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EMPLOYERS' RESPONSE TO COVID-19

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As COVID-19 (Coronavirus) continues to affect our daily lives, and is now officially considered a pandemic by the World Health Organization (WHO) and the Center for Disease Control (CDC), it is crucial for employers to be aware of the steps the government is taking to reduce infection, how those steps affect your business, and the protocols your business needs to implement to ensure you are complying with what is required under these unusual circumstances. Because the national response is changing daily, it is important to remain up-to-date on new laws, regulations, and government mandates that are likely to begin taking effect rapidly.

EMPLOYER SCREENING AND EXAMINATIONS

To a certain extent, the COVID-19 pandemic is largely unchartered territory. However, there are certain laws, regulations, and government advisory statements that may help an employer deal with these complex issues.

In early March 2020, the Equal Employment Opportunity Commission (EEOC) released a statement on the COVID-19 pandemic, referring employers to an advisory opinion the EEOC previously published in 2009 amidst the H1N1 ("swine flu") outbreak. In its 2009 advisory opinion, the EEOC implemented a temporary waiver of certain provisions of the Americans with Disabilities Act (ADA) that would otherwise prohibit an employer from taking action based on an employee's medical conditions. In taking the position that illnesses related to global pandemics are dissimilar to the disabilities that the ADA was designed to protect, the EEOC calls for more flexibility in allowing employers to conduct medical examinations and screenings in the workplace if doing so is "consistent with a business necessity" or if the employer has "a reasonable belief the employee poses a direct threat to the health or safety" of others and the workplace.

> EXAMPLE: An employer may institute screenings for employees who exhibit flu-like symptoms in the workplace, but may not make such inquiries to employees who work remotely or do not come into contact with other employees as part of their job description.

Relying on the CDC's recommendations for employers amidst the COVID-19 pandemic, employers may screen and examine employees to ensure the health and safety of others in the

workplace. The CDC suggests that employees should be screened if (a) they are exhibiting flu-like symptoms such as fever, dry cough, shortness of breath, etc.; (b) the employee recently returned from travel abroad; or (c) the employee is known to have been exposed to a person who is a confirmed carrier of the virus. During these examinations, an employer may ask an employee if he or she is experiencing any flu-related symptoms, what symptoms the employee is experiencing, whether the employee has visited a doctor or has been tested for COVID-19, the employee's recent travel history, and the employee's reasoning for any recent work absence.

The CDC and U.S. Department of Labor (DOL) advise that employees who exhibit flu-related symptoms can and should be sent home immediately and prohibited from returning to work until they are symptom-free for at least 24 hours. If an employee has traveled to a country designated a Level 3 travel risk area (currently China, Iran, South Korea, and much of Europe), it is recommended that the employee be sent home immediately and be required to remain away from the workplace for 14 days. Further, if an employee is confirmed to have COVID-19, it is suggested that all employees who have been in contact with that employee should be sent home and a professional cleaning company should be hired to do a full cleaning of the affected workspace.

Ultimately, any medical information employers received from an employee during one of these screenings, examinations, or otherwise, must remain confidential. If an employee is confirmed to have COVID-19, employers should inform other employees about their potential exposure to the virus, but the identity of the infected employee must remain confidential to the extent possible.

Ultimately, employers must be careful not to violate any state, federal, or local laws when implementing new protocols designed to prevent the spread of COVID-19. For instance, employers should avoid taking adverse employment actions (termination, demotion, etc.) against an employee who misses work or is sent home due to the outbreak of COVID-19. Additionally, employers must implement all such protocols uniformly and equally among all employees to avoid violating anti-discrimination laws. For example, if an employer chooses to send an employee home for exhibiting flu-like symptoms, it should also send home all other employees exhibiting flu-like symptoms.

WORKPLACE SAFETY STANDARDS

The General Duty Clause of the Occupational Safety and Health Act (OSHA), requires employers to keep their workplaces free from recognized hazards that are causing or are likely to cause death or serious physical harm. While it remains to be seen whether COVID-19 is considered a "recognized hazard" pursuant to 29 U.S.C. 654(a)(1), OSHA standards tend to rely heavily on CDC guidelines, which could consider a pandemic the scale of COVID-19 as such a hazard. Accordingly, employers must be cognizant of potential health risks posed by certain employees and implement protocols for employees to remain safe during a potential outbreak. Additionally, COVID-19 may be considered a recordable illness pursuant to 29 C.F.R. 1904 – Subpart C. For example, an outbreak of an infectious disease or similar illness occurring at a medical facility may be considered a recordable illness, under the Code of Federal Regulations, if such an outbreak is an illness resulting from events or exposures occurring in the work environment. Please note,

however, that the Bloodborne Pathogens standard found in 29 C.F.R. 1910.1030, which requires employers take certain measures during the outbreak of a bloodborne pathogen, does not apply in the response to COVID-19. Please visit OSHA's website (https://www.osha.gov/SLTC/covid-19/standards.html), which has an employer's guide to COVID-19, for more general guidelines and tips for maintaining a safe workforce during this outbreak.

EMPLOYEE PAY AND BENEFITS

In the coming weeks, as more employees either choose to work from home or are required to do so, employers will face challenges regarding employee pay and conditions of employment. Generally speaking, unless otherwise stated in an employee's contract, employers are not required to provide paid leave or paid time off to employees who are unable to work due to an outbreak of COVID-19. Additionally, employers may require employees forced to take time off during an outbreak to use any accrued paid time off (sick and/or vacation days) during such an outbreak. However, employees must be properly compensated for any work they perform remotely or off-site. Minimum wage and overtime laws remain effective during a pandemic.

If you employ union workers and are requiring such employees stay home from work, to the extent possible, you must bargain in good faith with such employees prior to making any unilateral changes to their employment status or benefits. We strongly advise that all union-employers familiarize themselves with their respective collective bargaining agreements prior to making any such changes.

If your business is a covered employer under the Family and Medical Leave Act (FMLA), an employee who contracts COVID-19 or needs to care for a spouse, child, or parent who has contracted the virus, may be eligible for up to 12 weeks of job-protected, unpaid leave and a continuation of his or her health insurance benefits during the time that he or she is unable to work because of the virus. Depending on the terms of your leave policy, the employee may choose to use accrued paid leave during his or her FMLA leave, or you may require the employee to do so. According to the DOL, the FMLA does not apply to leave taken by an employee merely for the purpose of avoiding exposure to COVID-19 or to care for a healthy dependent whose school or daycare is closed because of COVID-19. There is currently no federal law addressing private-sector employees who take off from work to care for healthy dependents.

However, in response to COID-19, the United States House of Representatives recently passed a bill that, if enacted, would expand the scope of FMLA job-protected leave and would require employers to provide paid leave in certain circumstances. It is important for employers to monitor this bill (H.R. 6201) and respond accordingly if it passes. Further, employers should also be mindful that some states have previously enacted their own state family medical leave law, and employers must comply with those analogous state laws where applicable.

MASS LAYOFFS

If your business is covered by the Worker Adjustment and Retraining Notification (WARN) Act, you are generally required to provide affected employees at least 60-days' notice before a mass layoff or plant closure as defined by the Act. However, the normal 60-days' notice

likely does not apply if the mass layoff or closure is due to the effects of COVID-19, as this would likely fall under the "unforeseeable business circumstances" exception to the WARN Act. However, even where the unforeseeable business circumstances exception applies, a covered business is required to give its employees as much notice as is reasonably practicable. Employers should also be mindful of potential state laws similar to the Federal WARN Act, and ensure that any mass layoff or closure complies with any such analogous state law.

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