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Legal Considerations for Employers Regarding COVID-19

Now, among the COVID-19 outbreak, employers need to be more cautious than ever when implementing and administering a communicable illness policy. The following sections address the legislation that needs to be forefront in your policies.

Occupational Safety and Health Act (OSHA) of 1970

The Federal Occupational Safety and Health Act of 1971, established that employers have a general duty to provide employees with safe workplace conditions that are "Free from recognized hazards that are likely to cause death or physical harm:" Further, it established workers' right to receive information and training about workplace hazards and exercise these rights without retaliation.

As of March 2020, there are no specific OSHA standards covering COVID-19, but many current guidelines will apply. Foremost, employers are required to prevent occupational exposure to diseases. In addition to the General Duty Clause, OSHA's Personal Protective Equipment (PPE) standards and Blood borne pathogen standards may apply to certain workplaces, particularly in healthcare.

Employers need to continue to monitor the development of COVID-19, to establish if employees are at risk of exposure. It is important for employers to consider what preventative measures they can take to maintain safety, and protect their employees from contracting COVID-19.

Finally, OSHA requires many employers to record certain work-related injuries and illnesses on their OSHA Form 300 (OSHA Log of Work-Related Injuries and Illnesses). OSHA has determined that COVID-19 is a recordable illness when a worker is infected on the job. Establishments that are required to complete an Osha 300 log need to be sure to include all COVID-19 infections that are work-related.

The Americans with Disabilities Act (ADA)

The Americans with Disabilities Act protects applicants and employees from disability discrimination.

It is relevant to COVID-19 because it prohibits employee disability-related inquiries or medical examinations unless:

- They are job-related and consistent with business necessity; or
- The employer has a reasonable belief that the employee poses a direct threat to the health or safety of him or herself or others (i.e., a significant risk of substantial harm even with reasonable accommodation).

The Equal Employment Opportunity Commission (EEOC), determines whether a particular outbreak rises to the level of a "direct threat" based on the severity of the illness. Employers are expected to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location and to make reasonable assessments of conditions in their workplace based on this information.

The EEOC has stated that sending an employee home who displays symptoms of contagious illness would *not* violate the ADA's restrictions on disability-related actions, because advising such workers to go home is not a disability-related action, if the illness ends up being mild, such as seasonal influenza. On the other hand, if the illness were serious enough, the action would be permitted under the ADA as the illness would pose a "direct threat." In either case, an employer may send employees home, or allow employees to work from home, if they are displaying symptoms of contagious illness.

The ADA requires that information about the medical condition or history of an employee, obtained through disability-related inquiries or medical examination, be collected and maintained on separate forms and in separate medical files and treated as a confidential medical record. Employers should refrain from announcing to employees that a coworker is at risk of or has a disease. Instead, employers should focus on educating employees on best practices for illness prevention.

Employee Leave Requirements

If an employee, or an employee's family member, contracts COVID-19, the employee is entitled to time off from work. For example, an employee who is experiencing a serious health condition or who requires time to care for a family member with such a condition may be entitled to take leave under the Family and Medical Leave Act (FMLA).

On a Federal Level, employees are now entitled to sick leave under the Families First Coronavirus Response Act (FFCRA). The FFCRA grants sick leave to private sector employees, in companies of fewer than 500 workers. Full-time employees are to receive 80 hours of paid sick leave, and part-time workers are entitled to their average wages of a two-week period.

For these private-sector employees, Emergency Family Leave has been added, which extends FMLA to 12 weeks. The first 10 days may be unpaid, but on the subsequent days, workers will receive benefits from their employer equal to at least two-thirds of their normal pay. This can be used for workers who are unable to work or telecommute because they have to care for a minor child if the child's school or place of care has been closed.

Some employees may wish to stay home from work out of fear of becoming ill. Whether employers must accommodate these requests will depend on whether there is evidence that the employee

may be at risk of contracting the disease. A refusal to work may violate an employer's attendance policy, but employers should consult with legal counsel prior to disciplining such an employee. However, if there is no reasonable basis to believe that the employee will be exposed to the illness at work, the employee may not have to be paid for any time that is missed.

Compensation and Benefits

If employees miss work due to COVID-19, whether they are compensated for their time off will depend on the circumstances. As noted above, employees are entitled to paid time off under FFCRA if they (or a family member) contract the illness. In other cases, non-exempt employees generally do not have to be paid for time they are not working. Exempt employees must be paid if they work for part of a workweek, but do not have to be paid if they are off work for the entire week. Note that special rules may apply to union employees, depending on the terms of their collective bargaining agreement.

Employees may be entitled to workers' compensation benefits if they contract the disease during their employment. For example, employees in the healthcare industry may contract the disease from a patient who is ill.

Whether an employee is eligible for other benefits, such as short-term disability benefits, will depend on the terms of the policy and the severity of the employee's illness.

Communicating with Employees

As part of their efforts to prevent the spread of COVID-19 in the workplace, employers should consider communicating information about the illness to employees. The CDC, WHO and OSHA have all created informational material on the virus and its symptoms, prevention and treatment that can be helpful for employees. Further the US Department of Labor has released posters on the FFCRA, which must be displayed.