**COVID-19: Is Your Business Pandemic-Proof?**

The Coronavirus Disease 2019, or COVID-19, outbreak has caused widespread confusion and concern in the business community. Companies are focused on ensuring safe and productive workplaces amidst the growing risks of exposure and rapidly changing travel directives and infection statistics. At the same time, companies are tasked with handling increased numbers of requests for medical leave and workplace accommodation and complying with a mosaic of Federal, State and local employment laws, including new Federal paid sick and medical leave statutes that were recently put into effect to address the crisis. This Article will address several of these legal dilemmas and offer practical solutions to some of the most commonly reported issues from business owners of all sizes and industries.

***Accommodating Disabilities and Preventing Discrimination***

Many businesses are unsure to what extent they can ask employees about potential exposure to COVID-19 or travel to high-risk areas. The Americans with Disabilities Act (ADA) limits employers’ abilities to ask questions related to employees’ actual or perceived disabilities, which becomes problematic since questions about exposure to a disease may illicit information about employees’ underlying health conditions. Such questions are generally permitted, however, if an employee poses a greater risk of spreading COVID-19 due to their level of exposure and thus presents a direct threat to other employees in the workplace.

While the ADA does not prohibit asking employees about travel to high-risk areas to evaluate the risk of potential exposure, employers should exercise caution in making such inquiries and ensure they do so without regard to an employee’s race, color, or national origin, as this could give rise to a discrimination claim under Federal or State law. For example, employers asking all employees whether they have traveled to China in the past sixty days would be permissible, but limiting such questioning to employees of Asian descent would not.

Employers should advise employees against nonessential domestic and international travel, as the Centers for Disease Control and Prevention (CDC) has recommended, or at least encourage employees who have traveled to areas with active COVID-19 cases to work from home and monitor themselves for fever or other flu-like symptoms for seventy-two hours before reporting to work. Employees who have traveled to certain high-risk areas can be required to remain at home and obtain medical clearance before returning to work.

Employers should also be evaluating alternative working arrangements, such as working from home, virtual meetings, and modifying employee’s duties and workloads to coincide with any reduction in business or production. If an employee has a medical condition that places him or her at higher risk of COVID-19 infection or complications (such as pregnant women or individuals with immune system disorders), employers should strongly consider offering work-from-home or other modifications to working conditions upon request from the employee. However, there is no legal obligation to make any workplace accommodations for employees who are not presently exhibiting symptoms of COVID-19 and have not recently traveled to a high-risk area or had known contact with an infected person. The new leave and sick pay laws discussed later in this Article, however, do protect employees who have a medical diagnosis or quarantine recommendation.

Employers that decide to conduct their own medical screening of employees for COVID-19 symptoms should keep in mind that the Equal Employment Opportunity Commission (EEOC) generally does not permit mandatory screenings unless they are job related and consistent with business necessity, or unless there is information that the employee poses a direct threat to others.

***Workplace Safety and Worker’s Compensation***

The Occupational Safety and Health Administration (OSHA) recently released updated guidance on COVID-19, which provides a list of practical measures to limit the risk of exposure and infection and respond to employees who display signs of illness. The guidance classifies employees through a risk-based assessment, ranging from “very high” risk employees who are likely to come into direct contact with COVID-19 (e.g., certain healthcare personnel), to “lower exposure risk” employees whose duties do not involve frequent contact with the public and are less likely to have exposure to infected persons. Among other things, OSHA recommends that all employers develop an infectious disease preparedness and response plan that addresses proper hygiene practices and requires sick employees to remain at home and refrain from coming into the office unless specifically instructed to do so.

Allowing employees to work from home due to COVID-19 concerns also presents separate issues of workplace safety and worker’s compensation. Since a teleworking employee’s home is an extension of the workplace, OSHA regulations suggest that the employer must avoid introducing any condition into the employee’s work environment that presents an unreasonable safety risk. Also, If an employee suffers an injury at home while in the course and scope of their duties, that may constitute a covered workplace injury entitling the employee to recover worker’s compensation benefits. For these reasons, employers should consider specifying in their teleworking policies that company is not liable for injuries or illnesses that occur outside of certain time periods or to family members or other third parties.

***Wage and Hour Issues***

As mentioned, COVID-19 has led to a significant increase in employees working remotely, and this directly implicates Federal wage and hour laws that require employers to accurately record employees’ hour worked each week and to pay minimum wage and overtime. Employers should ensure their employees are compensated for all authorized work time, including work-related tasks occurring after the employees’ principal activities for the day have begun (which may include necessary travel to and from the office for work meetings). It is also essential to monitor employee timecards to confirm that employees are not working “off the clock” or recording “on call” or “waiting” time without prior approval. To address these issues, employers should revise existing teleworking policies to address proper timekeeping practices, establish work-from-home schedules and work hours, and impose disciplinary actions for falsification of time records.

***Paid Sick and Medical Leave***

The Families First Coronavirus Response Act was enacted on March 18, 2020 and becomes effective April 2, 2020. The new provisions will remain in effect until December 31, 2020. The Act provides two weeks of paid leave for specific issues related to COVID-19 and expands the Family and Medical Leave Act (FMLA) to include paid leave to employees to care for children due to school closures caused by the virus. The Act also provides a tax credit to employers for providing paid leave.

The two weeks of paid sick leave are available to all employees who are unable to work (in the office or remotely) due to a Federal, State or local quarantine or isolation order related to COVID-19, who have a diagnosis or symptoms of COVID-19, who are caring for an individual under quarantine or with a diagnosis or symptoms, or who are caring for children due to closure or unavailability of a school, day care, or other child care provider. Paid sick leave is available immediately regardless of an employee’s length of service and ends when the employee’s self-isolation period is over, symptoms abate, or the two-week leave period expires, whichever occurs first. The Act provides for a maximum payment of $511 per day or $5,110 in the aggregate for the two-week period. This paid leave is added onto any leave policies that the employer currently has in place and prohibits changes to leave policies that are intended to avoid providing additional leave or force employees to use other paid leave before using paid sick leave under the Act.

FMLA leave is also expanded by the Act to provide two weeks of unpaid leave and ten weeks of paid leave for an employee who is required to stay home and care for a child due to closure of a school or child care facility resulting from COVID-19. An employee must have been employed for thirty calendar days before requesting this new FMLA leave. The first ten days of leave may be unpaid, and the employee can elect (but cannot be required) to substitute any accrued paid leave during this time period. After unpaid leave expires, the Act provides up to ten weeks of paid leave, calculated at two-thirds of an employee’s regular rate of pay multiplied by the number of hours that the employee is normally scheduled to work. There is a maximum payment under the Act of $200 per day or $10,000 in the aggregate for the ten weeks of paid leave. Under the expanded FMLA provisions, employers with fewer than twenty-five employees are not required to restore employees to their prior positions if such positions do not exist at the end of their leave periods due to economic or other conditions related to COVID-19. However, the employer must make reasonable efforts to restore the employee to an equivalent position and must contact the employee for up to one year if an equivalent position becomes available.

To offset the increased costs to businesses of providing paid leave, the Act allows an employer tax credit equal to 100 percent of the total sick and family leave paid in each calendar quarter. The Act further provides that employees with fewer than 50 employees who demonstrate that providing paid leave would jeopardize their businesses may request an exemption from the U.S. Department of Labor, which may be granted at the agency’s discretion.

 In summary, COVID-19 presents a set of unique and monumental challenges to businesses across the country to maintain healthy workforces and limit the spread of the disease while safeguarding productivity and profitability. Decisions regarding compliance with Federal, State and local laws in light of the complications presented by the current pandemic should be made in consultation with legal counsel wherever possible.

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