GENERAL GUIDANCE FOR EMPLOYERS ON LEGAL ISSUES RELATED TO COVID-19

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For more information please contact a member of our Employment and Labor COVID-19 response team or any other member of our Employment and Labor Group.

Employers across the country are facing unique and unprecedented challenges in responding to workforce issues in light of the COVID-19 pandemic. The law is changing quickly to address issues presented by the spread of COVID-19. The following shares guidance and insight into common workplace issues that can arise in response.

RECENT FEDERAL LEGISLATION: THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA) and the CARES ACT

- The Families First Coronavirus Response Act (FFCRA)

On March 14, 2020, the U.S. House of Representatives passed HB 6201, the Families First Coronavirus Response Act (FFCRA). The bill, as modified, was approved by the Senate and signed by the President on March 18, 2020. The Act contains several provisions imposing additional requirements on employers of fewer than 500 employees, which were effective April 1, 2020 and are summarized below. Note that there is an exemption to these new requirements for businesses of fewer than 50 employees who can show that providing the benefits would jeopardize the viability of the business as a going concern. The United States Department of Labor issued its first guidance on these laws on March 24 and has since updated it twice. The DOL Guidance is available here: https://www.dol.gov/newsroom/releases/whd/whd20200324.

Most of the useful guidance is in the Questions and Answers document: https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.

In addition, the DOL issued temporary rules implementing the FFCRA on April 1, 2020 and made them permanent on April 6: https://www.federalregister.gov/documents/2020/04/06/2020-07237/paid-leave-under-the-families-first-coronavirus-response-act

The Department of Labor also created a poster to meet the employer notice requirement, and it is available here:

https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

- Special Paid Leave to Care for Child Due to School or Childcare Closure under Amendments to the FMLA

The FFCRA amends the FMLA through the Emergency Family and Medical Leave Expansion Act (EFMLEA). The EFMLEA adds a new category for leave "for a qualifying need related to a public health emergency."

Coverage: Employers with fewer than 500 employees (counted at the time the leave is to be taken) are obligated to provide such leave, and any employee who has worked for the employer for at least 30 days is eligible (including time spent as a temp employee who is later hired full-time and including employees who were laid off not earlier than March 1, had worked for the employer for not less than 30 of the last 60 calendar days prior to the layoff, and were rehired). The leave is available to an employee who cannot work (or telework) due to a need to care for a child whose school or childcare is closed due to a public health emergency. Employers who are healthcare providers can elect to exclude any of their employees, and employers of emergency responders can elect to exclude those emergency responders. According to DOL Guidance, coverage is not provided for employees who cannot work because their employer has no work for them.

Paid and Unpaid Leave: The first 10 days of the EFMLEA leave are unpaid under this law, but they will likely be paid under the Emergency Paid Sick Leave Act described below. Thereafter, the employer must provide paid leave equal to at least two-thirds of the employee's regular rate of pay (as determined under the FLSA) based on the number of hours that the employee otherwise would be normally scheduled to work (including overtime), up to a maximum of $200 per day.

Effect on Other Paid Leave: The EFMLEA permits employees to choose to use accrued paid time off (vacation, personal, medical or sick leave). According to DOL Guidance, the employee can use PTO to cover the difference between EFMLEA pay and full pay, but only if the employer agrees. Otherwise, the employee must choose between EFMLEA paid leave or PTO.

Intermittent Leave: According to the DOL, intermittent leave is available only if the employer agrees. The employer can set the increments for intermittent leave.

Reinstatement after Leave: Most covered employers will be subject to reinstatement obligations for employees who take this leave, but the reinstatement obligations are limited when the employer employs fewer than 25 employees. Also, as with regular FMLA, employees are not protected from employment actions, such as layoffs, that would have affected the employee regardless of whether the employee took leave.

Sunset: Leave under the Act can only be taken between April 1 and December 31, 2020, but reinstatement obligations can last more than a year after the leave for a small employer (fewer than 25 employees) who is unable to restore the employee upon return from leave but is making reasonable efforts as required.

- Two Weeks of Paid Sick Leave under the Emergency Paid Sick Leave Act

Coverage: A separate title of the FFCRA, the Emergency Paid Sick Leave Act, requires private employers with fewer than 500 employees (counted at the time the leave is to be taken), and certain government employers, to provide up to two weeks of paid sick leave (80 hours for full time employees and the average number of hours worked in a 2-week period for part-time employees). For private employers, "employees" are those

covered under FLSA, and there is no minimum length of employment or hours of work for an employee to qualify for the leave. However, as with the EFMLEA, employers who are healthcare providers can elect to exclude any of their employees from the Act, and employers of emergency responders can elect to exclude those emergency responders. According to DOL Guidance, coverage is not provided for employees who cannot work because their employer has no work for them.

Paid Leave: Specifically, the employer must provide paid sick time to an employee who is unable to work (or telework) due to a number of situations. The paid leave is 100% of regular pay but capped at $511 per day ($5,110 in the aggregate) for leave related to a government-ordered quarantine, a self-quarantine or isolation on the advice of a healthcare provider because of COVID-19 concerns, or the employee's experiencing COVID-19 symptoms and seeking of a diagnosis. The paid leave is at least 2/3 of regular pay but capped at $200 per day ($2,000 in the aggregate) for leave related to taking care of someone quarantined or isolated, taking care of a child whose school or childcare provider closed, or a substantially similar condition specified by DHHS.

Effect on Other Leave: The sick leave does not preempt state and local paid sick leave laws or diminish employee rights under existing collective bargaining agreements and employer policies. The employer may not require an employee to use other paid leave provided by the employer before the employee uses the emergency paid sick time under this new law.

Intermittent Leave: According to DOL Guidance, intermittent leave is available only if the employer agrees. The employer can set the increments for intermittent leave.

Prohibited Acts: The Act prohibits employers from: requiring employees to find a replacement worker as a condition for using paid sick leave; requiring employees to use other leave before using paid sick leave; and discharging, disciplining, or discriminating against any employee who takes leave or engaged in protected activity under the Act.

Reinstatement after Leave: Generally, employees are entitled to reinstatement upon return from leave, but employees are not protected from employment actions, such as layoffs, that would have affected the employee regardless of whether the employee took leave.

Sunset: The Act, and the requirements under the Act, expire on December 31, 2020.

- Tax Credits For Paid Sick And Paid Family And Medical Leave

Division G of the FFCRA provides for tax credits to employers providing paid leave under EFMLEA and/or EPLSA. The IRS, the Department of Treasury and the DOL issued a notice regarding the tax credits on March 20, 2020. In short, covered employers can withhold the amount paid out as sick leave (under the EPSLA) and childcare leave (under the EFMLEA) from payroll taxes that it otherwise would have paid to the federal government. If that is not sufficient to cover the paid leave, the employer can request funds from the government. In addition, the DOL is giving a 30-day grace period so that employers can come into compliance. The DOL will not enforce the Acts against employers as long as they are acting reasonably and engaging in good faith efforts to comply. The joint notice is available here:

https://www.irs.gov/newsroom/treasury-irs-and-labor-announce-plan-to-implement-coronavirus-related-paid-leave-for-workers-and-tax-credits-for-small-and-midsize-businesses-to-swiftly-recover-the-cost-of-providing-coronavirus

DOL Guidance notes that employers should retain documentation from its employees supporting a qualifying need for leave so that the employer can provide the documentation to the IRS to claim the tax credit.

- Unemployment Compensation under the Emergency Unemployment Insurance Stabilization and Access Act of 2020

The Emergency Unemployment Insurance Stabilization and Access Act of 2020 provides $1 billion in funding to states for "processing and paying unemployment insurance (UI) benefits, under certain conditions." About $500 million of the funds to states are for non-benefit related resources (i.e., for technology, systems, and administrative costs) *if* the state meets the following requirements designed to ensure that workers have access to benefits:

- Require employers to provide notification of potential UI eligibility to laid-off workers.
- Ensure that workers have at least two ways (for example, online and phone) to apply for benefits.
- Notify applicants when an application is received and being processed, and, if the application cannot be processed, provide information to the applicant about how to ensure successful processing.

Employers should expect changes on the state level to unemployment compensation benefits and procedures and should be prepared to notify employees of potential unemployment compensation rights. For example, in North Carolina, the Governor issued an Executive Order on March 17, 2020, that directed the state's Department of Commerce and Division of Employment Security to ensure that individuals who, as a result of COVID-19, are separated from employment, have had their hours of employment reduced, or are prevented from working due to a medical condition caused by COVID-19 or due to communicable disease control measures, be eligible for unemployment benefits to the maximum extent permitted by federal law. The measures to be taken included waiving the waiting period for benefits, the "able to work" and "available to work" requirements, the work search requirements, the "actively seeking work requirements," and the "lack of work" requirement.

- The CARES Act

The United States Senate passed the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") on March 25, 2020, and, on March 27, the U.S. House passed it and it was signed by the President. The CARES Act is a $2 trillion stimulus measure that has a number of aspects.

- Forgivable Small Business Loans – Paycheck Protection Program

The CARES Act also provides for small business loans under a newly created "Paycheck Protection Program." These loans are available for entities with 500 or fewer employees, and the loans can be forgivable if the proceeds are spent on payroll and other approved expenses over an 8-week period. But there are limitations on that forgiveness if workforce reductions and substantial (more than 25%) pay reductions are not reversed

by June 30, 2020. Businesses in the accommodation and food services industries can qualify for these loans if they do not have more than 500 employees at any physical location even though they have more than 500 employees in aggregate.

These loans can be up to the lesser of $10 million or the sum of 2.5 times the average total monthly payroll costs for the prior year.

The Treasury Department has issued borrower guidance on this program, and it is available here: https://home.treasury.gov/system/files/136/PPP--Fact-Sheet.pdf

Also, the Treasury Department has published regulations regarding the program, and they can be found here: https://home.treasury.gov/system/files/136/PPP--IFRN%20FINAL.pdf

- Government-Backed Loans for Air Carriers and Other Entities

The CARES Act also provides for government-backed loans to other employers with a number of strings attached.

For air carriers (passenger and cargo) and related service companies, businesses critical to maintaining national security, and other eligible businesses (defined as any other U.S. business that has not otherwise received adequate economic relief in the form of loans or loan guarantees provided under the Act), conditions include restricting the recipient from engaging in stock buybacks for a year after taking the loan, restrictions on paying dividends, limits on how much certain executives can be paid during the term of the loan, and – for air carrier and national security companies only – restrictions on workforce reductions through September (using loan proceeds to keep 90% of employees). This section of the Cares Act also provides the same kind of emergency economic relief for states and municipalities.

Nonprofits and mid-sized businesses (between 500 and 10,000 employees), in addition to the restrictions above (if applicable), are also required to use the funds it receives to retain at least 90 percent of the its workforce at full compensation and benefits until September 30, 2020, to pledge not to offshore jobs, to abide by collective bargaining agreements with unions, and to "remain neutral" if employees seek to form a union during the loan term.

- Enhanced Unemployment Compensation

The CARES Act bolster's state unemployment compensation systems by adding $600 per week to benefits amounts (through July 31, 2020), providing for full federal funding of the first week of unemployment (which normally was an unpaid waiting period), and providing for the extension of unemployment compensation by an additional 13 weeks. In most states, unemployment compensation is available for 26 weeks, but the duration is shorter in North Carolina (between 12 and 20 weeks depending on the seasonal adjusted statewide unemployment rate).

- Employee Retention Tax Credits

The CARES Act has provisions allowing "employee retention" tax credits through December 31, 2020 for certain employers who have either (1) had their operations fully or partially suspended due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings due to COVID-19 or (2) had a 50% decline in gross receipts in calendar quarter compared to the same quarter from the prior year. The tax credit against applicable employment taxes for each calendar quarter will equal 50 percent of the "qualified wages" paid after March 12, 2020 and before January 1, 2021 with respect to each employee. Qualified wages are capped at $10,000 in wages paid per employee, and thus the tax credit can be up to $5,000 per employee for the year.

Qualified wages vary based on employer size and reason for eligibility. For employers whose average number of full-time employees was greater than 100 in 2019, qualified wages are those paid to employees for time that they are not providing services (whether they are furloughed or given reduced hours) because of either of the qualifying reasons above. For employers whose average number of full-time employees in 2019 was not greater than 100, qualified wages are those paid to all employees (even if not furloughed) during the period of closure or reduced operations because of a government limiting order (if the first reason applies) or those paid to all employees during a quarter of declined gross receipts (if the second reason applies).

Qualified wages will not include any wages for which tax credits are available because they are paid pursuant to the Emergency Paid Sick Leave Act or the Emergency Family and Medical Leave Extension Act. Qualified wages can include the employer's qualified health plan expenses, to the extent they are excludable from the employee's gross income.

The CARES Act employee retention tax credits are not available to small businesses that obtain a newly created Paycheck Protection Program loans.

- Delay of Payment of Employer Payroll Taxes

The CARES Act includes a provision allowing businesses to delay paying to the federal government Social Security payroll taxes that would otherwise become due between the Act's effective date and the last day of 2020. If employers opt to do this, they must pay half of those delayed taxes at the end of 2021, and the other half at the end of 2022. This would allow employers to keep for a longer period of time the cash that they would otherwise pay as social security tax at 6.2% of employees' salaries.

This benefit is not available to employers who obtain a small business Paycheck Protection Program loan made available under the CARES Act and have any portion of it forgiven.

- Benefits Plans Flexibility

The CARES Act provides for the easing or delay of some minimum contribution requirements for plans subject to the Employee Retirement Income Security Act of 1974 (ERISA).

The CARES Act will also empower certain workers to withdraw up to $100,000 from their 401(k) or another defined contribution plans without facing penalties and, if they choose to pay themselves back (into their plans), they may take three years to do so. In addition to such hardship distributions, employees may qualify for a larger loan from their retirement plans than has been available ($100,000 instead of $50,000).

- Net Operating Loss Rule Changes for Businesses

A provision of the CARES Act suspends a previous rule that limited the amount of net operating losses companies can offset to 80% of a company's taxable income. Companies can now apply losses to the entire taxable income of a previous year. In addition, companies that lost money in 2018, 2019, or 2020 can take those losses for each of those years and carry them back up to five years to reduce their taxable income in a previous year. The companies would amend their tax returns for the relevant previous years and get a refund check from the IRS a few weeks later.

- Change in Interest Deduction Rules for Businesses

The CARES Act raises the limit on the amount of loan interest companies can deduct on their tax returns. That amount will rise to 50% from 30% of earnings before interest, tax, depreciation, and amortization (EBITDA).

- Other Features

The CARES Act has many other features not directly concerning employers. Among them is the provision of money directly to all individuals. It also addresses many provisions towards supporting the healthcare system in the fight against coronavirus.

WORKPLACE SAFETY AND HEALTH

- Do we have an obligation to protect employees from the virus at our worksites?

Yes. OSHA requires that employers "furnish…a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm" to employees. Employers must use "feasible methods" to keep their workplace safe, such as:

- Notifying and training employees on precautions, such as proper handwashing, coughing into elbows, sneezing into tissues, social distancing, staying home in the event of a fever, and sanitizing work areas and work equipment after use;
- Notifying employees if there is known exposure to COVID-19 in the workplace, including if an employee, vendor, or another visitor at the workplace has been diagnosed with COVID-19.
- Undertaking reasonable cleaning measures.

Employers should record on an OSHA 300 log if an employee is infected with COVID-19 as a result of performing work-related duties (if at least one general recording criteria (listed in 29 CFR 1904.7) is met, such as requiring medical treatment beyond first-aid or days away from work).

- What other steps should we take?
- Place appropriate restrictions on business travel and provide guidance on personal travel. *See* Travel Section*, below*.

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- Set expectations for when an employee is ill – encourage the employee to stay home when presenting any symptoms and require the employee to stay home if the employee has a fever.
- Provide tissues, wipes, and hand sanitizer to employees (if available). Post CDC guidance poster (https://www.cdc.gov/coronavirus/2019-ncov/about/share-facts-h.pdf).
- Check with janitorial services to ensure proper cleaning procedures.
- Implement quarantine for employees returning from international travel (and consider for domestic travel to U.S. hotspots).

(see https://www.cdc.gov/coronavirus/2019-ncov/locations-confirmed-cases.html)

- Send home any employees displaying symptoms.
- Prohibit visitors with symptoms from entering the workplace.
- Monitor federal, state, and local guidance regarding workplaces and large events.

It is important to continuously communicate with your workforce so that your employees understand the measures being taken to keep them safe.

- Can an employer send an employee home if the employee displays COVID-19 symptoms?

Yes. The ADA does not prohibit employers from following CDC guidance and sending home employees who demonstrate symptoms associated with COVID-19.

- Can employers take the temperature of employees?

Normally, it would violate the ADA to require employees to submit to temperature checks. However, the EEOC has released guidance that an employer may measure employee's temperature given the widespread nature of COVID-19. Employers should be cognizant of (1) who administers the checks, (2) where and how temperature readings are maintained (for confidentiality concerns, *see* below under Other Legal Risks), and (3) avoiding the appearance of discrimination based on any protected category (such as disability, perceived disability, or national origin). Only properly trained and qualified personnel should take the temperatures, both to ensure a proper process and protect the employee and others from possible infection.

- May an employer require an employee who is out sick with flu-like symptoms to provide a doctor's note, submit to a medical exam, or remain symptom-free for a specified amount of time before returning to work?

Yes, an employer may impose such requirements for an employee's return to work, either because the requirements are not disability-related (if the pandemic is less severe) or because they would be justified based on direct threat considerations (if the pandemic is more severe). If an employer's policies do not currently include such requirements, changes should be communicated to employees in writing. Employers should also be cognizant of employees' being unable to obtain documentation based on overwhelmed healthcare resources.

- What should an employer do if an employee tests positive?

If an employee tests positive, the employer should send the employee home immediately (if the employee is not already at home) and require that the employee quarantine for the longer of 14 days or until the employee is symptom free. Be sure to check current CDC guidance as well, as longer periods may be recommended. Such employees may be entitled to paid leave under the EPSLA if they cannot work during the quarantine.

Employers should notify their employees and any customers or vendors who may have been in close contact of the potential exposure. Employers should evaluate where the infected employee most frequently worked and socialized to evaluate the extent of possible exposure. Employers should not identify the employee by name or any other specifically identifying characteristics.

The employer can notify local public health agencies and seek guidance on next steps. As of the date of this memorandum, it appears that only certain health care providers are obligated to give notice of a positive test result. Other employers do not generally have this obligation.

- Can an employer ask an employee about possible symptoms?

Yes. Employers can ask employees to identify if they have experienced symptoms associated with the pandemic, such as fever, cough or a sore throat. The EEOC says such questions are allowed based on the direct threat justification. It is important to focus questions on pandemic symptoms rather than symptoms associated with other unrelated conditions.

- Can an employer ask an employee about symptoms suffered by family members?

Yes, with caution. Federal law prohibits employers from asking specific questions about the medical history of an employee's family members. However, questions about whether members of the employee's household have been diagnosed with COVID-19 or are displaying symptoms of COVID-19 infection are allowed. Such questions should not be designed to elicit information about any genetic condition. *See* Other Legal Risks Section, *below*.

TRAVEL

- Can an employer restrict employee business or personal travel?

Business Travel: An employer may restrict business travel. Employers should continue to consult the CDC's website: "Coronavirus Disease 2019 Information for Travel" for up-to-date travel notices concerning risk. Employers should also monitor guidance from the U.S. Department of State regarding international travel. As of March 20, 2020, the State Department issued a Level 4 travel advisory warning U.S. citizens to avoid *all international travel* due to the global impact of COVID-19. As of March 29, 2020, CDC advises that employers restrict all nonessential international travel.

Personal Travel: No. Employers cannot prevent employees from traveling to affected areas for personal reasons, even high-risk areas, but they can deny a time off request based on the destination, the business cost of a resulting quarantine or other legitimate business-driven reasons. Also, employers can make their

employees aware of U.S. State Department and CDC guidance regarding travel. Employers can follow CDC recommendations on self-quarantine or self-monitoring (including working from home, if applicable) as a result of personal travel and should advise employees of the employer's protocols.

- What if an employee has a family member who has traveled to a high-risk area or displayed COVID-19 symptoms?

Employers may request that employees report to the employer if any immediate or close-contact family members have traveled to high-risk areas or displayed COVID-19 symptoms. After consulting the CDC guidance, the employer may decide to require the employee to self-quarantine for 14 days following possible exposure to someone with COVID-19.

COMPENSATION

- Do employers have to pay employees for leave?

If employers are covered by the FFCRA that was passed this week, there are paid sick leave and new FMLA requirements that may apply. See the Recent Federal Legislation Section above.

Otherwise, employers are generally not required to pay for leave due to COVID-19, subject to state or local paid sick leave statutes and employee rights to use PTO and other paid leave under state family and medical leave laws. Under the FLSA, employers must generally pay non-exempt employees only for the hours they actually work. Salaried exempt employees must receive their full salary in any week in which they perform any work, even if they only work part of the week, subject to certain limited exceptions.

The FLSA does not require employer-provided vacation time. Where an employer offers vacation time to its employees, there is no prohibition on an employer requiring that such accrued leave or vacation time be taken on a specific day(s). This will not affect the employee's salary basis of payment so long as the employee still receives in payment an amount equal to the employee's guaranteed salary.

It is prudent to allow any employee to use accrued/allotted, unused PTO for all or part of the quarantine period. Generally, employers should not force employees to use sick leave over any other type of available leave (vacation and unpaid leave).

Employers should be mindful of their own policies and of ongoing updates to state sick leave laws, as some states are extending sick leave statutes to cover the COVID-19 situation. If employer policies and applicable state laws do not mandate paid sick leave, employers have flexibility to decide if the leave should be paid or unpaid.

- Do employers have to offer unpaid leave?

An employee sick with COVID-19 or caring for a family member with COVID-19 likely will qualify for leave under the FMLA. In a situation in which an employer sends an employee home for symptoms consistent with the pandemic, covered employers should follow the requirements of the FMLA for eligible employees, including providing FMLA eligibility notices and notice of rights. Employers may need to provide employees

with additional time to obtain medical certifications, given the likelihood of an overwhelmed health care system.

Employers with fewer than 500 employees will be required to provide FMLA leave to employees who cannot work because of the need to take care of children who are out of school because of COVID-19 as described in the Recent Federal Legislation Section above. Much of this leave will need to be paid.

- What if an employee refuses to come to work to avoid getting COVID-19?

Preventative leave taken by an employee to avoid exposure would not be protected under the FMLA as currently enacted. However, employers should encourage employees who are ill or exposed to potentially ill family members to stay home and consider flexible leave policies.

The ADA would protect employees with certain mental health conditions, severe anxiety, or similar conditions that could contribute to needing an accommodation to not come to work during an outbreak. The ADA would similarly protect employees with an autoimmune disorder or similar condition.

- If an employer directs exempt employees to work without pay or take vacation, will that decision impact the employee's exempt status?

Employers cannot direct employees to work without pay.

Under the FLSA, employers must generally pay non-exempt employees only for the hours they actually work. Exempt, salaried employees must generally receive their full salary for any week in which they perform work, subject to certain limited exceptions, but need not be paid their salary in weeks in which they perform no work.

- Does my company have to pay employees who are sent home due to a mandatory plant or facility closure due to a government state of emergency?

It depends on the length of the closure and the status of the employee. For exempt employees required to be paid on a "salaried basis" and non-exempt employees under the fluctuating workweek compensation scheme, the employer does not need to pay the employee for any workweek in which the employee performs no work. If the employee works any part of the workweek, a private employer may direct these employees to take vacation or debit their leave bank account in the case of an office closure, whether for a full or partial day, provided the employees receive in payment an amount equal to their guaranteed salary

The FLSA only requires employers to pay nonexempt employees (other than employees who are paid under the fluctuating workweek method) for hours that the employees have actually worked. Therefore, an employer is not required to pay nonexempt employees if the employer is unable to provide work to those employees due to a mandatory plant or facility closure due to a government issued state of emergency.

Employers also should consider whether employees are eligible to receive unemployment compensation benefits during a temporary shutdown. Refer to the applicable state department of labor website. In North Carolina, the Governor's March 17, 2020 Executive Order specifically mentioned reduced hours as a result of

COVID-19 as a reason for the Department of Commerce and Division of Employment Security to ensure that individuals can obtain unemployment compensation.

- Do employers have to permit employees to work at home?

It depends. While "work-at-home" is not a required accommodation under the ADA, it is a potential accommodation for those suffering from an underlying disability. It is also a recognized way of controlling the spread of infections. Given the current environment, the better practice is to allow for such work if duties can be adequately performed remotely.

Employers should document the temporary nature of any "work from home" arrangements offered so that employees are not entitled to ask for work-at-home as an accommodation in the future after the pandemic. Possible language: "Because of the extraordinary situation in the workplace caused by COVID-19, you will be working remotely for a temporary period. We understand that you might not be able to perform all of your job's essential functions during this temporary period because you will be working remotely."

- If an employer requires employees to work from home, must the employer pay those employees who are unable to work from home?

For exempt employees, an employer may be required to pay if the employee is otherwise able to work remotely. Because specific circumstances vary, please check with your counsel for guidance. As for non-exempt employees, different rules apply. If the employee is unable to work, an employer is not required to compensate the employee. See the Recent Federal Legislation Section above for ways in which this lack of compensation may be alleviated. Employers are advised to confer with their counsel for further guidance.

- Are employers required to cover additional costs that employees may incur if they work from home (internet access, computer, additional phone line, increased use of electricity, etc.)?

Employers may not require FLSA-covered employees to pay or reimburse the employer for items that are business expenses of the employer if doing so reduces the employee's earnings below the required minimum wage or overtime compensation. Additionally, employers may not require employees to pay or reimburse the employer for such items if telework is being provided as an accommodation to a disabled employee.

State law may impose additional obligations relating to reimbursement of expenses. Some states include expense reimbursements in their definition of "wages." Certain states, like California and Illinois, have statutes that specifically require employers to reimburse employees for expenses incurred by the employee on behalf of the employer. Telecommuting expenses that exceed normal household and personal expenses may fall under this category.

TELEWORKING

- How can my company control overtime if we allow non-exempt employees telework?

Employers should set out clear standards for hours of work for employees who are working from home. For example, employers should inform such employees of their specific work hours and that they are not authorized to work outside of those hours unless requested in writing by Human Resources or another high-level manager. Employers should inform non-exempt employees that they must record all time worked and are not permitted to work "off the clock." Any request by a manager to a non-exempt employee to work without recording their time should be reported and handled immediately.

- How can my company protect company information and data while employees are teleworking?

Employers should require employees working from home to follow the company's data security requirements, including accessing the company's information and networks through secure connections, using dual factor authentication or other secure methods of access. This is particularly true if employees are using their personal devices for work. Employers also can prohibit or place additional security requirements on the use of public Wi-Fi for work. Employers can and should, to the extent feasible, prohibit employees from using personal email or texting to conduct company business, and should prohibit employees from creating or storing company or customer documents and information on personal devices or personal cloud data storage sites. Employees using hard copy files should agree to protect the confidentiality of the files and agree to maintain them in a secure location. Spoofing and hacking schemes are flaring up to take advantage of the pandemic. Employers should remind employees to be careful of such schemes. This website from the FBI provides good guidance: https://www.ic3.gov/preventiontips.aspx#item-13

OTHER LEGAL RISKS AND CONSIDERATIONS

1. Off Duty Conduct Restrictions: Some states prohibit blanket restrictions on employee off-duty conduct (like personal travel) so mandatory bans on personal travel and personal activities are risky.
2. State and Federal Leave Laws: Employers should remain aware of their obligations under state and federal leave laws to allow employees leave to care for themselves and others who are ill, including persons in affected areas. Employers should remain up to date on FMLA and state leave law requirements and should consult counsel if necessary.
3. Age and National Origin Discrimination Concerns: Employers should not treat employees differently based on their age, national origin or other protected class and must not make determinations of risk or exposure based on an employee's protected characteristic. Employers should rely on CDC guidance to determine risk of COVID-19.
4. Confidentiality: Employers must maintain the confidentiality of employee's medical information and any medical leave details. If an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but not disclose the identity of the quarantined employee due to federal and state law restrictions.
5. Disability Discrimination and Harassment: Employers must be careful to prevent discrimination and harassment against employees who are disabled or perceived as disabled because they are exhibiting symptoms suggestive of having contracted coronavirus. Employers should ensure the confidentiality of all employees' medical information and leave details to prevent harassment. Employers should also consider reminding employees of anti-harassment and discrimination company policies and tamp down rumors about employees related to employee health or travel. Employers must be vigilant about promptly

responding to and investigating any complaints of harassment or bullying in the workplace.

6. GINA: The Genetic Information Nondiscrimination Act of 2008 prohibits taking adverse employment actions based on genetic information, and family medical history is considered "genetic information" under GINA. Asking "Is anyone in your household exhibiting symptoms of COVID-19 should not be construed as asking about family medical history because it could include non-family members.
7. Privacy Concerns: Employers may ask employees if they are experiencing COVID-19 symptoms such as fever, tiredness, cough, and shortness of breath. Federal or state law may require the employer to handle the employee's response as a confidential medical record. Employers should maintain this information in a separate, confidential medical file and limit access to individuals with a business need to know. In addition, some states require employers to use reasonable physical, administrative, and technical measures to protect the security of medical information.

FURTHER GUIDANCE

CDC Guidance for Employers:
https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html

CDC Interim Guidance for Businesses and Employers:
https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html

CDC Guidance for Coronavirus 2019 Information for Travelers:
https://www.cdc.gov/coronavirus/2019-ncov/travelers/index.html

For additional posters and print resources*:*
https://www.cdc.gov/coronavirus/2019-ncov/communication/factsheets.html.

EEOC Pandemic Guidance:
https://www.eeoc.gov/facts/pandemic_flu.html.

WHAT YOU SHOULD KNOW ABOUT THE ADA, THE REHABILITATION ACT, AND COVID-19: HTTPS://WWW.EEOC.GOV/EEOC/NEWSROOM/WYSK/WYSK_ADA_REHABILITAION_ACT_CORONAVIRUS.CFM

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GENERAL GUIDANCE FOR EMPLOYERS ON LEGAL ISSUES RELATED TO COVID-19

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These informational materials are current as of April 6, 2020 and are not intended, and should not be taken, as legal advice on any particular set of facts or circumstances. You should contact any member of the Moore & Van Allen Employment and Labor team for advice on specific legal problems.