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What Employers Need to Know
Regarding the Coronavirus Impact on the Workplace

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COVID-19 (otherwise known as the coronavirus) is rapidly changing the world as we know it. There are many important and pressing issues arising from the spread of the virus and we encourage you to stay informed via the Centers for Disease Control, the World Health Organization, and your state, county and local officials. We also hope that each and every one of you are staying safe and not experiencing any critical issues as a result of the virus.

We are focused on the impact of COVID-19 on employers and Human Resources professionals. We know that your employees have many questions and during this time, we will endeavor to provide you with real-time, up-to-date answers that you can provide. Since the situation is fluid, please understand that some of what is outlined here may change. In the event it does, we will update you as we are able. Please feel free to share this information with your Chapters as you see fit.

EXISTING LAWS

Occupational Safety & Health Act

The Occupational Safety & Health Act applies to all employers and the provision applicable in this case is the General Duty Clause, Section 5(a)(1). This provision requires employers to provide employees with a workplace free from recognized hazards likely to cause death or serious physical injury. Based upon guidance from the Department of Labor regarding COVID-19, it appears that the DOL is implying that COVID-19 is a recognized hazard. They have not said so explicitly, but the safest bet is for employers to proceed as if it is.

While it is important to understand that guidance from the DOL is not law, courts are likely to use that guidance as instructive in evaluating any lawsuits filed under OSHA. As such, it is a good idea to follow the guidance as best as possible.

The OSHA guidance is available at https://www.osha.gov/Publications/OSHA3990.pdf. The following are just a few highlights from that guidance. First, the DOL recommends that employers develop an Infectious Disease Preparedness and Response Plan that among other things, evaluates the source of potential infection in the workplace (i.e., workers, suppliers, vendors, customers, etc.) and considers responses such as social distancing, staggered work shifts, temporary downsizing, remote work, and more.

The OSHA guidance also recommends that employers implement basic infection prevention measures such as promoting frequent and thorough hand washing, providing hand sanitizer,

increasing the frequency of office cleaning, limiting visitors, encouraging sick workers to stay home, and offering flexible work sites, flexible work hours, and remote work.

The OSHA guidance also encourages employers to develop policies and procedures for identification and isolation of sick workers. This includes asking employees to self-monitor and inform if they suspect exposure, eliminating requirements for doctor's notes in light of overworked healthcare agencies and workers, and minimizing or eliminating travel.

In addition to the General Duty requirement for employers, employees could utilize OSHA under the concept of "imminent danger." Essentially, OSHA permits employees to refuse to work when they believe they are in imminent danger if they do so. If remote work is not available or permitted and an employee feels in imminent danger if they must come to the office, he or she may refuse to do so. It is difficult to say now if this strategy would work but employers are definitely at risk if they take adverse action against an employee who refuses to come to work based on the fear of imminent danger under OSHA.

Americans with Disabilities Act

Since COVID-19 is transient in nature, it is highly unlikely it would be classified as a disability under the ADA. As such, you do not need to make any reasonable accommodations regarding requests under the ADA related to COVID-19.

The ADA does have applicability, however, with respect to medical inquiries and medical examinations. Historically, EEOC guidance limits inquiries an employer can make into an employee's medical background. There is an exception, however, when reliable information gives rise to a reasonable belief that an employee poses a direct threat due to a medical condition. In that instance, medical inquiries can be made and medical examinations can be conducted.

With respect to the direct threat exception, the EEOC has outlined four factors to consider when determining whether an employee poses a direct threat: (1) the duration of the risk, (2) the nature and severity of the potential harm, (3) the likelihood that potential harm will occur, and (4) the imminence of the potential harm.

In light of the Center for Disease Control's classification of COVID-19 as a pandemic, employers should be able to utilize the direct threat exception. This is based upon previous EEOC guidance regarding pandemics, which can be found here: https://www.eeoc.gov/facts/pandemic_flu.html.

In addition, the EEOC has confirmed in updated guidance that employers can take the temperature of their employees (although it is not necessarily advised since fever is not always a COVID-19 symptom). The EEOC has also confirmed that their previous pandemic guidance does indeed apply with respect to the COVID-19 pandemic: https://www1.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm?renderforprint=1.

Workers' Compensation

For those employers that are subscribers, workers' compensation generally covers an employee who is injured or contracted an occupational disease as a result of his or her employment. In the case of COVID-19, this is generally more applicable to workers whose job requires them to be around sick people, i.e. healthcare workers. As the virus spreads, it will be difficult for employees to show that contracting the virus is a result of their employment. Even still, the Texas Workforce Commission has indicated it will look at workers' compensation claims based upon COVID-19 on a case-by-case basis.

Dallas Paid Sick Leave

For those employers that have more than 5 employees working 80 hours or more in a year within Dallas city limits, the City of Dallas will begin enforcing its Paid Sick Leave law on April 1, 2020. In light of COVID-19, employers can expect that employees will be more apt to utilize the paid sick leave. Although court action is pending, no decision has been made and employers should ensure they are in compliance with the Dallas Paid Sick Leave law.

Remember that the law requires employees to be able to accrue 1 hour of paid sick leave for every 30 hours of work (unless the employer front loads the hours). Accrual rates are capped at 48 hours for employers with 6-15 employees and 64 hours for employers with more than 15 employees.

Unemployment

The Texas Workforce Commission has indicated that workers whose employment is affected by COVID-19 may file for unemployment and identify COVID-19 as the reason for separation. A temporary layoff, furlough, or even reduction in hours can create unemployment eligibility for employees.

In addition, Texas recently announced that they would not penalize employers for an increase in unemployment claims related to COVID-19.

National Labor Relations Act

The NLRA applies to all employers. The provision at issue here is the right of employees to engage in protected concerted activity. This means that employees may challenge unsafe and/or unhealthy work environments and may refuse to come to work. Employees that do so may have protection (remember, COVID-19 is a whole new phenomenon and we are still figuring things out), so employers should be mindful that they are at risk if they take adverse action against employees who assert their NLRA rights of protected concerted activity.

Worker Adjustment and Retraining Notification Act

WARN applies to employers with 100 or more employees. Among other requirements, it requires employers to provide a 60-day notice period for any closings. The law is triggered when (1) an employment site is shut down and the shutdown will result in an employment loss of 50 or more employees or (2) the employer institutes a mass layoff, which is defined as a layoff of 500 or more employees OR a layoff of 50-499 employees if the total equals at least 33% of the active workforce.

With respect to the triggering provisions, employment loss is defined as (1) termination of employees other than for cause, voluntary, or retirement, (2) a layoff exceeding 6 months, or (3) a reduction in hours worked of more than 50% in each month of a 6-month period.

Under WARN, there are exceptions for natural disasters and unforeseeable business circumstances. It is likely that one of those would apply in this case. The exception allows employers to forego the 60-day notice as long as they provide notice as soon as practicable.

POTENTIAL NEW LAWS

Families First Coronavirus Response Act

The *Families First Coronavirus Response Act* was passed by the United States House of Representatives on Saturday, March 14, 2020 by a vote of 363-40. It was reaffirmed and adjusted slightly in a technical changes vote on Monday, March 16, 2020. It is now pending before the United States Senate, which has indicated it will pass the Act, potentially with additional provisions and changes. The President of the United States also has indicated he supports the Act. As such, some form of this Act is expected to pass the Senate this week (likely today) and employers should expect that it will become law this week or early next week.

To provide the most amount of notice, we want to outline the requirements of this Act. Remember that these requirements are not law yet and employers need not follow them yet. We will update you when there is a final version that has been signed into law.

The *Families First Coronavirus Response Act* would guarantee free COVID-19 testing, paid leave, enhances to unemployment insurance, expansion of food security initiatives, and provide an increase in federal Medicaid funding. The Act also includes $15 million in funding to the IRS to provide tax credits for paid sick leave and paid family leave.

The Act includes the following three relevant Acts that we will discuss below: *Emergency Family and Medical Leave Expansion Act*, *Emergency Paid Sick Leave Act*, and *Emergency Unemployment Stabilization and Access Act of 2020*.

Emergency Family and Medical Leave Expansion Act

The *Emergency Family and Medical Leave Expansion Act* applies to employers with fewer than 500 employees and government employers. Eligible employees are those who have been employed by the employer for 30 days. The Act provides 12 weeks of FMLA leave to employees (who are unable to work or telework) to care for an employee's child if the child's school or childcare facility is closed or unavailable due to coronavirus.

The typical FMLA job restoration requirements (i.e., to return an employee to the same or equivalent position) do not apply to employers with fewer than 25 employees if (1) the employee's position doesn't exist because of economic conditions or changes due to COVID-19, (2) the employer makes reasonable efforts to restore the employee to an equivalent position, and (3) if reasonable efforts fail, the employer makes reasonable efforts during the proscribed period to

contact the employee and notify him or her of an available equivalent position. The "proscribed period" referenced in #3 is the earlier of 1 year following (1) the date on which the need related to coronavirus concludes, or (2) 12 weeks after the date on which the employee's leave begins.

Under the *Emergency Family and Medical Leave Expansion Act*, the first 2 weeks of leave is unpaid. Employees can elect to use available paid leave and there is no prohibition against employers requiring employees to use available paid leave. After the first 2 weeks, the leave is paid. The pay is at a rate equal to at least 2/3 of the employee's regular pay and it is capped at $200 per day per employee (and $10,000 total).

The Act would go into effect 15 days after enactment of the Act and would expire on December 31, 2020. The Act would also provide a tax credit to employers equal to 100% of the qualified family leave wages paid. Finally, the Act excludes employers who are health care providers or emergency responders.

Emergency Paid Sick Leave Act

The *Emergency Paid Sick Leave Act* applies to employers with fewer than 500 employees and government employers. It would also go into effect 15 days after enactment and expire on December 31, 2020. The Act does not apply to employers who are health care providers or emergency responders.

The Act would require 2 weeks of paid sick leave for employees who are unable to work or telework due to any of the following reasons:

1. The employee is subject to a federal, state, or local order to quarantine or isolate
2. The employee has been advised by a health care provider to self-quarantine
3. The employee has symptoms of COVID-19 and is seeking diagnosis
4. The employee is caring for an individual who qualifies under #1 or #2 above
5. The employee is caring for a child whose school or childcare facility has closed as a result of COVID-19
6. The employee is experiencing other substantially similar conditions as specified by the Secretary of Health and Human Services, Secretary of Treasury and Secretary of Labor

The 2 weeks is calculated as 80 hours for full-time employees and is calculated for part-time employees as the average number of hours the employee works over a two-week period. For reasons #1, #2, and #3, the pay is at the employee's regular rate of pay and is capped at $511 per day ($5,110 total).

For reasons #4, #5 or #6, the pay is at the rate of at least 2/3 of the employee's regular rate and is capped at $200 per day ($2,000 total).

The *Emergency Paid Sick Leave Act* does not permit carryover of the leave past 2020. Importantly, employees would be permitted to use the paid sick leave provided under this Act before using any other available leave and employers could not require employees to use pre-existing paid sick leave first.

Additionally, this Act would prohibit employers from requiring employees to search for or find replacements and this Act would prohibit discrimination and retaliation against employees for utilizing the sick leave provided under this Act or for opposing unlawful practices related to this Act. Any violations of this Act would be considered a violation of the FLSA, which would subject employers to damages for back pay, liquidated damages in an amount equal to back pay, and attorney's fees.

Importantly, the *Emergency Paid Sick Leave Act* would not pre-empt state or local sick leave laws and the Act would provide a tax credit to employers equal to 100% of the qualified sick leave benefits paid.

Emergency Unemployment Insurance Stabilization and Access Act of 2020

The *Emergency Unemployment Insurance Stabilization and Access Act of 2020* would provide $1 billion in emergency funds to states for unemployment insurance. $500 million would be allocated to administrative costs and $500 million would be allocated to states that experience at least a 10% increase in unemployment claims (as long as those states eased their unemployment eligibility requirements). The Act would also give states access to interest-free loans to pay unemployment insurance benefits through December 31, 2020.

The Act also provides that for states that see at least a 10% increase in unemployment and otherwise comply with the requirements of the Emergency Unemployment Insurance Stabilization and Access Act of 2020, the Federal government would fund 100% of Extended Benefits. Extended Benefits provide an additional 26 weeks of unemployment benefits after the original 26 weeks are exhausted. Usually, the Federal government would only pay 50% of those Extended Benefits.

WHAT CAN EMPLOYERS DO?

- You CAN send employees home if they are exhibiting symptoms
- You CAN prohibit employees from coming to work if they are exhibiting symptoms
- You CAN refuse to compensate workers if you send them home or prohibit them from coming to work or working remotely (absent passage of the *Families First Coronavirus Response Act* in some form similar to that above)
    - Just be sure that for exempt employees who perform any work in a workweek, you compensate them for the full week in order to maintain the exemption
- You CAN inquire about employees' travel and prohibit employees from coming into work based upon that travel
- You CAN inquire if employees are experiencing COVID-19 symptoms (just maintain confidentiality)
- You likely CAN take an employee's temperature
- Absent anything in your policies that says otherwise (and absent passage of the *Families First Coronavirus Response Act in some form similar to that above*), you CAN require employees to utilize paid time off if they are unable to work

WHAT CAN EMPLOYERS NOT DO & WHAT SHOULD EMPLOYERS NOT DO?

- You CANNOT target employees of specific national origins
- You SHOULD NOT take adverse action against an employee that refuses to come to work based upon COVID-19 (without first consulting your lawyer)

WHAT SHOULD EMPLOYERS DO?

Now is the time to exercise a little humanity. Your employees are scared for a variety of reasons and the last thing you want to do is add additional burden to them. Of course, your responsibility is to your employer and your business but to the extent you are able, provide some leeway and understanding to your employees. Remember, this is only temporary.

Be a place of information and comfort for your employees. If you want to rid your company of the perception that HR only exists to discipline, demonstrate a different existence during this time.

Unless remote work is absolutely impossible for your workforce, allow your employees to work remotely. And understand that their work may not be at the same level of production or efficiency for a short time due to the fact that many of your employees' children are also home from school. Again, though, exercise some humanity and understanding.

Finally, be a source of information for your employees. This means staying abreast and up to date on workplace issues and laws, including any new laws that may get passed. It is a lot of work and an additional burden for you, but we and other law firms, lawyers, and HR consultants are here to help.