The Coronavirus: Helping Employers Through New and Developing Workplace Issues

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Agenda

• Introduction
• How We Got Here and Current Status
• The Latest from D.C. on Employment Law Issues
  - Paid Leave and Expanded FMLA – What Does this Mean?
• Common Employment Law Issues and Solutions
  - Leave
  - FLSA
  - OSHA
  - ADA/Discrimination
• Communicating Through Disruption
  - Key Messaging
  - Adapt Your Communication Playbook
• Questions?
COVID-19: How We Got Here and Current Status

• Pneumonia-like infection first identified in Wuhan, China in late-2019

• According to the CDC, the virus has been named “SARS-CoV-2” and the disease it causes has been named “coronavirus disease 2019” (abbreviated “COVID-19”)

• Symptoms include fever, cough, shortness of breath, and possibly death

• Elderly, those with underlying conditions (e.g., asthma, diabetes), or compromised immune systems are at greater risk of experiencing symptoms

• Infection spreads through close contact, coughing, sneezing, and potentially touching surfaces where the virus may live
COVID-19: How We Got Here and Current Status

- March 11, 2020 – World Health Organization Declares Pandemic
  - Does speak to the severity of the illness
- March 13, 2020 – President Trump declares National Emergency
- As of March 18, 2020, cases have been reported in every state with over 100 deaths
Latest from D.C.:
H.R. 6201 Families First Coronavirus Response Act

• Passed by the House on March 13, 2020
• Negotiated by Speaker Pelosi and Secretary Mnuchin, and supported by President Trump
• Impact on employers
  - Emergency Paid Sick Leave
  - Expended FMLA Coverage
• Current status of the bill
FMLA & COVID-19

- Family and Medical Leave Act
  - Provides 12 weeks of unpaid leave for eligible employees of covered employers to address their own serious health condition or to take care of a parent, spouse, or child with a serious health condition
  - Continuation of health benefits

- If an employee is afraid of contracting the virus and does not want to come to work, are they FMLA-eligible?

- May still require certification under existing and expanded FMLA laws, but consider relaxing standards given the rush at doctor’s offices

- Remember State and local leave requirements
Our Business is Closed – Do I Have to Keep Paying My Employees?

Non-exempt employees (hourly)
- Only must pay them if they actually work – does not matter where
- Must be paid at least minimum wage and are entitled to overtime
- Employer options to provide pay during difficult times

Exempt employees (salary)
- If these employees work at all during a week, they are entitled to that full week’s salary
- May deduct from salary for full-day absences for sickness and disability under sick leave policies
Title VII and COVID-19

• Title VII prohibits employers from treating employees adversely because of their race or national origin solely out of fear of pandemic virus
• Many states have their own statutes
• Recommended Employer Steps
  - Keep health information of employees confidential to minimize gossip
  - Educate employees on how virus is actually spread and that it is not unique to any ethnic group
  - Reinforce your non-discrimination policy
  - Reinforce anti-bullying measures
The ADA and COVID-19

• ADA applies to employers with 15 or more employees

• Typically, viruses like the flu or common cold (i.e., short-term impairments) do not qualify as disabilities under the ADA
  - Do not have the full-picture for COVID-19 yet

• Employer Pitfalls: “Regarded As” claims
Prior EEOC ADA Guidance During H1N1 Pandemic


- ADA regulates what employers can ask of employees
  - Inquiries and examinations must be job-related and consistent with business necessity
  - Must have reasonable belief that ability to perform essential job function with be impaired by medical condition or that employee poses a direct threat
  - Reasonable belief must be based of objective evidence obtained prior to making the inquiry or requiring the examination

- Must provide accommodations, unless doing so would cause an undue burden
Prior EEOC ADA Guidance During H1N1 Pandemic

• Cannot exclude individuals with disabilities from the workplace, unless they pose a direct threat to others (i.e., a significant risk of substantial harm, even with a reasonable accommodation)

• Must treat all medical and health-related information and records as confidential and separate from personnel file
Prior EEOC ADA Guidance During H1N1 Pandemic

Employer rights during a pandemic:

- May send employees home if they are displaying influenza-like symptoms
- May ask employees who report feeling ill at work or who call in sick if they are experiencing influenza-like symptoms
- May ask about exposure to pandemic disease while traveling, even if they are not showing symptoms
- May encourage telework as a control strategy
What Can I Do About Employees Not Showing Symptoms?

- If they have recently traveled to hotspots (i.e., China, Iran, Italy, Washington state), you may ask them to stay home for 14 days.
- If they have traveled to other impacted areas and report contact with an affected person, you may ask them to stay home.
- CDC Interim Guidance – Consider requiring employees with affected household members with the virus to notify employer.
Can We Take Temperatures?

• According to the EEOC, taking an employee’s body temperature is a medical examination.

• If pandemic influenza symptoms become more severe than the seasonal flu or the H1N1 virus in the spring/summer of 2009, or if pandemic influenza becomes widespread in the community as assessed by state or local health authorities or the CDC, then employers may measure employees’ body temperature.
Can We Take Temperatures?

On March 11, 2020, the CDC issued guidance for the next thirty (30) days for Santa Clara County, CA, and Seattle-King, Pierce, and Snohomish Counties, WA that specifically recommends that employers in these jurisdictions conduct “[r]egular health checks on arrival each day (e.g., temperature and respiratory symptom screening) of staff and visitors entering buildings”
Can We Take Temperatures?

Minimize (but not eliminate) risk by taking these steps:

• Emphasize symptom identification – not trying to determine whether an employee has impairment/condition
• Use non-invasive means of temperature readings
• Conduct testing in ways that ensure employee privacy
Employee Safety and COVID-19

• No specific OSHA standards formulated for COVID-19, but existing standards likely apply

• OSHA Interim Guidance Issued: https://www.osha.gov/Publications/OSHA3990.pdf
Existing OSHA Standards

• The General Duty Clause requires employers to furnish to each worker “employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.”

• OSHA's Personal Protective Equipment (PPE) requires using gloves, eye and face protection, and respiratory protection.

• OSHA Bloodborne Pathogens Standard

• Recording/reporting occupational injuries and illnesses

• Access to employee exposure and medical records

• Hazard Communication
OSHA Recordkeeping and COVID-19

• Per OSHA, COVID-19 can be a recordable illness if a worker is infected as a result of performing work-related duties

• Must meet the following:
  - The case is a confirmed case of COVID-19
  - The case is work related as defined by 29 C.F.R. § 1904.5
  - The case involves one or more of the general recording criteria in 29 C.F.R. 1904.7 (e.g., medical treatment beyond first-aid, days away from work)
Employee Rights and COVID-19

• Section 11(c) – prohibits retaliation against employees for raising concerns about safety and health conditions

• Section 13(a) – entitles all employees to refuse to work if they reasonably believe they are in imminent danger
  - If employees are unionized, “No-Strike” clause may not necessarily help.
  - Under NLRA, refusing to come to work may constitute “protected concerted activity”
Industry Specific OSHA Concerns

• Big concern around healthcare workers and first responders at front-lines of the battle

• CDC has issues specific guidance for these workers: https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-risk-assesment-hcp.html
Worker’s Compensation and COVID-19

• State dependent
• Healthcare workers/first responders would likely qualify
  - Washington Gov. Inslee’s efforts
• Other employees? Depends on the facts
  - Did they contract at work?
    o How do they prove that?
  - Caused by conditions peculiar to work?
Unionized Workforces

- NLRA requires you to bargain in good-faith over terms and conditions of employment, wages, and hours
- Is COVID-19 a “compelling economic exigency?”
WARN ACT

• 100 or more full-time employees
• Applies to plant closing or mass layoffs
• Must provide 60 days notice
• Exemption for unforeseeable business circumstances
Teleworking Policies

- Do you even have one?
  - Does it have suggested OSHA language?
- Is your IT system capable of handling influx of remote workers?
- What equipment will you provide?
- How will you ensure security of proprietary information or trade secrets?
  - Personal equipment, USBs, third-party email and storage accounts
- What will you allow employees to take home?
- How will you handle IT disruptions?
Communicating through Disruption

• This situation is fluid - making the need for communication even more critical
• Across the board, people are asking questions; *economy, job security, supply chain, service disruption, emotional distress*
  - It’s critical that organizations provide *regular* and *honest* updates to address the growing anxiety and uncertainty of this situation
• **First Focus: Safety & Security**
• Don’t overpromise or overstate
• Be transparent
• Streamline communication
• Let customers know you are prioritizing staff safety while doing what you can to provide support and services with minimal disruption
Create an Adaptable Communication Playbook

- Know your audiences: employees, customers, media, vendors, investors, etc.
  - What is your communication plan and message to each audience?
- Designate a spokesperson and create message approval process
- Be prepared to provide timely updates and answer questions
- Designate a single email or team of people and provide them with talking points and FAQ
- Create meaningful communications
Know Your Audiences

Employees:
• Am I getting paid?
• Will I have a job?
• Am I safe coming to work?
• What are you doing to protect me?
• What can I expect?

Customers:
• Will I still get my products and services?
• Will there be service delays or cancellations?
• Is it safe to do business with you?

Media:
• Are you a good steward of public health?
• How are you keeping your employees and customers safe?
• Are you making decisions in the best interest of your employees and community?

Investors and stakeholders:
• Financial impact of the pandemic
• What is the business plan moving forward?
• How are local and state mandates affecting current and future operations?
Key Messaging

Educate employees on the situation
- What are you doing to keep workplace safe
- Let employees know what to do if they think they are sick
- Inform employees if there is possible exposure
- Reassure employees that you will provide regular and factual updates

Set and manage expectations
- Communicate contingency plans
- Operational changes
- Remote work policies/adaptations
- Self-screening before coming to work

Reduce anxiety among workforce
- Let employees know you are in this with them
- Communicate that the situation is fluid but you will remain transparent

Communicate what you know right now
- Don’t speculate
- Don’t be paralyzed by fear of the unknown

Create messaging that assures customers that your organization is doing all it can to ensure consistent delivery of services (or products) they need and expect. If there are delays, substitutions, cancellations – make sure and let them know.
Stay True to Your Brand Promise

- Communication is just as much about what you do as what you say
- This is a time for organizations to stay true to their brand promise
  - Mission
  - Vision
  - Values
- Remember the big picture and who your organization serves
- When a brand’s actions align with its core values, it reminds customers and employees that they’ve selected the right partner
Why is Communication Through COVID-19 Important?

• Reduces employee anxiety and reinforces message that you care about their safety and put the employee first
  - Builds trust and drives compliance
• Reinforces your brand and integrity
• Supports retention and recruitment
• Brand-building opportunity
Key Takeaway’s

• Focus on your most immediate communication needs and don’t make promises about the future
• Communicate regularly with the information you do have
• Remain empathetic
• Remember – this is new territory for many of us and our communications will need to adapt day-by-day
• Keeping your lines of communication open, actionable and transparent will help reduce the anxiety and fears of your workforce
To help provide perspective and education on COVID-19, Clark Hill attorneys have produced several pieces of thought leadership to assist clients and colleagues through this difficult and rapidly-changing time.

Please visit www.clarkhill.com/pages/covid-19 for access a wide range of resources related to coronavirus.
Legal Disclaimer

This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.