

MEMORANDUM

FROM: Couch White, LLP
DATE: March 17, 2020
RE: COVID-19

I. WORKPLACE PREPAREDNESS

- A. Adopt Coronavirus preparedness policy.
- B. Provide updated contact information of all employees and circulate emergency contact details for key employees to address a crises response.
- C. Carry out a risk assessment at the workplace, ensuring good hygiene practices in the common areas of the work place and training employees on the key facts and risks.
 1. Good hygiene and infection control practices include:
 - a. Promoting frequent and thorough hand washing and providing employees and worksite visitors with places to wash their hands (and providing alcohol-based hand sanitizer containing at least 60% alcohol if soap and running water are not immediately available, such as where portable toilets are used on a worksite).
 - b. Encouraging employees to stay home if they are sick.
 - c. Encouraging respiratory etiquette, including covering coughs and sneezes.
 - d. Providing employees, customers and worksite visitors with tissues and trash receptacles.
 - e. Discouraging employees from sharing work tools.
 - f. Regularly disinfecting common surfaces and equipment, including portable toilets, at least once if not multiple times per day.
 - g. Exploring and, where feasible, implementing practices that reduce the number of employees, or increase the physical distance between workers,

at worksites at any given time, such as by staggering shifts or reducing crew sizes to essential employees only.

- h. Encouraging self-monitoring among employees (such as encouraging employees to take their temperatures prior to reporting to work, asking employees to report whether they or a family member have traveled to impacted regions, etc.).
 - i. Although employers are normally prohibited from asking employees about their health and medical conditions, the Pandemic Preparedness in the Workplace and the Americans with Disabilities Act (“ADA”) guidance issued by the U.S. Equal Employment Opportunity Commission (“EEOC”) provides that during a pandemic, exceptions to the ADA’s restrictions on employer health inquiries allow employers to inquire about an employee’s potential infection with the disease and related travel.
- i. Promptly isolating employees who are identified as potentially infectious, especially from employees who are potentially at higher risk, and following the Centers for Disease Control and Prevention’s (“CDC”) current guidance for dealing with infected workers (*e.g.*, sending the employee home unless symptoms are severe, in which case contact medical care center for instructions).
- j. Staying informed and current regarding guidance by public officials and authorities such as the Centers for Disease Control and Prevention (“CDC”) and the Occupation Safety and Health Administrations (“OSHA”), whose current guidance can be found here:
 - i. CDC:
<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>
 - ii. OSHA:
<https://www.osha.gov/Publications/OSHA3990.pdf>
 - iii. Update employee handbook for any policies or procedures (*e.g.*, sickness, absence, dependent care leave, flexible/home working) which may be affected by an outbreak of coronavirus.
 - iv. Privacy – An employer may provide general information to employees to let them know that someone in the company is infected with the virus to allow employees to monitor themselves for signs or symptoms and quarantine themselves, if appropriate. To comply with the ADA and other privacy laws, employers may not specifically disclose the identity of the infected employee or provide

information that will allow other employees to identify the infected employee.

II. CONTRACT NEGOTIATIONS/REVIEW

- A. Review contracts to assess whether you are obligated to provide insurance coverage to another entity or if another entity is required to provide insurance coverage to you. If the latter, request copies of relevant insurance policies (not just certificates of insurance) and review them to assess potential coverage.
- B. Specific Contract Terms to Review.
 - 1. Force majeure – the right to assert force majeure is governed by the terms of the parties’ contract, but generally speaking, unless expressly excluded, “pandemics” is an event that, depending on the facts, typically qualifies as a force majeure event. In reviewing your contracts, be sure to identify any specific Notice Requirements for asserting force majeure.
 - 2. Impact to construction supply chain and cost/delay
 - 3. Impossibility/impracticability/frustration of purpose defenses
 - 4. Waiver of Liability
 - 5. Liquidated Damages
 - 6. Choice of law/venue (especially international transactions or supply agreements)

III. INSURANCE COVERAGE REVIEW

- A. Before a disruption occurs, assess your current liability coverage.
 - 1. Property and Business Interruption insurance – typically limited to slow downs and stoppages of your business due to property damage, in this instance, contamination.
 - 2. Contingent Business Interruption (“CBI”) or Supply Chain Risk insurance – for disruption of supply chains and, potentially, markets.
 - 3. Commercial General Liability (“CGL”) insurance – covers third party liabilities arising from bodily injury or, potentially, personal injury or property damage (including, potentially, coverage of claims by infected third parties).
 - 4. Directors & Officers (“D&O”), Management Liability, Errors & Omissions (“E&O”) and Professional Liability insurance – for claims that management personnel failed to take appropriate measures to protect the business or third parties.

5. Workers' Compensation Insurance – adopt protocols to help employees make a record to support COVID-19 claims.
6. Travel Insurance/Event Cancellation Insurance.

NOTE: Infectious Disease Exclusion: Traditional property and casualty insurance policies provide only limited coverage for epidemics. Following the SARs outbreak in 2003, many carriers started to include exclusions for epidemics or pandemics, excluding coverage for losses “in connection with a notifiable infectious disease,” meaning any disease health care employees are required to report to federal and/or state agencies.

- B. Monitor news for policy changes. Obtain COVID-19 Insurance Riders if made available (one rider per job).

IV. EMPLOYEE LEAVE

- A. Employees meeting certain eligibility requirements may be entitled to take up to 12 weeks of unpaid leave under the Family Medical Leave Act (“FMLA”) in the event the employee contracts the coronavirus or needs to care for a family member who has. Generally, the FMLA does not entitle an employee to take leave to avoid getting sick.
- B. Under the New York Paid Family Leave Act (“PFLA”), eligible employees in New York may be entitled to take up to 10 weeks of limited paid leave (increasing to 12 weeks on January 1, 2021) to care for a family member with a serious health condition (although an employee cannot take leave under the PFLA by reason of their own illness).

V. WAGE ISSUES

- A. Other than limited state law exceptions, the Fair Labor Standards Act (FLSA) generally does not require employers to pay nonexempt employees for hours they did not work. Nonexempt employees directed by their employer not to report to work and not to work from home generally need not be paid, although these employees may be permitted to use accrued paid time off, including paid sick leave in jurisdictions with paid sick leave requirements, such as New York City and Westchester County, where employees meeting certain eligibility thresholds can accrue up to 40 hours of paid leave (or unpaid leave if the employer has less than 5 employees).
- B. If an exempt employee stays home for the entire workweek, and performs no work during that workweek, the employee need not be paid but may be permitted or entitled to use accrued paid time off, including paid sick leave in jurisdictions with paid sick leave requirements. But if an exempt employee has performed any work during the workweek, the employee will be entitled to be paid for the entire workweek unless the employee is, in fact, infected with the coronavirus. If an employee is infected with the coronavirus, the employee need not be paid and must be permitted to use accrued paid time off including paid sick days.

VI. WORKERS' COMPENSATION

- A. If an employee alleges that they contracted COVID-19 at work, this may result in a compensable workers' compensation claim but the likelihood of a successful claim would be very fact-specific. Workers' compensation is a no-fault system, meaning the employee does not have to prove negligence on the part of the employer. The employee only must prove the injury occurred at work and was caused by their employment.
- B. COVID-19 is not an "injury" but is instead analyzed under state law to determine if it is an "occupational disease." In New York, in order to establish that their contraction of COVID-19 constitutes an occupational disease, an employee would have to show two things:
1. that they contracted COVID-19 because of their exposure to harmful conditions incident to their employment; and
 2. that the harmful conditions are present in their particular kind of employment to a greater degree than employment generally.
- C. Absent state or federal legislation on this topic, an employee seeking workers' compensation benefits for COVID-19 infection will have to provide medical evidence to support their claim.

VII. REPORTING REQUIREMENTS

- A. COVID-19 can be a recordable illness if a worker is infected as a result of performing their work-related duties. However, employers are only responsible for recording cases of COVID-19 if all of the following are met:
1. The case is a confirmed case of COVID-19 (see CDC information on persons under investigation and presumptive positive and laboratory-confirmed cases of COVID-19);
 2. The case is work-related, as defined by 29 CFR 1904.5; and
 3. The case involves one or more of the general recording criteria set forth in 29 CFR 1904.7 (*e.g.*, medical treatment beyond first-aid, days away from work).