



WIMBERLY LAWSON WRIGHT DAVES & JONES, PLLC

ALERT

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CORONAVIRUS: CRITICAL ISSUES FOR EMPLOYERS

As of March 11, 2020, the World Health Organization declared COVID-19 a pandemic, and on March 13, 2020, President Trump declared a national emergency to respond to the virus.

Clearly, the virus is presenting difficulties for all aspects of everyday life. While many laws are potentially implicated by COVID-19 issues in the workplace, at this point, the ones most frequently faced by employers are the Fair Labor Standards Act (FLSA), the Americans with Disabilities Act (ADA), and federal and state laws prohibiting discrimination on the basis of protected status such as age, race, national origin, pregnancy, gender, and genetic information.

The FLSA is implicated in a number of ways, such as employees on quarantine, and employee pay issues when employees work remotely. For hourly non-exempt employees, there is no obligation under the FLSA to pay them for time spent on mandatory or voluntary quarantine. However, salaried, exempt employees must generally receive their full salary in any week in which they perform any work. For example, if a salaried employee was placed on mandatory quarantine for an entire week and did not perform any work in that week, the employer would not have to pay them their full salary; however, if the employee performed even a small amount of work during the week, the employee would be entitled to full salary. If the quarantine is voluntary and the employer is open for employees to come into work if they so choose, but the employee chooses not to come in, then the employer is only obligated to pay the employee for any days in which the employee performs any work.

For non-exempt employees who are working remotely, it is important to consider limits on how much time they work, so as to control overtime, as well as having a reliable method to track their work time. Employers may also consider reminding employees working remotely that the same work rules apply there, such as social media policies and computer use policies.

Whether an absence related to COVID-19 could be covered by the Family & Medical Leave Act (FMLA), paid time off (PTO) and other leave policies would have to be analyzed based on the employee's particular circumstances. Likewise, as of now, whether quarantine time is paid or unpaid will depend on an employer's existing policies. Pursuant to Executive Order 13706, some federal contractors may be required to provide paid sick leave to employees under certain circumstances, such as if the employee or a family member is sick with the virus or seeking care related to the virus. Furthermore, it appears "The Families First Coronavirus Response Act" which passed the United States House late March 13, 2020 will include some form of an employee paid leave requirement with potentially broad application. That forthcoming new law will be the subject of another Alert from our Firm.

COVID-19 also presents issues subject to the ADA, which prohibits employers from making disability-related inquiries and requiring medical examinations unless (1) the employer can show that the inquiry or exam is job-related and consistent with business necessity, or (2) the employer has a reasonable belief that the employee poses a “direct threat” to the health or safety to the individual or other that cannot otherwise be eliminated or reduced by reasonable accommodation. According to the EEOC, whether a pandemic rises to the level of a direct threat would require an assessment by the CDC or public health authorities because that would provide “the objective evidence needed for a disability-related inquiry or medical examination.” The EEOC’s guidance, entitled “Pandemic Preparedness in the Workplace,” specifically notes “employers are expected to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location, and to make reasonable assessments of conditions in their workplace based on this information.”

The EEOC’s Pandemic Guidance was issued in response to the H1N1 virus outbreak in 2009, but it is still valid. The Guidance addresses common employer questions such as how much medical/health information may an employer request from an employee during an event such as the current pandemic? For example, the Guidance provides that a temperature test is a medical examination within the meaning of the ADA, and notes that if a pandemic “becomes widespread in the community as assessed by state or local health authorities or the CDC, the employers may measure employees’ body temperature”, but goes on to caution that “some people with influenza....do not have a fever.” In other words, taking someone’s temperature is not foolproof and is only one assessment that may be relevant. Asking about other symptoms (body aches, weakness, coughs, etc.) may be beneficial. Moreover, employers would need to exercise consistency as far as who to test, and maintain confidentiality with respect to employee medical information.

In a similar vein, employers should refrain from singling out groups of employees for special treatment or heightened scrutiny based on a protected status, such as being over the age of 60, or pregnant, or those employees with underlying health conditions. Even if well-intended, such measures could be considered discriminatory and in violation of employment laws which prohibit discrimination on the basis of a protected status, such as age or pregnancy. A pandemic is not a reason to turn the workplace into pandemonium and prudent employers should obtain legal advice before implementing measures likely to be viewed as invasive or punitive. In addition, it is important to remember that employers covered by the ADA (or similar state laws) are prohibited from discriminating on the basis of a perceived disability.

The CDC’s “Interim Guidance for Businesses and Employers” regarding COVID-19 recommends that employees who exhibit symptoms of the virus should stay home until they are free of fever and any other symptoms for at least 24 hours (without the use of fever-reducing or symptom-altering medicines such as cough suppressants). www.cdc.gov/coronavirus/covid19.

The Occupational Safety and Health Act of 1970 requires employers to provide safe and healthful workplaces for their employees. Along these lines, employers should consider steps to encourage safe practices by employees (such as staying home when sick), encourage social distancing, reduce large gatherings and reconsider in-person meetings, consider limiting worksite visitors, and using other reasonable controls to reduce potential exposure.

To keep those in management positions up-to-date on developments regarding COVID-19, employers may consider more frequent managerial briefings, or email reminders to supervisors and managers regarding relevant workplace policies and updates. Supervisors and managers should be directed to consult with Human Resources if they have questions on these issues, and certainly before taking any adverse employment actions related to COVID-19 issues. The U.S. Department of Labor OSH Administration (OSHA) has recently issued two publications to provide guidance to employers at: www.osha.gov/SLTC/covid-19/ and www.osha.gov/Publications/OSHA3990.pdf.

There are numerous other laws which deserve consideration regarding the impact of COVID-19, such as group health plans, unemployment compensation, workers' compensation, disability plans, travel issues, business insurance policies, and plant shut-downs or reductions in force just to name a few. Space does not allow for a full discussion on all of the issues potentially presented by the COVID-19 outbreak. Employers, and of course their Human Resource professionals, will no doubt be faced with unusual and difficult questions in the coming weeks. As this rapidly-evolving situation continues to unfold, Wimberly Lawson will continue to stay abreast of developments and we will issue updates and Alerts for our clients. Clients may also contact a Wimberly Lawson attorney if they have specific questions warranting legal analysis.