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Workplace Issues and COVID-19

HEALTH INQUIRIES, MEDICAL EXAMS, EXCLUSIONS FROM THE WORKPLACE AND COMPENSATION ISSUES

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Employers are important stakeholders in adopting policies and strategies to help curb the spread of Coronavirus (COVID-19), which has been increasing worldwide and in the United States. On March 11, 2020, the World Health Organization determined that COVID-19 is now considered a global pandemic.

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To aid employers in the effort to aggressively contain the virus without running afoul of applicable laws, the EEOC released a technical assistance guide for employers that was originally issued in the wake of the H1N1 pandemic. As a threshold matter, the EEOC guide makes clear that the existence of a pandemic influenza more severe than the seasonal flu or the H1N1 influenza expands an employer's right to safeguard its workplace. Additionally, an employee with a disability which poses a direct threat to the workplace can also expand an employer's right to protect the workplace.

While there is a technical argument that the EEOC Guidelines do not apply because the Centers for Disease Control (CDC) has not yet declared a pandemic, the EEOC guidelines are aimed at "pandemic planning and preparedness" and specifically reference the WHO and Department of Health and Human Services, CDC as definitive sources on what is a pandemic. Some confusion by the public exists because the CDC has not officially declared a pandemic. Because the WHO has declared a pandemic, it is not unreasonable to consider the EEOC guidelines as applicable in this situation, and we believe the risk of liability for complying with the EEOC's guidelines is low because of (1) general fears, (2) consistent reports in news outlets supporting the WHO's declaration, (3) cautions about containment, (4) some controversy concerning information shared by the CDC and (5) the OSHA obligations for a safe workplace and business continuity/public health. Additionally, the CDC's acknowledgment this week that the U.S. is also experiencing community spread supports the WHO's pronouncement that the virus has spread globally. If you have any questions about how the

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Guidelines apply to your workforce, it is important to seek legal counsel. Below are some key questions and answers to guide your strategies.

UPDATED ON March 17, 2020 at 4:50 pm:

On or about March 16, 2019, the EEOC specifically described their 2009 pandemic planning and preparedness guideline as relevant to the COVID-19 pandemic. The EEOC's affirmation of the applicability of its guidelines to the current pandemic and the pandemic declaration by the WHO support reliance on and compliance with the EEOC guidelines to address employment issues relating to COVID-19.

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1. Is COVID-19 classified as a pandemic?
Yes. As of March 11, 2020, the World Health Organization (WHO) has classified the COVID-19 virus as a global pandemic. A pandemic describes how widespread COVID-19 is but not its severity.

2. Is COVID-19 more serious than the seasonal flu or H1N1 influenza?

Unknown, but likely. In March 2020, the WHO's director- general described COVID-19 as causing a "more severe disease" than the seasonal flu and as a "unique virus with unique characteristics." We know that the virus spreads from person to person and is easily transmitted between persons, but unlike the seasonal flu, it is containable. The CDC has not been clear on the issue of severity because of the possibility of asymptomatic cases which are likely underreported due to the lack of testing. The lack of transparency in some regions also impacts the validity of the numbers. Refer to the CDC's link regarding future information on the severity of the illness.

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3. Does the Americans with Disabilities Act (ADA) and Title VII limit an employer's actions in the current COVID-19 outbreak?

Yes. The ADA regulates employer disability-related inquiries and medical examinations for applicants and employees, prohibits the exclusion of employees from the workplace unless they present a direct threat to the workplace, and requires reasonable accommodation to individuals with disabilities. Title VII prohibits discrimination against individuals based on protected characteristics such as race and national origin.

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4. When is an employee a direct threat to the workplace, allowing employers to adopt expanded measures to protect the health and safety of the workplace?

It depends. To determine whether an employee is a direct threat because of a medical condition, an employer must assess the level of the threat the employee's medical condition poses to the workplace. An employee's medical condition poses a direct threat to the workplace if the severity of the condition presents a substantial risk of significant harm to the health and safety of others in the workplace that cannot be eliminated through a reasonable accommodation based on objective evidence. A direct threat is judged by the severity of the condition and the likelihood of harm. In the context of a severe form of pandemic influenza, the EEOC explains that it is the existence of a direct threat as announced by health authorities that expands employers' ability to require medical exams, make health-related inquiries and exclude workers from the workplace. The CDC provides a direct threat assessment decision-making chart. The chart was last updated on 2/28/20, and the current spread of the virus appears to require broader considerations not included in the chart.

The severity of COVID-19 is still unknown, so employers will need to assess the threat presented by an employee's medical condition to determine whether they are a direct threat to the workplace. The EEOC previously has taken the position that the ADA protects employees against actions based on a perceived risk of a future disability or serious illness. In an Eleventh Circuit case, the EEOC argued that an employee who traveled to Ghana during an alleged Ebola outbreak was protected by the ADA because her employer unlawfully perceived her as having the potential to become disabled by the illness. The Eleventh Circuit disagreed stating that the ADA only protects persons with current disabilities or impairments, not "a potential future disability that a healthy person may experience later." According to the Court's decision, the ADA does not prohibit employers from taking employment actions based on a "potential future disability that a healthy person may experience later."

Despite the Eleventh Circuit's holding, an employer's task of evaluating an employee's condition to determine the existence of a direct threat to the workplace can be complex in the context of the current COVID-19 outbreak. In addition to the EEOC's position on potential future impairments, other federal laws, privacy issues, and state and local laws may limit the inquiries an employer may make to conduct a direct threat assessment. Declared states of emergencies recently announced by certain regions also do not suspend employment laws. As a result, employers should seek the advice of legal counsel to help formulate a direct threat assessment to address the particular circumstances facing the employer.

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UPDATED ON March 24, 2020

According to the EEOC's latest revisions on March 21, 2020, the COVID-19 pandemic meets the direct threat test as of March 2020

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5. Can an employer inquire about an employee's absence from work or send a visibly sick employee home?

Yes. Questions to employees about their absence from work, asking about cold or flu symptoms, or advising an employee to leave work when they are visibly sick are not disability-related inquiries.

UPDATED ON March 17, 2020

On or about March 16, 2019, the EEOC confirmed that employers may ask employees if they are experiencing symptoms consistent with COVID-19, including fever, chills, cough, shortness of breath, or sore throat.

6. Can an employer inquire about an employee's personal travel history or future travel plans, including location and duration?

Yes. However, employers should ensure that all employees are being asked to disclose information about travel history/plans and ensure that inquiries are not based on national origin or race of the employee.

7. Can an employer prevent an employee from traveling to areas experiencing an outbreak for personal reasons?

No, an employer may not prevent an employee from traveling to a high risk area for personal reasons.

An employer may be able to deny leave based on where an employee is planning to travel. However, we recommend that employers proceed with caution. To the extent an employee shares future travel plans, an employer may be able to deny leave based on a legitimate nondiscriminatory business reason such as the destination or the subsequent cost to the business of a subsequent quarantine. The employer should treat all employees similarly and ensure that its actions are not based on national origin or the race of the employee.

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Employers can and should proactively communicate with employees regarding recommendations issued by the CDC and OSHA about travel that may result in quarantine upon the employee's return to safeguard the workplace from exposure to the virus. Such communications include informing employees of:

Recent COVID-19 developments while providing reassurance to employees that the employer is monitoring the developments to protect the workplace and workers from exposure;

A requirement that employees must inform the employer if a close family member with whom they have had contact has traveled to a high-risk area in order to assess a direct threat to the workplace;

The identity of a designated contact person to whom employees must direct inquiries related to COVID-19 and must contact if an employee is exposed or becomes infected with COVID-19;

CDC travel advisories, and that travel to an infected area may negatively impact an employee's ability to return to the U.S. or to work without avoiding quarantine, and that they may encounter difficulty accessing medical care in affected countries. In addition, some countries are requiring visitors from the U.S. to also submit to a quarantine upon arrival.

8. Can an employer ask employees whether they will be unavailable to work during this pandemic?

Yes. According to the EEOC, such inquiries are lawful so long as they don't require disclosure of a disability. Such inquires can be achieved through the use of a survey that is designed to elicit unavailability for work during a pandemic by including both non-medical and medical reasons without identifying an employee's specific reason. For example, a survey question regarding availability can lawfully ask whether an employee would be unavailable due to any one or more multiple reasons such as school closures, transportation issues, or a serious condition of the employee or family member that the CDC designates as a high risk for complications with the COVID-19 virus.

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9. Can an employer require medical exams of job applicants?

Yes. After a conditional offer of employment, employers may require a medical exam if all entering employees in the same job type are required to undergo an identical medical exam and are all subject to the same inquiries.

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UPDATED ON March 18, 2020

On or about March 18, 2020, the EEOC confirmed that employers may screen job applicants for symptoms of COVID-19 and take job applicants' temperatures after making a conditional offer of employment. Employers must screen and test all entering employees in the same type of job to avoid unlawful discrimination due to a protected characteristic.

UPDATED ON March 18, 2020

9(a). If an entering employee either displays symptoms of COVID-19 or is infected with COVID-19, can an employer either delay the entering employee's start date, or, if the employer needs the entering employee to begin the job immediately, can the employer rescind the job offer?

Yes. Based on CDC guidance, it is the EEOC's position that under such circumstances the individual cannot safely enter the workplace.

10. Can an employer conduct medical exams of current employees?

It depends. According to the EEOC, an employer cannot require medical exams of asymptomatic employees if a pandemic is comparable to the seasonal flu. In the current situation, a pandemic has been declared and while some evidence exists that COVID-19 is more severe than the seasonal flu, the CDC has not characterized COVID-19 as more severe. Given the similarity in symptoms between the seasonal flu and COVID-19 and the stated objective by the CDC to contain the virus, an employer, which has objective evidence and a reasonable belief that an individual has been exposed to or infected with COVID-19, could require an employee to submit to a medical exam to determine whether they are infected with COVID-19.

Alternatively, the employer can require the employee to quarantine at home for the 14-day quarantine period recommended by the CDC. The employee must inform the employer of all of their contacts during the previous 14-day work period, and the contacts must be informed of the exposure or potential exposure and be sent home for the quarantine period. The employer must maintain the confidentiality of the identity of the infected employee. The employer must also execute all proper cleaning protocols to clean the affected areas of the workplace.

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UPDATED ON June 18, 2020:

Employers are permitted to require employees to undergo diagnostic viral tests to determine whether they are currently infected with COVID-19. At this time, however, employers are not permitted to require employees to undergo an antibody test for COVID-19. The CDC recently stated that antibody tests "should not be used to make decisions about returning persons to the workplace." On June 17, 2020, the EEOC issued an update to its Technical Assistance Questions and Answers stating that employers are not permitted to test for or to mandate that employees obtain an antibody test for COVID-19. The EEOC's position is based on the CDC guidance that antibody tests do not reliably establish immunity to reinfection. A change in the EEOC's position may occur if and when new scientific information develops relating to the reliability of antibody tests and the CDC changes its recommendation.

UPDATED ON March 24, 2020

The EEOC confirmed employers can send employees home who have COVID-19 or symptoms associated with it.

11. Can an employer test its employees for fever?

It depends. In the event of a severe form of pandemic influenza or a widespread pandemic influenza in the community as assessed by state, local or federal authorities an employer may test for fever. At this point, the CDC has not announced the severity of COVID-19, but COVID-19, a novel virus, is widespread. While testing for a fever is considered a medical exam, employers are permitted to check their employees for fever by measuring their body temperature if a pandemic influenza becomes widespread in the community as assessed by state and local authorities or the CDC.

Employers should weigh the benefits of monitoring temperatures and consider that the existence of an elevated temperature may be evidence of an illness, but not necessarily COVID-19; that the device used by the employer may not accurately measure the employee's temperature; and that some infected individuals are also asymptomatic. However, if COVID-19 is widespread in the employer's area, temperature testing may be appropriate and one of multiple methods used to screen individuals for possible infection to protect the workplace. Employers should properly document their direct threat assessment.

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UPDATED ON March 17, 2020

On or about March 16, 2019, the EEOC confirmed that because WHO has declared a pandemic and the CDC and state and local authorities have acknowledged community spread and issued precautions, employers may measure employees' body temperatures.

12. Can employers require employees to adopt infection control practices?

Yes, hand washing, coughing and sneezing etiquette, and proper hygiene practice such as tissue disposal do not implicate the ADA. During the pandemic, employers may require employees to work remotely or to wear personal protective equipment (PPE). If an employee with a disability needs an accommodation with regard to the PPE, the employer should accommodate the employee absent an undue hardship.

13. Can an employer require employees to obtain a medical exam after the end of the incubation or quarantine period before returning to work?

Yes, according to the EEOC, employees who appear symptom free at the end of their quarantine period may be required to confirm they are not infected with COVID-19 and are fit to return to work. The CDC and EEOC, however, warn that employers should not require a health care provider's note for employees who are ill with an acute respiratory illness to validate their illness or to return to work. Health care offices may be extremely busy and unable to provide a note in a timely manner. Additionally, subjecting healthy employees to a health care provider's office may expose the healthy employee to illness. At the time of writing this post, only the state of Washington has implemented drive-through testing, but the types and number of people that can be tested is limited due to the unavailability of testing kits. As the availability of testing kits increases, drive-through testing may present a good option. Until then, employers may want to utilize company doctors for return to fitness notes, if available. As a practical matter, if an employee has been in quarantine for 14 days and asymptomatic, medical documentation certifying an employee's fitness to return to work may be waived due to the lack of good options for obtaining a return to fitness note. Any medical documentation received should be maintained as confidential and in a file separate from the personnel file.

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14. Can an employer exclude an employee from the workplace after travel to a high-risk area or possible exposure to the COVID-19 virus?

Yes, an employer should require employees who have traveled to a region experiencing widespread, ongoing community spread or who have been exposed to an infected person to quarantine or work

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remotely from home during the incubation period recommended by the CDC. Refer to the CDC website for additional information. For travel to locations not experiencing a severe outbreak where the risk is lower, employers should engage in a threat assessment to support a conclusion that an employee is a direct threat to the workplace and must be excluded. Refer to the answer to question 10 above regarding assessment of a direct threat.

UPDATED ON April 9, 2020

CDC issues new guidance for essential employees exposed to COVID-19
According to the CDC's updated guidance, critical infrastructure employees (essential employees) may be permitted to work after potential exposure to COVID-19. A potential exposure is defined as "a household contact or having close contact within 6 feet of an individual with confirmed or suspected COVID-19." Contact with an individual who is confirmed or suspected to be infected with COVID-19 includes the period of 48 hours prior to the time the individual became symptomatic.

Potentially exposed essential employees may be permitted to work after a potential exposure if the employee 1) remains asymptomatic, and 2) the following practices are adopted before and during the work shift:

The employer performs temperature checks on the employee before the employee enters the workplace to begin work;

The employee self-monitors their temperature through-out the work-day;

The employee wears a face mask in the workplace at all times for 14 days following their last potential exposure. Employers can issue facemasks or can approve employees' supplied cloth face coverings in the event of a shortage;

The employee maintains a distance of 6 feet and practices social distancing as work duties permit in the workplace; and

Employers routinely clean and disinfect all areas such as offices, bathrooms, common areas, and shared electronic equipment.

If an employee becomes sick or symptomatic during the work-day, the employee should be sent home immediately, surfaces in the workplace should be cleaned and disinfected, and the employer should compile information on all other persons the individual had contact with for up to 2 days prior to becoming symptomatic, including individuals that were within 6 feet of the employee during the same time period.

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Information which identifies employees who are essential critical infrastructure employees can be found here and here.

The terms “facemask” and “employee supplied cloth face coverings” are undefined in the CDC guidance. Based on the best available information, the cloth face mask should be acquired from a commercial source. In the event of unavailability, the CDC is recommending that individuals wear homemade face masks.

The CDC has issued a helpful, concise poster defining the obligations of employees and employers in the event an employee has been potentially exposed to COVID-19.

UPDATED QUESTION AND ANSWER on March 12, 2020 at 12:56 pm:

15. Is there anything else employers should consider before an employee undertakes necessary international travel?

Employers should be aware that if their employees travel to other countries they may be required to self-quarantine for 14 days upon arrival to the country. For example, the Argentine Ministry of Health announced that anyone coming from the U.S. will be required to quarantine for 14 days upon arrival in Argentina. The Ministry of Heath stated that their guidelines may change with little or no notice and failure to quarantine may be considered a criminal offense.

In addition, the CDC has announced that although a country may not be on the list for do not travel due to a widespread outbreak it may have limited medical care and that should be considered when traveling internationally. Venezuela has been identified as one of those countries.

16. Can an employer request that employees who are at a high risk for complications from the COVID-19 work from home?

Employers may encourage employees who are at a high risk for complications to work remotely. The CDC describes individuals who may be at a high risk for complications here and here.

17. Can an employer exclude from the workplace employees who exhibit symptoms of COVID-19 or the flu?

Yes, employees who are exhibiting symptoms of an acute respiratory infection must be separated from co-workers and should be sent home. Employers can also request that the employee receive a medical exam and be tested for COVID-19 if they are exhibiting symptoms consistent with the virus or flu. Refer to the answer to the answer to question 10 regarding other actions an employer must take with

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regard to other employees. Refer to OSHA's website regarding isolation and decontamination procedures.

UPDATED ON March 17, 2020 at 4:58 pm:

On or about March 16, 2019, the EEOC confirmed that employees exhibiting symptoms of COVID-19 should leave the workplace.

18. Should employers exclude from the workplace all employees who have been exposed to COVID-19 by a co-worker who tests positive for COVID-19?

Yes, all co-workers who are exposed to an infected employee should be informed of the exposure, be sent home for the quarantine period recommended by the CDC, and be instructed to contact their health-care provider. The employer must maintain as confidential the identity of the infected employee. Learn more from our discussion regarding specific steps an employer must take in the event of a workplace exposure. Refer also to the link to OSHA's website as indicated in the answer to question 16.

UPDATED ON April 9, 2020: See update to question 14.

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19. Should employers maintain the confidentiality of medical records related to employees' medical exams and health disclosures?

Yes, the ADA and various state and local laws contain prohibitions on disclosing confidential medical information concerning employees. Companies should take all appropriate measures to maintain the confidentiality of medical information associated with infected individuals or exposed individuals while also providing notice to employees who may have been exposed. Any health information received from an employee by an employer must be maintained in a file separate from the personnel file.

UPDATED ON March 24, 2020

Employers which measure employees' body temperatures for fever or who observe other symptoms in employees must maintain the confidentiality of such medical information in compliance with ADA confidentiality requirements.

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20. Can employees refuse to travel due to COVID-19 concerns?

It depends. Employers should carefully consider an employee's request not to travel due to COVID-19 concerns. Presently, the CDC has issued travel warnings for specific countries. Refer to the CDC travel health notices here. The employer should respect the federal government's travel warnings. Businesses should refrain from all non-essential travel to countries with a State Department level 4 – Do not travel warning or a CDC level 3 – avoid nonessential travel warning. Employers should exercise heightened caution for travel to CDC level 2 areas- Practice Enhanced Precautions. As the virus spreads, travel advisories for additional countries will increase. Employers can permit use of video-conferencing or other tools as an alternative means of conducting business in the affected regions.

OSHA regulations entitle employees to refuse to work only if an "imminent danger" exists in the workplace that could reasonably be expected to cause death or serious physical harm before the danger is eliminated. For health hazards to be classified as imminent dangers, there must be a reasonable expectation that the health hazard exists and that exposure will shorten life or cause substantial reduction in physical or mental efficiency. The harm caused by health hazard does not need to happen immediately. Employers should consult with legal counsel regarding the existence of an imminent danger.

Employers should also engage in a discussion with employees who are reluctant to travel to gain an understanding of their specific concerns. By following CDC recommendations and creating an environment that allows employees to freely voice their concerns, both the employer and employee can engage in a meaningful dialogue to dispel fears and concerns that are fear-driven. Employers should be guided by the circumstances existing in the travel areas, transportation methods to be used, the level of the outbreak in arriving at their decisions, and the likelihood of exposure to the virus.

To the extent that the employee has a disability or whose disability would place them in a category for high-risk of complications from COVID-19, employers can accommodate the employee by allowing them to conduct business remotely if feasible, or to use vacation or emergency leave, if available.

21. Can employees refuse to report to work during an outbreak of COVID-19?

It depends. At the present time, and depending on the location of the employer, many places of employment do not pose an imminent danger to employees. The circumstances could change depending on the level of an outbreak at the employer's location, the existence of an exposure at the workplace, or other circumstances. Engage in the discussions with concerned employees as indicated in the response to question 20.

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Employers should recognize that OSHA's general duty clause places an obligation on the employer to provide employees with" a workplace free from recognized hazards… likely to cause death or serious physical harm." As a result, employers should adopt OSHA and CDC policies and practices to maintain the safety of the workplace and the health of employees as referred to earlier in this post. See also OSHA's Guidance on Preparing Workplaces for COVID-19.

UPDATED ON March 24, 2020

21(a). During a pandemic, must an employer continue to provide reasonable accommodations for employees with known disabilities that are unrelated to the pandemic, barring hardship?

According to the EEOC, an employer's ADA responsibilities to individuals with disabilities continue during the pandemic. If an employee with a disability needs the same reasonable accommodation at a telework site that was provided at the workplace, the employer should provide that accommodation, absent undue hardship. However, the EEOC acknowledges that the rapid spread of COVID 19 has disrupted normal work routines and resulted in an increase in the number of requests for accommodation. The increase in requests and extraordinary circumstances surrounding the COVID-19 pandemic may result in delays in discussions of requests for accommodation between the employer and employee. The EEOC encourages employers and employees to "use interim solutions" to enable employees to continue to work as much as possible.

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22. Can employees voluntarily choose to use face masks or NIOSH approved face-pieces that reduce the threat of exposure to COVID-19 by protecting the wearer?

To dispel confusion, a face mask refers to surgical masks that protect others from exposure to potentially infected respiratory secretions of the person wearing the mask. NIOSH approved face pieces or respirators protect the person wearing the face piece from potentially infected respiratory secretions spread by others.

It depends. Employees may choose to use a face mask or face piece, so long as the employer does not find the use of the face mask or face piece to cause an additional hazard. At this point the CDC is not recommending the use of face masks or face pieces except for a limited number of workers. Regarding voluntary use of a face mask or face piece, the employer is not required to pay for the face mask or face piece or to provide training to the employee. However, if an employer has an employee who wishes to wear a face mask or face piece while on the job, the employer is required to provide specific information to the employees found at section 29 C.F.R. 1910.134 Appendix D of the OSHA regulations. Appendix D requires the employee to read and comply with all manufacturer

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instructions, to choose the correct respirator certified by NIOSH for protection against the contaminant of concern, to use respirators properly, and to protect against accidental use by others or sharing of respirators. Employers should also review an OSHA 2018 Standard Interpretation letter that is a direct response to the voluntary use of face pieces.

23. Can employers with public-facing businesses prevent employees from wearing a face mask or face piece?

Possibly. See the answer to questions 22 and 24. For guidance relating to your particular circumstances, seek legal counsel.

24. When is a face piece required as personal protective equipment (PPE) for employees?

According to OSHA, employers are obligated to provide their workers with PPE needed to keep them safe while performing their jobs. The types of PPE required during a COVID-19 outbreak will be based on the risk of being infected with the virus while working and the job tasks that may lead to exposure.

Workers, including those who work within six feet of patients known to be, or suspected of being, infected with COVID-19 and those performing aerosol-generating procedures, need to use respirators. Refer to the link to OSHA's Guidance on Preparing the Workplace for COVID-19 as provided in response to Question 21, above.

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25. Should an employer pay an employee who is asymptomatic for COVID-19 but is quarantined at home due to a suspected exposure or recent travel?

It depends.

For non-exempt employees:

Employers must only pay non-exempt employees for actual hours worked.

An employee may be entitled to use sick, vacation or personal leave benefits offered if permitted by the employer's plan and such use does not violate state time off laws.

Employer or state disability benefits also can be extended to employees who are absent from work due to COVID-19 exposure to the extent permitted under the employer's plan and/or state or local law.

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After a non-exempt employee exhausts all applicable paid leave, an employer is not required to pay the employee who is unable to return to work because of illness or quarantine.

The WHO, however, is encouraging employers to be flexible with quarantined workers and to provide teleworking or other alternative work options and to extend additional paid time off to employees to prevent the spread of COVID-19.

For exempt employees:

If the employee works some time during the FLSA designated workweek, the employee must be paid for the full workweek regardless of the actual number of hours or days worked.

An employer can require employees to use sick, vacation or other paid time off benefits, if permitted under the employer's plan and permitted under state law. Under California law, for example, employers cannot require quarantined employees to use paid sick leave, but employees may choose to use paid sick leave.

An employer can reduce the pay for absences of one or more full days in which no work is performed if the deduction is made in accordance with a bona-fide salary replacement benefit.

The employer is not required to pay any portion of the salary for full day absences for which the employee receives compensation from a salary replacement benefit.

An employer may also make deductions from pay for one or more full days in which no work is performed if salary replacement benefits are provided under a state disability insurance law.

For non-exempt fluctuating workweek employees:

An employer must pay the full fluctuating workweek salary for every workweek in which the employee works and is not permitted to deduct pay for less than full week increments.

In addition, employers can review their level of income protection for employees, and extend or expand benefits to employees. Employers, however, must be cautious when considering the adoption of payroll advances or loaning paid time-off leave to employees, as state law requirements may limit or prohibit such practices. Employers should consult with legal counsel to determine the best approach for providing employees with income protection benefits based upon the employer's business considerations and applicable state/local laws.

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The federal government is considering legislation that may require employers to provide additional paid time off to employees. We are monitoring the legislation and will provide an update if/when such legislation is passed.

UPDATED ON March 24, 2020

See update to question 27 below.

26. Should an employer pay an employee who is unable to return to work because they are caring for a family member who is infected with COVID-19?

It depends.

For non-exempt employees:

An employee should be permitted to use paid sick time, vacation, personal or other paid leave to the extent permitted by the employer's plan and/or under state or local law to care for a family member infected with COVID-19.

After an employee exhausts all applicable paid leave, an employer is not required to pay the employee who is unable to return to work.

For exempt employees:

If an employee is absent to care for a family member and works some time during the FLSA designated workweek, the employee must be paid for the full workweek regardless of the actual hours worked.

If the employee does no work during the workweek, the exempt employee is not compensated for that workweek.

An employee should be permitted to use paid vacation or personal leave under a benefit plan or paid leave benefits under state or local law to care for a family member infected with COVID-19.

If an employee has exhausted all available accrued but unused paid time off, deductions from an exempt employee's salary may be made only in full day increments unless the employee takes leave for a partial day that is covered by the Family and Medical Leave Act (FMLA). The employee must be absent for one full day and not perform any work for a deduction to be permissible.

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An employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act. Rather, when an exempt employee takes unpaid leave under the Family and Medical Leave Act, an employer may pay a proportionate part of the full salary for time actually worked.

The federal government is considering legislation that may require employers to provide additional paid time off to employees. We are monitoring the legislation and will provide an update if/when such legislation is passed.

UPDATED ON March 24, 2020

See update to question 27 below.

27. Should an employer pay an employee who is unable to work because they are infected with COVID-19?

It depends.

For non-exempt employees, it depends.

The employer must only pay non-exempt employees for actual hours worked.

An employee should be permitted to use sick time, vacation, personal or other paid leave to the extent permitted by the employer's plan and/or under state or local law.

After an employee exhausts all applicable paid leave, an employer is not required to pay the employee who is unable to return to work.

For exempt employees: Usually.

If the employee works some time during the FLSA designated workweek, the employee must be paid for the full workweek regardless of the actual number of hours or days worked.

Employers may require employees to use vacation or a leave bank account in the event of absence due to illness, so long as the employees' pay is equal to their guaranteed salary.

Employers can require exempt employees to use their sick leave as permitted under the employer's bona fide sick leave policy or short-term disability plan, and the employer is allowed to make deductions for a full day's absence. Deductions from salary for absences less than a full day are not permitted.

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Partial day deductions from an employee's sick leave bank to enable an employee to be paid using accrued sick leave is permitted. No salary deductions may be made for partial sick days if the employee has exhausted their sick leave balance unless the partial-day absence is covered by the Family and Medical Leave Act (FMLA).

If an employee exhausts all accrued paid leave, deductions from the employee's salary must be made in full day increments unless the employee takes leave for a partial day that is covered by the Family and Medical Leave Act (FMLA). The employee must be absent for one full day and not perform any work for a deduction to be permissible.

An employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act. Rather, when an exempt employee takes unpaid leave under the Family and Medical Leave Act, an employer may pay a proportionate part of the full salary for time actually worked.

For Colorado employers, the Colorado Department of Labor has issued an emergency rule, the Colorado Health Emergency Leave with Pay ("Colorado HELP"), which temporarily requires certain employers to provide paid sick leave to employees who may be impacted by COVID-19. For more information, please consult our legal alert on Colorado HELP.

The federal government is considering legislation that may require employers to provide additional paid time off to employees. We are monitoring the legislation and will provide an update if/when such legislation is passed.

28. If the employer must reduce hours or temporarily close the business is the employer required to pay workers for the hours they <u>would have</u> worked?

It depends.

For non-exempt employees:

No, under the FLSA, the employers must only pay non-exempt employees for actual hours worked.

Workers may be entitled to unemployment insurance benefits under state law in the event of a temporary closure of the business.

For exempt employees: It depends.

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If the employee works some time during the FLSA designated workweek, the employee must be paid for the full workweek regardless of the actual number of hours or days worked.

If an employer requires mandatory or voluntary time off in full workweek increments, and the employee does no work during the workweek, the exempt employee is not compensated for that workweek.

An employer also may require mandatory or request voluntary time off in full day increments. The salary must be replaced through salary replacement benefits.

The employer cannot reduce an exempt employees' salary in less than full day increments without jeopardizing the employee's exempt status and exposing the employer to liability for the amount of overtime worked by the employee.

Employers can require exempt employees to use their vacation or leave bank account for office closures of a full or partial day so long as the exempt employees' pay is equal to their guaranteed salary.

If an exempt employee has no accrued benefits or insufficient accrued benefits in their leave account, and a reduction in the leave account would result in a negative balance, the employee must still receive their guaranteed salary for absences due to the office closure to preserve exempt status.

Employers may reduce an exempt employee's salary prospectively without risking the exemption, provided the change is bona fide and not used as a device to evade the salary basis requirements. Such a predetermined regular salary reduction, not related to quality or quantity of work performed, will not result in loss of the exemption, so long as the employee still receives, on a salary basis, the relevant statutory minimum per week for an exempt employee. Accordingly, employers must plan the reduction in advance and intend for the reduction to be permanent. On the other hand, deductions from predetermined pay occasioned by day-to-day or week-to-week determinations of the operating requirements of the business constitute impermissible deductions from the predetermined salary and would result in loss of the exemption. Reduced pay need not be paid through wage replacement.

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29. In the event an employer must furlough or temporarily close the business, does the employer have any obligation under the WARN act?

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It depends. There is no exception in the Worker Adjustment and Retraining Notification (WARN) Act for epidemics such as COVID-19, so the Act will continue to apply even as the virus spreads. If an employer chooses only to reduce work hours or allow employees to work from home, the WARN Act will not be implicated. If an employer chooses to close completely, the WARN Act's notice provisions will begin to apply. Typically, the WARN Act requires employers to provide sixty (60) days' advance notice to employees prior to a plant closing or mass layoff. Notice is not required if the employee is laid off for less than six (6) months. Ideally, employers would not be forced to close for six months but with the ever-evolving nature of the novel coronavirus, employers cannot predict how long a closure would last.

It is not clear that the "Unforeseen Business Circumstances" exception which removes the sixty (60) day requirement, will apply to circumstances relating to the COVID-19 pandemic. Even though such circumstances may cause a business to close or initiate mass layoffs abruptly, employers must provide as much WARN compliant notice as possible to employees who are furloughed or temporarily laid off. Employers should remember that a number of states have their own mini-WARN statutes that may have different requirements than the federal statute.

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30. Can an employee be required to work at a job outside of their job description?

Yes, so long as the employee is 18 years or older. If a collective bargaining agreement exists, consult with the bargaining representative.

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31. Can employers require employees to work remotely from home or telework as an infection control strategy?

Yes. Employers may require or encourage employees to work from home as an infection control strategy "based on timely information from public health authorities about pandemic conditions." Working remotely may also be permitted as a reasonable accommodation for employees. Employers should ensure that a requirement or offer to work at the workplace or at home is provided to all employees whose job duties can be performed at home on a non-discriminatory basis.

For employees who are unable to work from home, the DOL recommends employers adopt other social distancing techniques such as staggered work shifts.

The FLSA requires the employer to maintain accurate records of hours worked for all employees, including those participating in telework or other flexible work arrangements.

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32. Are employers required to pay employees who work from home at the same hourly rate?

It depends.

For employees who work remotely as a reasonable accommodation or as required by a union or employment contract:

Yes, the employee must be paid at the same hourly rate.

For non-exempt employees:

The FLSA requires only that an employer pay employees only for actual hours worked, and at least the minimum wages for all hours worked at the workplace or home.

Employees must be compensated at time and one-half the regular rate of pay for hours worked in excess of 40 per week. State or local laws which require higher rates of pay take precedence over the FLSA.

For exempt employees:

Salaried employees must generally receive their full salary in any week in which they perform work, with limited exceptions.

If the Service Contract Act (SCA) or state or local laws regulating the payment of wages also apply, nothing in the FLSA or its regulations or interpretations overrides or nullifies any higher standards provided by such other laws or authority.

UPDATED ON March 24, 2020

Regarding non-exempt employees, before reducing a non-exempt employee's pay, some state and local laws have specific notice requirements. Consult with legal counsel before unilaterally reducing pay.

33. Are businesses required to cover employee expenses associated with working from home such as a DSL line, computer, additional phone line or increased use of electricity?

It depends. Employers should discuss with their employees whether they anticipate increased expenses while working from home. Certain federal and state law prohibitions may prohibit or limit businesses from requiring employees to absorb such business expenses. For example, employers may

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not require employees to pay or reimburse the employer for the employer's business expenses if doing so reduces the employee's earnings below the minimum wage or overtime compensation; employers are not permitted to require employees to pay or reimburse the employer for business expenses if the employee works remotely due to a disability and as a reasonable accommodation under the ADA; and California law prohibits an employer from passing on such business costs to the employee who is required by the employer to work from home. The circumstances and state law may limit the scenarios under which an employee can be expected to absorb costs associated with working from home over an extended time period.

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34. How do employers address compensation issues and workplace closure issues with a unionized workforce?

The National Labor Relations Act requires employers to bargain with representative unions regarding, wages, benefits and other terms and conditions of employment unless there are "compelling economic exigencies" requiring immediate action. Compelling economic exigencies are extraordinary, unforeseen events with major economic impacts that require an employer to make a unilateral change immediately. Collective bargaining agreements that contain a force majeure provision would allow the employer to take unilateral measures without engaging in bargaining. Whether a force majeure clause would be triggered by the COVID-19 outbreak is dependent on the terms of the collective bargaining agreement. Employers should consult the terms of the collective bargaining agreement with respect to all wage and hour issues, including payment of wages during absences from work related to COVID-19 or the implementation of new policies to assist employees who are unable to work for reasons related to COVID-19.

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35. Are employees who are absent from work as a result of COVID-19 exposure or illness entitled to workers' compensation?

It depends. In most cases, exposure to or illness from COVID-19 is not considered an allowable, work-related condition. Under certain circumstances, employees who are health care workers or first responders, or employees who are exposed due to work-related travel may be entitled to file a claim when a work-related activity has resulted in exposure or illness, and certain criteria have been satisfied. Whether the illness is compensable varies by state, but it typically requires competent evidence that the employee contracted the disease due to occupational exposure. Some states have recently taken actions to ensure certain categories of employees, such as first responders and health care employees, are provided workers compensation coverage if they are infected with COVID-19 on the job.

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36. Does the federal Family and Medical Leave Act Apply to absences related to COVID-19?

It depends. Employees requesting leave to care for their own illness or the illness of a spouse, parent or child may be protected by the Family and Medical Leave Act (FMLA) if they meet the eligibility requirements. Generally, the FMLA would not allow employees to take FMLA leave to stay home if they are not sick or caring for someone who is sick.

State leave laws and/or an employer's policies may provide additional protections for employees beyond those offered through the FMLA, and should be considered when evaluating an employee's leave request.

The federal government is considering legislation that may expand FMLA eligibility and coverage for certain employers. We are monitoring the legislation and will provide an update if/when such legislation is passed.

UPDATED ON March 24, 2020

The Families First Coronavirus Response Act (Act), signed into law on March 18, 2020 and, according to the DOL, effective on April 1, 2020, provides that emergency paid sick leave and emergency expanded paid family and medical leave must be provided by private employers with fewer than 500 employees and all public employers. The Act also broadens the category of employees eligible to receive the paid leave under the Emergency Family and Medical Leave Expansion Act by reducing the length of time an employee must work for the employer before being eligible for leave. Employees will be eligible to receive paid leave under the Emergency Family and Medical Leave Expansion Act after at least thirty calendar days of employment. Exemptions are available for certain employees and small businesses.

For more details on the emergency sick leave and emergency paid family and medical leave provided by the Act, see our previous alert.

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37. What are an employer's obligations regarding reporting pay during the COVID-19 pandemic?

At least eight states and the District of Columbia have adopted reporting pay laws which require employers to pay a minimum amount of pay to non-exempt employees who are required or requested to report to work, even if no work is performed. The reporting pay laws could present a challenge to

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employers who may need to act quickly in response to local or state directives or conditions in their workplace relating to a COVID-19 exposure. Provisions in some state laws contain an exception to compensation requirements for employers which make a "good faith effort" to notify employees not to report to work. Such exceptions are not uniform across all jurisdictions though, and generally, reporting laws do not address changes in the workplace due to emergencies, including the current pandemic.

Employers should consider adopting measures that reduce the likelihood of employees reporting to work with flu or COVID-19 symptoms, or in the event of a reduction in hours or closure due to an exposure to the virus or a directive from public health officials. The following types of measures can be adopted to facilitate communication with employees about changes in their need to report to work due to a COVID-19 exposure or community spread:

1. Adoption of a communication plan and a means to timely notify employees of changes in the workplace that affect employees so that employees don't report to work in the event of an abrupt change in circumstances.

2. Adoption of a COVID-19 policy that prohibits employees from reporting to work if they have traveled to high risk areas, have been exposed to an individual(s) infected with COVID-19, or are symptomatic for the illness. Document all notifications and incidents in which employees are sent home due to illness.

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38. What are an employer's obligations regarding predictive scheduling law requirements during the COVID-19 pandemic?

Several cities and one state currently have predictive scheduling laws which require that employers give non-exempt employee's advance notice of work schedules. Seattle's Secured Scheduling Ordinance became effective in 2017, while Chicago's Fair Workweek law is effective on July 1, 2020, Philadelphia's law is effective on April 1, 2020, and Oregon will increase the advance notice required under its law from 7 to 14 days on July 1, 2020. The advance notice requirements will be challenging as employers are faced with 1) requests for accommodations to telework due to child care issues and school closures, 2) employee absences due to quarantine or infection with COVID-19; and 3) the need to reduce hours or close the workplace in the fluid and rapidly changing circumstances presented by the COVID-19 pandemic and community spread.

The effect of the COVID-19 pandemic on the applicability and enforcement of predictive scheduling laws varies among jurisdictions. For example, Seattle's law contains an exception for "threats or natural disasters." Seattle, on the front line of the U.S. COVID-19 infections, has issued a Special

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Notice regarding their Secured Scheduling Ordinance and COVID-19 and an FAQ sheet for employers. Oregon has also issued guidance to assist employers with predictive scheduling issues that arise during the COVID-19 pandemic. Chicago's Fair Workweek Ordinance provides an exception relating to advance notice for changes to an employee's schedule and the payment of predictability pay in the event of a pandemic. San Francisco's ordinance provides for an exemption when "operations cannot begin or continue due to threats to employees or property." Whether the exception in San Francisco's ordinance and in similar exceptions under other ordinances applies during the COVID-19 pandemic will depend upon existing circumstances. Given the declaration of a severe pandemic, a declared national emergency, and the CDC mandate for employers to safeguard the workplace, certain circumstances faced by employers can change an employer's obligations under predictive scheduling laws.

Employers should proactively communicate to employees that the COVID-19 pandemic may require abrupt changes to their schedules and that the employer will make a good faith effort to provide as much notice as possible regarding schedule changes. Proactive and regular communication with affected employees may establish that the employer acted reasonably and used good faith efforts to provide timely notice given the circumstances. In such a case, states and municipalities could reconsider strict enforcement of their predictive scheduling laws. Consult your attorney for guidance regarding predictive scheduling and COVID-19 issues facing your business.

Conclusion

The WHO and CDC have recognized that the COVID-19 virus will continue to spread, and some current evidence indicates that it causes a more severe disease than the seasonal flu. The WHO has urged leaders to "pull out all stops" to contain the virus. On a positive note, the Wall Street Journal reported on March 6, 2020 that an employer in a small town in Germany successfully contained the virus after one employee who tested positive infected 16 additional employees. You can read about the company's aggressive efforts here. U.S. employers should recognize that COVID-19 is a unique virus and take the actions necessary to prevent an outbreak at their workplace. If an outbreak should occur, employers should take steps to aggressively contain it. Communication, a preparedness plan and a quick response are the key to successfully confront this novel outbreak and to protect the workplace.

Contact us

If you have questions about this update or how we can help your preparedness, please contact Sonni Nolan or your Husch Blackwell attorney.

Resources

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Centers for Disease Control: Stop the Spread of Germs (Spanish)

Centers for Disease Control: Stop the Spread of Germs (English)

U.S. Equal Employment Opportunity Commission: What You Should Know About the ADA, the Rehabilitation Act and the Coronavirus

Centers for Disease Control: About Coronavirus Disease (COVID-19)

World Health Organization: Coronavirus Disease (COVID-19) Outbreak

United States Department of Labor: COVID-19 Control and Prevention

Husch Blackwell has launched a COVID-19 response team providing insight to businesses as they address challenges related to the coronavirus outbreak. The page contains programming and content to assist clients and other interested parties across multiple areas of operations, including labor and employment, retailing, and supply chain management, among others.

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