HINSHAW

Alerts

Employer FAQs for COVID-19 (Coronavirus)

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Insights for Employers

Virtually every employer in the United States is having to grapple with how to respond to employment-related issues as a consequence of the coronavirus (COVID-19) pandemic. To assist employers, we have prepared an FAQ designed to address some of the more common questions they are confronting. Hinshaw will continue to update these employer-related FAQs as the COVID-19 situation evolves.

Please contact your **Hinshaw labor and employment attorney** with any questions relating to these FAQs as there are state-specific regulations that may apply.

Travel Restrictions

1. Can an employer require employees to stay home from work if they have been diagnosed with COVID-19, or directly exposed to an individual diagnosed with COVID-19?

Yes. Employers have the right to require employees who are ill to stay home from work. In addition, given the health and safety concerns associated with COVID-19, employers can require employees to stay home if they have been directly exposed to someone diagnosed with COVID-19.

2. Can an employer require employees to stay home from work following international air travel or cruises?

Yes. Employers can require employees who have been traveling internationally to self-quarantine and stay home.

3. Can employers restrict personal travel to or through Level 2 and Level 3 countries?

An employer has limited ability to restrict an employee's personal travel. However, an employer can require an employee who has traveled from or through a Level 2 or 3 country—as designated by the CDC or WHO—to refrain from coming to work for an appropriate period of time, which is usually fourteen days. Note that some states affirmatively restrict an employer's ability to limit personal travel, and therefore, you should consult a labor and employment attorney regarding your state's requirements.

Attorneys

Tom H. Luetkemeyer

Mellissa A. Schafer

Service Areas

Labor & Employment

4. Can employers restrict domestic personal travel?

An employer has limited ability to restrict an employee's personal travel in the United States. Of course, an employer is free to urge employees to use common sense when traveling to certain higher risk areas, such as the State of Washington. An employer should stay up-to-date on the advice from the Center for Disease Control (CDC) regarding travel in order to determine what steps employees should take if they elect to engage in voluntary domestic travel.

Americans with Disabilities Act (ADA) and Medical Leave Considerations

1. Is COVID-19 considered a disability under the ADA or state laws?

COVID-19, like the seasonal flu, is generally considered a transitory condition and not a disability under the ADA. However, COVID-19 might cause significant impairments with respect to major life functions, including, most notably, breathing. A prudent course of action for employers is to treat COVID-19 as a disability when determining accommodations in the workplace.

2. What are the ADA implications of mandatory body temperature testing?

Most employers will elect not to engage in this type of testing. Given the protective scope of the ADA, employers should anticipate challenges to mandatory body temperature testing as an impermissible medical exam under the ADA. Post-employment medical exams only are lawful if justified by business necessity. Further, individuals infected by COVID-19 may not immediately exhibit symptoms, and therefore, such testing may give individuals a false sense of security and may ultimately fail to provide meaningful protection in the workplace.

3. What constitutes a disability-related inquiry and what are employers allowed to ask employees who are asymptomatic?

Generally, an employer cannot ask employees who are not exhibiting symptoms to disclose whether they have a medical condition. However, given the obvious health concerns implicated by COVID-19, employers may require employees to disclose if an immediate family member has tested positive for COVID-19, or the employee has tested positive for COVID-19. This is basic information necessary to protect other employees in the workplace. Employers also have the right to ask basic information about other activities which might constitute an elevated risk to others in the workplace, such as an employee's travels to a Level 2 or 3 country. Like any other medical issue implicating an extended leave, an employer may require a doctor's note indicating that it is safe for the employee to return to the workplace after they have recovered from COVID-19.

4. What medical documentation can an employer require as a condition of returning to work following a COVID-19-related illness or an asymptomatic quarantine?

Many employers have policies requiring a physician's or clinician's note following an absence lasting a certain number of days. The purpose of the note is to ensure that it is safe for the employee to return to work. An employee may return with certain work restrictions which would be the focus of a possible accommodation discussion.

5. Are employers required to compensate employees in the event of an employee's self- quarantine?

If an employee is self-quarantined due to COVID 19, the employers existing paid time off (PTO) policy would apply. In the event an employer does not have a sick leave policy, local laws and ordinances may govern whether paid leave is available. The law varies by state, county, and municipality.

In the absence of a policy, law, or ordinance, a self-quarantine due to COVID-19 would be treated like any other illness and would be without pay. However, many employers have elected to compensate individuals for a defined period of time for issues related to COVID-19. Employees should also keep in mind the Fair Labor Standards Act's (FLSA) salary basis test with respect to any decisions concerning the interplay between compensation obligations and an employer's leave policy.

Privacy and HIPAA Concerns

1. What can employers share with employees about another employee's illness or potential exposure to COVID-19?

COVID-19 highlights the competing interests of ensuring the health and safety of employees and protecting employees' privacy interests. Most employers are not covered entities under HIPAA and therefore, privacy concerns generally are going to be governed by state privacy laws (i.e., GINA and the ADA). With respect to the ADA, employers have an obligation to maintain the confidentiality of employee medical records.

Given health and safety concerns, employers must strike a balance between an employee's privacy interests and other employees' reasonable need to be informed if they have been exposed to COVID-19. Without disclosing names or personal circumstances, it is appropriate for employers to notify employees when another employee in the workplace has tested positive for COVID-19, or may have been directly exposed to COVID-19. A general statement that an employee has decided to self-quarantine or is home as a result of a positive test or exposure should not be problematic under the laws of most states.

Wage and Hour Considerations

1. May an employer require the use of paid time off during a quarantine or an office shut down?

Generally, yes, unless there is a specific employer-implemented policy, collective bargaining agreement or practice prohibiting such a requirement. The use of paid time off in a quarantine situation also may be limited by a collective bargaining agreement.

2. Is an employer required to pay employees during an office or work-place closure?

Generally, an employer is not required to compensate all employees in the event of an office or work-place closure. However, there are many exceptions, for example, under the FLSA's salary basis test, if a salaried employee works at any time during the week, he or he is generally entitled to salary for the entire week. For non-exempt employees, the rule is more straight forward. If an employee is not working, he or she is not entitled to hourly compensation. Employers should obtain the advice of labor and employment counsel prior to implementing office or work-place closures in order to avoid unanticipated compensation obligations.

3. Can an employer temporarily enhance compensation or leave benefits as a result of COVID-19?

Yes. An employer may provide temporary, enhanced benefits to deal with the hardships experienced by its employees due to COVID-19.

4. Can employers modify PTO accrual to allow employees to go "negative" during a period of illness or quarantine?

Generally, yes. However, employers should implement a written policy which temporarily abates policies governing ordinary application of paid time off. Employees should have a clear understanding of what "going negative" means and the consequences in the event there is a termination of employment. The ability to go negative should be limited to a defined time frame.

5. Can an employer force a furlough, and if so, how can it be done for employees exempt under the FLSA and state laws?

Certain industries have been hit especially hard by COVID-19. Furloughs are pre-planned reductions in schedules typically for a defined period. Like many other programs, they can create compensation liability for an employer if not implemented properly. Furloughs provide an alternative to layoffs and other employment separations. Employers should seek the advice of labor and employment counsel before implementing a furlough or similar plan.

6. Regarding layoffs and similar actions to address the economic impact to an employer's business, what options does an employer have and can they be applied in the same way for exempt and non-exempt employees?

Layoffs involve a separation of employment and are available to employers who need to adjust staffing as a result of an economic downturn. Both exempt and non-exempt employees can be laid off. However, employers may be subject to lawsuits in the event that layoff criteria is applied in an inconsistent or arbitrary manner. Employers also must consider the requirements of the federal Worker Adjustment and Retraining Notification (WARN) Act or state mini-WARN Acts with respect to mass layoff or plant closures.

7. Can employers in the health care industry enforce mandatory overtime policies?

Yes. Health care employers may enforce mandatory overtime policies unless prohibited by a collective bargaining agreement, contract, or a specific employer policy.

Working Remotely

1. If an employee is assigned to work from home, what state law expense reimbursement laws are implicated, and what unanticipated costs might an employer need to address?

The answer varies from state to state, but states like Illinois and California, among others, require reimbursement of expenses incurred by an employee in performing tasks assigned by the employer. It is important for employers to have a written policy establishing how expenses will be reimbursed and establishing caps on reimbursable expenses, if permitted.

2. Does an employer need to track the time of a non-exempt employee working remotely?

Under both the FLSA and state law, an employer has an obligation to keep a record of time worked by non-exempt employees. Some states such as Illinois, require that an employer track all time worked by all employees, including exempt employees. Prior to allowing a non-exempt employee to work remotely, there needs to be a clear understanding of assigned work hours, authorization for overtime, and how time is tracked. For example, many automated systems allow for log-in and log-out mechanisms. Those same systems can be used for purposes of time tracking when work is performed remotely.

Labor Relations and Collective Bargaining

1. Are temporary leave and quarantine issues (and related compensation decisions) mandatory subjects of bargaining if employees in the workplace are covered by a collective bargaining agreement?

Leave and compensation issues are mandatory subjects of bargaining under federal labor law. Such issues may have been left to what are known as "management rights" clauses in collective bargaining agreements, and each collective bargaining agreement will have to be assessed to determine how the topic is handled. Unilateral changes to leave and compensation policies may subject an employer to unfair labor practice liability. Therefore, employers should seek the advice of experienced labor counsel for a full assessment of the employer's obligations.

2. In unionized situations, assuming the employer can act unilaterally as a result of management rights provisions, what are the obligations to bargain over the "impact"?

Even though employers may have the right to make certain decisions, employers still may have the obligation to bargain over the "impact" of those decisions. For example, an employer may have the right to determine who is furloughed or laid off, but those same employers may still have to bargain over the consequences of making the underlying layoff decision such as whether severance benefits may be offered. Employers should contact their labor counsel to determine whether impact bargaining is required.

Health and Safety Issues

1. Does COVID-19 qualify as an occupational illness subject to Occupational Safety and Health Administration (OSHA) reporting?

If COVID-19 is contracted in the workplace, it could be considered an occupational illness covered by OSHA and subject to the reporting requirements. Typically, OSHA has said that the common flu is not a reportable occupational illness; however, COVID-19 is not the common flu. Therefore, until there is further clarity from OSHA on this point, employers should track individuals who actually have contracted COVID-19 as a result of exposure in the workplace.

2. How does an employer determine the circumstances that justify a medical exam given the 2009 EEOC guidance on pandemics in the workplace?

The EEOC last issued guidance on medical exams in 2009 in connection with the H1N1 influenza pandemic. EEOC guidance does not carry the same force and effect as a federal regulation, and is not meant to bind the public in any way. EEOC guidance is intended only to provide clarity to the public regarding existing requirements under the law or agency policies. But it is helpful to identify when the EEOC guidance believes a medical exam might and might not be appropriate. Generally, when the CDC or a local government issues a declaration of an emergency, employer testing most often is found to be job-related.

Worker's Compensation and Unemployment

1. Can an employee make a worker's compensation claim if they contracted COVID-19 in the workplace?

Many state unemployment statutes would recognize a claim under circumstances where an employee can establish that he or she was infected by COVID-19 at work.

2. If an employer has a staffing agreement with a third party, how are the notice provisions of those contracts implicated by an employer's decision to close an office or a site?

This will have to be determined on a case by case basis depending on the wording of the contract. Some contracts will have a force majeure provision which permits termination due to so-called "acts of God" or other natural disasters.

3. If an employee is on leave or quarantine, does he or she qualify for unemployment benefits?

Many states are in the process of enacting emergency rules to allow for unemployment benefits in situations where employees are self-quarantined or cannot work. This will be decided on a state-by-state basis and employers need to consider the availability of unemployment benefits as they decide whether to enhance paid time off benefits available to their employees.

4. If an employer permits work from home arrangements due to the COVID-19 pandemic, does this set a precedent?

No, so long as employers who do not generally permit such arrangements put their employees on notice that a work from home arrangement is temporary and limited to the COVID-19 pandemic, it will not set precedent for a new standard.

5. Can employers rescind offers of employment in light of the COVID-19 pandemic?

This is a matter of contract law as well as practicality. On one hand, employers may not want to have an employee start work only to expose them to a risk within the office. Handled correctly, new hires will be understanding of a delayed start date. However, the total rescission of an offer may subject an employer to a breach of contract claim and potential damages. Employers are advised to consult with labor and employment counsel prior to making such decisions.