KING & SPALDING

CRISIS PRACTICE

Coronavirus

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For more information, contact:

Michael W. Johnston
+1 404 572 3581
mjohnston@kslaw.com

Rebecca Cole Moore
+1 404 572 3540
rcolemoore@kslaw.com

King & Spalding

Atlanta
1180 Peachtree Street, NE
Atlanta, Georgia 30309-3521
Tel: +1 404 572 4600

COVID-19: A Guide on Labor and Employment Issues

The COVID-19 pandemic is a rapidly evolving public health emergency that provides challenges to employers large and small nationwide. The nature of those challenges is continuously evolving and depends on many factors, including the employer's specific industry, workforce, and local law. Following are responses to some of the most common questions we are hearing from our clients. This is intended to provide general guidance only, and it is important that these issues be evaluated in light of an employer's particular facts and circumstances and the requirements of applicable state and local laws. Employers will need to continuously evaluate their policies and practices as this pandemic evolves and new legislation is enacted. King & Spalding's labor and employment practice stands ready and able to help clients navigate these unchartered waters.

EMPLOYEE LEAVE ISSUES

In response to the coronavirus outbreak, the federal government recently passed the Families First Coronavirus Response Act ("FFCRA"), which provides eligible employees with two forms of paid leave: (1) up to two weeks of paid sick leave for qualifying employees who are sickened, quarantined, or caring for others affected by the outbreak and (2) up to ten weeks of paid FMLA leave where the leave is necessary to care for children whose school was closed or child-care provider is unavailable because of the outbreak. The Department of Labor has issued a Guidance outlining the FFCRA's general requirements.

The paid sick leave and expanded family and medical leave provisions of the FFCRA apply to certain public employers, and private employers with between 1-499 employees. This Guide applies only to private employers.

What paid sick leave benefits must employers provide to employees?

Employees of employers covered by the FFCRA (those with fewer than 500 employees) are eligible for two weeks of paid sick leave, capped at $511 per day and $5,110 in total, to comply with a mandatory quarantine, a quarantine directed by a medical provider, or if they are experiencing COVID-19 symptoms and are seeking a medical diagnosis for

themselves. Additionally, employees of covered employers are eligible for two weeks of paid sick leave at no less than 2/3 their regular pay rate, capped at $200 per day and $2,000 in total, to care for an individual subject to a mandatory quarantine or quarantine directed by a medical provider or to care for a child (under 18 years of age) whose school or daycare has closed or whose childcare provider is unavailable because of coronavirus concerns.

State and local jurisdictions may also have paid sick leave laws mandating this type of leave for employees, which may be in addition to that required by federal law.

What additional leave benefits must an employer provide under the changes to the FMLA?

Under pre-existing FMLA law, covered employers are required to provide eligible employees (*i.e.*, employees who have been employed for 12 months and worked 1,250 hours for an employer with 50 or more employees within 75 miles) with 12 weeks of unpaid leave to address their serious health conditions or to provide care to a family member with a serious health condition.

The FFCRA expands the FMLA by:

- Allowing eligible employees (discussed below) of covered employers (discussed below) to take paid leave to care for a child whose schools or daycare facilities were closed or whose childcare provider is unavailable because of the pandemic ("School's Out Leave").
- The FFCRA does not provide paid leave for other types of leave covered under the FMLA or expand the class of employees eligible for such leave.
- School's Out Leave is available to employees of employers with between 1-499 employees who have been employed for at least 30 days;
- The first ten days of School's Out Leave can be unpaid, although employees may elect to use other paid benefits (such as the two weeks paid leave discussed above) to cover that period. The remaining time must be paid at 2/3 of the employee's regular rate, capped at $200 per day and $10,000 in total.
- There are also certain exceptions for health care workers and for employers with fewer than 50 employees that can demonstrate significant hardship based on compliance with the statute's requirements.

Who pays for the benefits provided by the FFCRA?

Covered employers are required to pay these benefits initially; however, the legislation establishes a tax credit to offset 100% of the expense of the benefits provided under both the paid sick leave and the expanded FMLA provisions. Health insurance costs are also included in the credit.

What are the effective dates of the FFCRA?

The FFCRA becomes effective no later than April 2, 2020 and expires December 31, 2020. On March 20, 2020, the IRS issued a statement saying that "[t]oday … small and midsize employers can begin taking advantage of two new refundable payroll tax credits, designed to immediately and fully reimburse them, dollar-for-dollar, for the cost of providing Coronavirus-related leave to their employees." Given this, if employers choose to provide employees with paid leave prior to the April 2, 2020 effective date, it is likely that they will still qualify for the tax credits and satisfy the requirements of the statute. No later than March 25, 2020, the Department of Labor will issue a model notice that covered employers must post in a conspicuous place.

GENERAL WORKPLACE SAFETY ISSUES

What are employers' obligations to provide safe workplaces?

Employers are required to provide a workplace free from recognized hazards that are causing or likely to cause death or serious physical harm. The practical implications of that standard are evolving as more becomes known regarding the nature of the virus's transmission and the extent of its spread. The Occupational Safety and Health Administration has issued Guidance on Preparing Workplaces for COVID-19, which should be consulted in determining the specific measures employers should take to safeguard their workplaces. Comparable state laws and agencies may also provide guidance.

On March 19, 2020, the EEOC declared COVID-19 a direct threat under the ADA, which means that a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace. The EEOC has updated its pandemic Guidance to include information on COVID-19.

In addition to enhanced cleaning measures and other common-sense steps to decrease the likelihood of transmission, employers need to carefully consider how to limit their employees' risk of exposure through required business travel or from contact with infected employees or customers. Some common questions relating to these issues are discussed below.

For employees operating in high-risk exposure essential industries (i.e. healthcare providers, emergency responders, etc.), the Occupational Safety and Health Administration's Guidance provides additional recommendations on measures that should be taken to protect these employees from COVID-19. Additional information is also available at King & Spalding's client alert: "What if Working Remotely or Social Distancing is not Feasible."

Can an employee refuse to come to work for fear of getting COVID-19?

Generally, employees whose workplaces have not been closed by their employer or the government may not refuse to come to work for fear of getting COVID-19, unless they can establish that their employer's response to the pandemic is such that they reasonably believe they are in imminent danger (*i.e.,* have a reasonable belief that death or serious physical harm could occur within a short time). However, an employee whose disability makes the employee particularly vulnerable to exposure to COVID-19 may be entitled to tele-work (or to take short-term leave if tele-work is unavailable) as a reasonable accommodation under the ADA.

MANAGING EXPOSED OR ILL EMPLOYEES

May employers ask employees if they have the coronavirus or are exhibiting symptoms?

Employers may ask employees if they are experiencing COVID-19 symptoms (*i.e.*, fever or chills, a cough, or shortness of breath) or have received a positive diagnosis. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA. The inquiry should be limited to COVID-19 symptoms and diagnoses and not any other conditions.

May employers ask employees to not come to work if they have COVID-19 or its symptoms?

Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not prohibit employers from requiring those employees to leave, and employers have a duty to their other employees to protect them from such known risks of exposure.

May employers ask employees to not come to work if they are asymptomatic but have been in close contact with someone who has contracted the virus?

Employers may ask employees if they have been in close contact with an individual who has been diagnosed with COVID-19, but they should not ask the name of the individual. For employees likely to have been exposed to COVID-19, the CDC has provided Guidance on how to assess an individual's risk level and appropriate responsive measures.

Those measures may include having an employee not come to work during the suspected incubation period (currently 14 days) if their exposure risk-level is high or medium.

What are an employer's reporting requirements regarding whether one of its employees has the virus?

The best practice is for employers to inform persons who have been in contact with the employee (customers if known and other employees) that they were potentially exposed to COVID-19, but not name the employee who was diagnosed. The infected employee's healthcare provider will report the diagnosis to the CDC, and there is no requirement for the employer to do so. In some jurisdictions, there may be "business invitee" or similar laws that could require employers to report to invitees that they were exposed to the virus in the employer's facilities.

When employees return to work, are employers allowed to require doctors' notes certifying fitness for duty?

Yes, such certifications are permitted under the ADA, and best practice would be to require them. That said, as a practical matter, doctors and other health care professionals may not be available during the pandemic to provide fitness-for-duty documentation. If an employer relaxes or suspends its fitness-for-duty requirement, it should state in writing that its action is a temporary measure during the pandemic.

Can asymptomatic employees refuse to come to work for fear of contracting COVID-19?

Generally, no, as noted above in the "General Workplace Safety Issues" section; however, there may be situations where an individual may be entitled to tele-work or to take temporary leave as a reasonable accommodation.

WAGE AND HOUR ISSUES

How many hours is an employer obligated to pay an hourly employee who works a partial week because the employer's business closed?

Employers are required to pay hourly workers for actual hours worked. Generally, wage and hour laws do not require employers who are unable to provide work to non-exempt employees to pay them for hours the employees would have otherwise worked.

Do employers have to pay employees their same hourly rate or salary if they work at home?

Non-exempt employees must receive at least minimum wage for all hours worked and overtime compensation for all overtime hours, whether at home or at the employer's office. Employers are not precluded from lowering an employee's hourly rate provided the rate is at least the minimum wage, or from reducing the number of hours an employee is scheduled to work. It is important for employers to advise all nonexempt employees who are permitted to telecommute that they are not permitted to work overtime without advance approval and are required to accurately record all working time.

Salaried exempt employees generally must receive their full salary in any week in which they perform any work, whether at home or at the employer's office. There are circumstances in which employers can prospectively reduce the predetermined salary of a salaried exempt employee; however, doing so improperly may jeopardize the employee's exempt status. Employers should consult with counsel prior to reducing the salaries of exempt employees.

EMPLOYEE TRAVEL

May an employer restrict employees' business travel?

Employers may restrict business travel. The CDC has advised employers to restrict all nonessential business travel to countries currently subject to travel restrictions by the federal government. The federal government has also

discouraged unnecessary domestic airline travel. Employers should regularly refer to the CDC's website to stay up-to-date on travel restrictions and recommendations.

May an employer restrict employees' personal travel?

Employers can strongly encourage employees to forego personal travel; however, employers generally cannot prevent employees from engaging in legal off-duty activities, including traveling to affected areas for personal reasons. Some state and local laws also prohibit discrimination against employees based on their lawful off-duty conduct, including personal travel. That said, some state and local jurisdictions are enacting laws limiting personal travel. Employers may require employees to report if they have traveled to areas impacted by COVID-19, question employees regarding their exposure to COVID-19, and require those employees to quarantine before returning to work to avoid potentially spreading COVID-19 in the workplace.

TELEWORK

May employers require employees to telework?

Yes. OSHA, DOL, and CDC guidance all encourage employers to promote telework programs where possible to combat the spread of COVID-19. The telework policy should state that it is a temporary measure due to the pandemic and is not an acknowledgement that all of the essential functions of the employee's job can be performed remotely.

May employers treat employees differently with respect to permitting them to work from home (e.g., employee with kids home from school)?

Yes, but employers should establish clear criteria for telework eligibility to avoid claims that it has treated employees in protected categories (e.g., race, gender) less favorably.

LAYOFFS AND FURLOUGHS

Are there employee notification requirements associated with a furlough or short-term layoff?

Possibly, yes. Federal notice requirements generally are not triggered for temporary layoffs of less than six months or for layoffs (of any duration) affecting fewer than 50 employees at a single site. Applicable state laws may have lower thresholds (some as low as 25) to trigger notice requirements.

Are there exceptions for the notice period based on exigent circumstances such as this pandemic?

Possibly, yes. Federal law permits shortened notice periods in three circumstances, two of which may be applicable here. First, if terminations result from circumstances that were not reasonably foreseeable 60 days before employees are terminated, then shortened notice is allowed. An important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control, like an unanticipated and dramatic major economic downturn.

Second, if terminations result from a natural disaster, then shortened notice is allowed. In the event an employer is providing shortened notice of a layoff, that notice must be in writing and explain the reasons for the shortened notice. It is likely that this pandemic creates a sufficient basis to provide shortened notice periods as an unforeseen business circumstance; it remains unclear whether the pandemic also qualifies as a natural disaster within the meaning of federal law. Employers should also be aware that certain state laws do not provide means for shortened notice periods, although legislation is currently being considered in various jurisdictions to modify state standards.

RECORDKEEPING REQUIREMENTS

Do employers have recordkeeping obligations related to COVID-19?

Employers are required to record certain work-related injuries and illnesses. COVID-19 can be a recordable illness if a worker is infected as a result of performing work-related duties. 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; (2) the case is work-related, as defined by OSHA regulations; and (3) the case involves one or more of the general recording criteria set forth in OSHA regulations.

LABOR AND CBA ISSUES

For unionized workforces, are there additional considerations of which an employer should be aware?

Yes, unionized workforces present additional considerations when responding to the COVID-19 outbreak. Federal law obligates employers to bargain in good faith over mandatory subjects of bargaining such as hours and terms and conditions of employment. Employers that modify these conditions of employment may be subject to unfair labor practice claims even in emergency situations. Many CBA's contain provisions granting employers discretion in determining work assignments, scheduling, and layoffs. Employers with CBA's are advised to review their agreement and consult with counsel before modifying the employment conditions of their workforce. Employers should also review CBA's for force majeure clauses and consult with counsel to assess their applicability.