus at work by a coworker or someone who visited the workplace; or
  • Employee experiences stress or anxiety due to the potential of exposure to the virus.
• Coverage highly dependent on particular state workers' compensation laws:
  • Some laws do not extend coverage to contagious diseases obtained from exposure to fellow employee or from hazard to which individual would have been equally exposed out of work.

Workplace Safety: Communications and Privacy

• ADA confidentiality applies to communications.
• Employers should not disclose identity of employees diagnosed with, or suspected of having, the coronavirus (unless otherwise directed by government).
• Instead, employers should send a communication:
  • Reporting that there has been a confirmed case of a co-worker
  • Urging employees to be careful in observing symptoms
  • Directing employees to avoid the office and seek medical attention if symptoms occur
• Employers should reach out separately to any smaller populations that may have been at a higher risk of close contact with the affected employee (i.e. shared cubicle block, officemate, recently in meetings together).
Workplace Safety: Communications and Privacy cont.

- Employers should carefully consider whether and how to disclose suspected exposure based on numerous factors including:
  - Likelihood of infection based on other facts (e.g., employee has had exposure to someone who has been exposed, employee recently travelled to hot spot, absence of other indicators of likely exposure);
  - Potential extent of exposure within the workplace;
  - Timing of confirmation of test;
  - Impact on business of disclosing (e.g., potentially unnecessary anxiety) vs. impact of not disclosing (distrust of employees who may subsequently blame employer for subsequent spread).

ADA Considerations: Temperature Checks

- Employers normally cannot check employees’ temperatures under the ADA.
- Because CDC and state/local health authorities have acknowledged community spread of COVID-19, EEOC has stated that employers may check employees’ temperature.
- EEOC advised employers that some people with COVID-19 do not have a fever.
- Employers should abide by the following testing guidelines:
  - Test in a non-discriminatory manner.
  - Use non-invasive/thermal imaging equipment.
  - Remember that any information recorded is a medical test subject to confidentiality requirements (e.g., it should not be documented in personnel files).
- Employers may recommend that employees (particularly those with low-risk exposure) check their own temperatures before coming to work.
Working Remote: Overall Considerations

• Whether or not you should establish a temporary remote work policy?
  • Dependent on organization’s circumstances
  • Employers may not want to establish if they have not yet had time to test and develop.
  • Leverage established protocols
  • Make decisions based on objective evidence, not fear

• Who should work remotely?
  • Identify employees critical to operations and determine whether they can work remotely.
  • Assess your technological capabilities, as well as security and privacy protocols.

How to prepare for a temporary remote work situation?

• Develop a remote work policy, or review and update any existing policy
• Inventory of types of equipment employees need to perform their jobs, and ensure they have access to them (*i.e.* laptops, monitors, phones, printers, chargers, office supplies, etc.)
  • California and other states require reimbursement of business expenses (*e.g.*, mandatory use of their personal cell phones for work-related calls, internet, etc.)
• Clearly communicate which physical items can be taken from the workplace, and which need to stay in the workplace at all times.
Working Remote: Overall Considerations cont.

• **What to include in a remote work policy?**
  • Overall expectations for employees working remotely – including time recording for non-exempt
  • Expectations that employees help the organization maintain normal business operations
  • Whether employees are encouraged to work at home or are absolutely barred from coming to the office, as well as any exceptions
  • Whether employees will need to be available at all times during working hours, or whether remote meetings and appointments will be scheduled ahead of time
  • An anticipated end date

Working Remote: Overall Considerations cont.

• **How to ensure remote work time is productive and successful?**
  • Agree on a single communications platform (i.e. instant messaging, Skype, Zoom Conferencing, etc.)
  • Keep an eye on the bigger picture and track overall productivity
  • Monitor employee burnout
  • Consider using the following tactics to prevent employees from feeling disconnected:
    • Develop and distribute agendas for all team meetings
    • Schedule virtual team lunches and social time
    • Connect new remote workers with experienced remote workers
Issues of Paid and Unpaid Leave: Families First Coronavirus Response Act

**Expanded Family and Medical Leave**

- Employers with fewer than 500 employees and government employers must provide employees, who have worked for at least 30 days and are unable to work (or work remotely) because they need to care for their child whose school has been closed or alternative childcare provider is unavailable due to the coronavirus, with **12 weeks of family and medical leave**.

  - The first 10 days of the leave may be unpaid (although employee can elect to substitute available vacation, personal medical or of sick if terms of employer leave allow).
  - Remaining leave paid at not less than 2/3 regular rate up to $200 per day and $10,000 in total.

- Current FMLA regulations for calculating the employee threshold for coverage apply in determining whether interrelated entities are examined together.

- Employers get payroll tax credit for the qualified sick leave wages they pay, subject to the caps.

- Employers are required to restore employees to their same or equivalent position, and if not available, have ongoing obligation for 1-year to contact impacted employee if such position becomes available (exception for employers with under 25 employees).

**Expanded Paid Sick Leave**

- Employers with fewer than 500 employees and government employers are required to provide two weeks of paid sick leave to their employees. Paid sick leave can be used for the following reasons:

  1. Employee is subject to a Federal, State, or local quarantine or isolation order.
  2. Employee has been advised by a healthcare provider to self-quarantine.
  3. Employee is experiencing symptoms and seeking a medical diagnosis.
  4. Employee is caring for an individual who is subject to a quarantine or isolation order, or has been advised by a healthcare provider to self-quarantine.
  5. Employee is caring for his/her child whose school has been closed or alternative childcare provider is unavailable.
  6. Employee is experiencing any other substantially similar condition, specified by HHS and DOL.

  - Reasons (1), (2) or (3): regular rate of pay up to $511 per day, $5,110 in total
  - Reasons (4), (5) or (6): two-thirds regular rate of pay up to $200 per day, $2,000 in total

- **Expanded Paid Sick Leave cont.**
  - Full-time employees are entitled to two weeks (80 hours) and part-time employees are entitled to the typical number of hours they work in a typical two-week period.
  - Employers cannot require employees to use other paid leave provided by the employer before using the paid sick leave under this Act. Existing paid leave is to be in addition.
  - Employers will receive a payroll tax credit for the qualified sick leave wages they pay, subject to the caps.
  - Employers required to post model notice of rights DOL has seven days to issue.

- **Effective Date**
  - The President signed on March 18th and the law provides that it is effective no later than 15 days later, or April 2nd (but DOL could move up sooner).


- **Exclusions for Certain Employers**
  - Both extended FMLA and sick leave laws have provisions that allow employers of health care providers and emergency responders to be excluded.
  - Additionally, the laws provide the DOL with authority to issues regulations regarding the foregoing and to exempt small businesses (under 50 employees) if providing the FMLA of paid sick leave “would jeopardize the viability of the business”.

- **Open Issues**
  - What certification is required for leave to care for a child whose school has been closed or alternative childcare provider is unavailable?
  - Form of notices and potential FMLA policy amendments?
  - How can payments under a Short-Term Disability policy be coordinated with payments required under the new Paid Sick Leave?
  - Whether employees are eligible for payment due to otherwise qualifying unpaid employee absences prior to the effective date of this Act?
  - Whether employees who are laid off before or during the effective date of this Act are entitled to the expanded FMLA leave pay and job restoration rights?

- **DOL Regulations**
  - DOL to issue regulations - will answer some but likely not all of the foregoing issues.
Issues of Paid and Unpaid Leave

• Employers should follow their existing leave and workers’ compensation policies if an employee communicates that he/she, or his/her immediate family member, has been diagnosed with the coronavirus.

• If employees have been diagnosed, but are NOT exhibiting symptoms, they may or may not be entitled to unpaid FMLA leave or paid sick leave (while probably under new paid sick leave, may not be under employer sick leave as defined by the policy).

• Employers may decide to provide extra sick leave or PTO; create a new sick leave policy for COVID-19; or suspend attendance policies.

• Employees must have a “serious health condition" to invoke 12 weeks of unpaid FMLA leave.

Issues of Paid and Unpaid Leave cont.

• The coronavirus may be considered a serious health condition, depending on the circumstances.
  • An employee with the coronavirus may be permitted to take FMLA leave.
  • An employee who is taking care of a qualifying family member with the coronavirus may be permitted to take FMLA leave.

• Employees who refuse to come to work for fear of contracting the virus would likely not qualify for FMLA leave.

• While a doctor's certification is generally needed for FMLA leave, if an employer understands the employee has a serious health condition, the employer can waive the requirement to provide documentation.

• However, the FMLA rules regarding notices and documentation have not been lifted, and employers must continue to follow their regular and ordinary FMLA processes.
Issues of Paid and Unpaid Leave: Supply Chain/ Economic Disruption

- Refresher on Layoffs and Furloughs
  - WARN Act requirements
  - Reductions in pay or scheduled hours
  - Furloughs
  - Unemployment compensation
  - Collective bargaining obligations for union workplaces

Issues of Paid and Unpaid Leave: Supply Chain/ Economic Disruption cont.

- WARN Act Requirements
  - Applies to employers with 100 employees
  - Requires a 60-day notice of employment loss, including for plant closing and layoffs of more than six months or 50% hour reduction for six months
  - Triggered by:
    - A plant closing – where employment site (or one or more facilities or operating units within site) will be shut down resulting in employment loss for 50 employees in 30-day period.
    - Mass layoff – employment loss of 33% of the employer’s total active workforce at the site (up to 90-day window for calculation) or an employment loss of 500 or more workers at a site of employment during a 30-day period.
  - Affected employees – excludes part-time who average fewer than 20 hours per week and newer who have been employed fewer than six of last 12 months.
Issues of Paid and Unpaid Leave: Supply Chain/ Economic Disruption cont.

• **WARN Act Requirements cont.**
  • Allows exceptions for temporary layoffs (less than six months), unforeseeable circumstances, faltering company, and natural disasters
    • Even if unforeseeable, an employer must provide notice as soon as practicable
    • May not be practicable, *i.e.* the San Francisco Bay Area "shelter in place" order

• **Mini-Warn Compliance**
  • Many states have Mini-WARN statutes, and there are county and local laws and ordinances that apply to smaller employers and/or require notice for smaller workforce reductions (*e.g.*, CA, IL, MD, NJ, NY, TN, WI).

Issues of Paid and Unpaid Leave: Supply Chain/ Economic Disruption cont.

• **Reductions in Pay**
  • Because non-exempt employees typically only get paid if they work, there is no legal restriction on scheduling less hours or reducing pay as long as employers pay minimum wage and overtime.
  
  • Exempt salaried employees must be paid minimum salary to remain exempt – current federal minimum is $684 per week or $35,568 annually (CA and some other states higher).
  
  • Note: Some states have requirements for written advanced notice (*e.g.*, 30 days in MO). Follow this link to our 50 state survey on reduction notice requirements: [https://www.quarles.com/employer-notice-requirements-for-wage-reduction-a-o-march-18-2020/](https://www.quarles.com/employer-notice-requirements-for-wage-reduction-a-o-march-18-2020/)
  
  • Additionally, employers do not have the unilateral right to alter or cancel employment agreements where the employee is not at-will (and reduction could trigger termination for "good cause" by the employee provision triggering severance pay or other damages).
• **Furloughs (exempt employees)**
  - Partial-week furloughs occur when an exempt employee's workweek is reduced (e.g., to three or four days per week) with a corresponding reduction in salary. This is permissible, so long as:
    - Done in advance (and in compliance with wage reduction notice requirements).
    - Changes are not made so frequently as to appear to be the functional equivalent of an hourly wage.
    - *Partial-week furloughs can also be supplemented by available vacation or PTO, but ability to force use subject to terms of the policy and state law.
  - Full-week furloughs are permissible, but if exempt employee performs any work during the week, the employee is entitled to full salary.
    - Checking emails and voicemails enough unless employee in violation of clear rule against doing so on furloughs.

• **Unemployment Compensation**
  - Unemployment compensation may be available to employees due to layoff, furlough, reduction in hours, and/or inability to work due to school closures.
  - Many states have waived initial waiting periods for eligibility.
  - Some states have other programs designed to help employers retain their trained employees by reducing their hours and wages that can be partially offset with UI benefits. (CA Work Sharing Program; NY Shared Work Program)
  - Employers should provide UI notices as normally required.
Issues of Paid and Unpaid Leave: Supply Chain/ Economic Disruption cont.

• **Collective bargaining obligations for union workplaces**
  - In *Seaport Printing*, 351 NLRB 1269 (2007), the NLRB found that the employer did not violate the NRLA by failing to bargain over a plant shutdown and layoffs during Hurricane Rita.
  - Consider whether other temporary emergency safety or security measures may fall under a management rights clause of the collective bargaining agreement.
  - Evaluate decision vs. effects bargaining.

Addressing Travel Restrictions

• **Avoid requiring non-essential travel**
  - Particularly avoid countries identified by the CDC, and other high-impact areas of the United States.
  - Other non-essential day-to-day travel should be avoided in order to promote social distancing.

• **Employers cannot prohibit employee personal travel plans, however employers can:**
  - Deny time off if the denial is based on the destination, business cost of a resulting quarantine, or other legitimate business-driven reasons (but not the national origin of the employee, *i.e.* employees of Asian descent).
  - Advise employees that such travel may result in quarantine or self-monitoring (including work from home, if applicable), possibly for a prolonged period (at least 14 days).
  - Remain aware of obligations under leave laws to allow employees leave to care for others who are ill, including persons in affected areas.
Health and Welfare Plan Considerations

• Don’t forget to consider how your approach will impact your employee benefit plans.

• Health plan eligibility
  • Check your eligibility terms. Do they use a "forward-looking" test for eligibility (e.g., "You are eligible if you are scheduled to work 30 hours a week" or "monthly measurement method")? Or a "backwards-looking" test (e.g., follow "look-back measurement method" under Employer Shared Responsibility rules)?
    • If forward-looking, employees who go on furlough / layoff may lose eligibility. Is that what you want?
    • If backwards-looking, employees who are not formally terminated (just on a leave or temporary non-work) probably do not lose coverage because their "full-time" status is "locked in".
      • But how will they pay for coverage if they are not being paid? Employer "loan" to employees? What if employee never repays it? Taxable "wages"? Withhold FICA, FUTA, etc.?

Health and Welfare Plan Considerations cont.

• Health plan eligibility cont.
  • COBRA for terminated employees; maybe COBRA for furloughed employees (if reduction in hours causes loss of coverage, that is a COBRA event).
  • More flexibility to modify eligibility terms if self-funded (but run by stop-loss carrier). If fully-insured, talk to carrier (and maybe have "side letter"?).

• Eligibility for other welfare plans (e.g., life; long-term disability; short-term disability; AD&D)
  • Similar analysis as above. Check terms of your policy (if fully-insured) or plan (if self-funded).
  • If you don’t like what you find, change it (if self-funded) or talk to carrier (if fully-insured).
Health and Welfare Plan Considerations cont.

- **Must your health plan cover Coronavirus testing and/or treatment?**
  - Due to the Act: Yes, for testing. Probably not, for treatment, but most employers will want to cover treatment (and your policy/plan probably already does).

- **Law requires all "group health plans" to cover certain, specified testing during Coronavirus "emergency period".**
  - Cannot impose any "cost-sharing" requirements (deductibles, copayments, coinsurance) or "prior authorization or other medical management requirements"
  - Expect regulations/FAQs on how rule applies in certain situations.
  - Coverage of testing on pre-deductible basis will not destroy "high deductible health plan" status.

- **Law creates new health plan "credit."** Amount of credit employer can receive for required paid family leave/sick leave generally increased by "amounts paid or incurred" to "provide and maintain a group health plan", to extent amounts are excluded from employee's gross income under Code Section 106(a).
  - How to calculate/track?

Health and Welfare Plan Considerations cont.

- **Probably need a formal plan amendment for Coronavirus testing.**
  - Some third party administrators for self-funded plans just making the change, unless employer "opts out".

- **Probably no need to update summary of benefits and coverage ("SBC"); summary of material modifications possible.**

- **Effective date is unclear – this piece seems to have taken effect on 3/18/2020, but some provisions refer to a "15 days later" effective date.**

- **Bonus Retirement Plan Considerations: Retirement plans can have a "partial plan termination" if 20%+ are laid off; could require immediate vesting.**
  - Also consider whether communications to participants (e.g., account balance; ESOP valuation) which were recently made need to be updated.
Government Resources for Employers

• Being prepared is the best way to protect your organization from effects of the coronavirus. Additional information can be found at the resources below:
  • www.osha.gov/SLTC/covid-19/
  • www.eeoc.gov/facts/pandemic_flu.html
  • www.dol.gov/coronavirus

• Please visit www.quarles.com/publications/ for articles to help employers navigate many aspects of the COVID-19 pandemic.

Questions
Thank You

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