

COVID-19: Key Issues and Responses for Employers

Working Together

03.05.2020

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All of us are, of course, concerned about what “Coronavirus Disease 2019” (COVID-19) will mean for each of us, our families, schools, workplaces, and our communities. As employers, we must hope for the best, but prepare for the worst. If you haven’t yet started planning to deal with employees who show symptoms of what may be the disease, or who have been exposed to the virus, it is vital that you **START NOW**. Here are some practical pointers:

SAFETY FIRST

The Centers for Disease Control and Prevention (CDC) posts situational updates and guidance regularly, including specific guidance for businesses/employers available here. The CDC (www.cdc.gov) and the World Health Organization (www.who.int) are primary sources of information for the latest developments, what is known from a medical standpoint, and the latest guidance on appropriate preventative practices.

It cannot be over-emphasized that basic precautionary health measures (including workplace cleaning, hygiene, sneezing/coughing etiquette, and encouraging those who are sick to stay home) must be implemented, as discussed in the CDC guidance. This information should be disseminated to employees through multiple channels.

It’s true that employers have obligations to accommodate employees with disabilities (though it’s not yet clear that having COVID-19 or exhibiting symptoms is a covered "disability" under state or federal law), but employers are also obligated to provide all employees with a safe working environment. The watchword is SAFETY FIRST. You should inform your employees that you will enforce these safety requirements including keeping employees at home to contain contagions.

SENDING EMPLOYEES HOME (AND WORKING FROM HOME)

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Employers may REQUIRE employees who are sick, or who are known to have been exposed to the virus, to stay at home, as such employees may pose a direct threat to the health and safety of others. You should inform your employees that this may occur. And you need to inform employees whether they will be obligated to work remotely during this time or whether the leave will be considered non-working time. This will obviously depend on – among other things - whether the employee is sick or merely being isolated from the rest of the population.

Employers are not required to provide telecommuting or work at home options, but can certainly choose to do so under the right circumstances. Employers with policies permitting this option should follow their policies. While not mandated by law, employers who have not previously considered such options may wish to contemplate whether there are positions where this option could be made available (so as to encourage employees to stay home rather than come into the workplace and infect others). Clearly, there are positions whose duties can be performed at home, and this may enable a business to continue its operations – rather than partially or fully shutting down – even when most or all employees are unable to come to the workplace. Just as clearly, there are positions whose duties cannot be performed off site, and there is no requirement to create this option. In any event, you should plan ahead and determine which positions are in which category.

If employees are permitted or required to work from home, they must be paid. For “non-exempt” employees (those who are entitled under the Fair Labor Standards Act or similar state laws to be paid overtime if they work more than 40 hours in a workweek), it will be essential that accurate time records be kept and that the employees are paid for all of the hours they work. Note that non-exempt employees need not be paid for any hours that they do not work (unless they are using authorized paid time off of some kind). Employers have the discretion to require non-exempt employees to stay out of the workplace, and need not pay them if no work is assigned to them.

The rules are different for FLSA-exempt employees. These workers generally must be paid their full salary for any week during which they do any work. However, if there is a paid time off (sick or vacation leave) plan or policy, the non-working days may be charged to that plan or policy. After the exhaustion of any paid leave, the exempt employee may still be provided with unpaid leave, whether as an entitlement under the FMLA or as a discretionary accommodation as discussed below.

PAID AND UNPAID LEAVE

Whether “exempt” or “non-exempt”, if an employee’s time off will be non-working time, employers should then make available all paid and unpaid leave that exists under any applicable paid sick leave laws, employer sick leave/paid time off policies, and applicable family and medical leave mandates (whether by policy or the law, and whether paid or unpaid), as well as any applicable contractual or collective bargaining agreement requirements. In addition, employers should – and may be required to – make such leave available when an otherwise healthy employee has to stay at home to serve as a caregiver for an ill child, spouse, or other family member. You should communicate to employees your commitment to provide all the paid and unpaid leave

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the law requires.

If employees exhaust their leave entitlements while staying at home (voluntarily or otherwise) due to COVID-19, employers may wish to provide additional unpaid leave. As noted above, it is not clear whether the coronavirus would constitute a covered disability under state and federal disability laws (since a cold or other viral infection is not considered a disability), but the offer of such leave would certainly suffice as a “reasonable accommodation” to the extent that might be required by law. It also fosters employee loyalty and morale.

FOLLOW THE SCIENCE

Finally, all of these measures should be guided by public health considerations and by science, not presumptions or stereotypes suggesting that certain classes of persons are carriers of the virus. Employers should follow the latest updates to determine whether a) to cancel any work-related travel plans for their employees, and b) whether quarantining employees (i.e., requiring them to stay home for a period of time) is a necessary step.

Please feel free to contact us with any questions or follow-up issues or concerns. We will do our best to keep you informed of current developments through our Labor & Employment blog, Working Together (workingtogether.pullcomblog.com), and through the blog published by our Health Care practice, Connecticut Health Law (cthealthlawblog.com). For your information, here is a link to our firm’s Health Care practice advisory on the Coronavirus.

Posted in Centers for Disease Control (CDC), COVID-19, Leave

Tags: Fair Labor Standards Act (FLSA)