



Coronavirus (COVID-19) Updates for Employers

March 16, 2020

In our previous alert on the coronavirus (COVID-19) (<https://www.cullenllp.com/blog/coronavirus-how-employers-should-prepare-for-a-possible-outbreak-in-the-united-states/>), we discussed the facts that presented themselves at the time. Needless to say, events have moved swiftly and have affected every aspect of life in the United States, from school children to college students to restaurant patrons to businesses of every size. We'll try to answer some of the more pressing questions on the topic.

1. Workplace safety. The U.S. Occupational Safety and Health Administration ("OSHA") has prepared a detailed pamphlet on preparing the workplace to be as safe as possible in light of the pandemic. The information can be found at <https://www.osha.gov/Publications/OSHA3990.pdf>.
2. Can employees refuse to work if they think the workplace is unsafe? —It depends. The Occupational Safety and Health Act states that employees may refuse to work if they are in "imminent danger", which is defined as "any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act." A general fear of being in a public place due to the current pandemic likely would not rise to this level. However, if an employee or customer in a particular workplace received a positive diagnosis for the coronavirus, the immediacy of harm is a closer fact-specific question. In such circumstances, please consult your legal advisor for specific advice.
3. Can we send home employees who are sick, or who appear to be sick, or who have been exposed to someone who is sick? —Absolutely yes. This does not violate prohibitions in the Americans with Disabilities Act ("ADA") on dealing with employees with disabilities.
4. Can we require all employees to have their temperatures taken when they report to work? —Probably. The Equal Employment Opportunity Commission ("EEOC") has published guidance on pandemic-related issues: https://www.eeoc.gov/facts/pandemic_flu.html. While this guidance pre-dates coronavirus, its principles still hold. According to the EEOC:

During a pandemic, may an ADA-covered employer take its employees' temperatures to determine whether they have a fever?

Generally, measuring 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. However, employers should be aware that some people with influenza, including the 2009 H1N1 virus, do not have a fever.

Since coronavirus has been declared to be a pandemic, and President Trump has formally declared a national emergency, it would appear that conditions have been met to allow the taking of temperatures. Since this is a

medical exam, care should be taken to keep this information segregated from any other employee information. Indeed, if the employee does not have a temperature, perhaps consider discarding the results (i.e. make the test pass/fail). As this course of action has a number of risks, please consult your legal advisor before implementing such a program.

5. If we close temporarily, must we pay employees anyway? —The answer is complex and grows more complex by the day. For non-exempt employees (those who are not eligible for overtime, including but not limited to all hourly employees), the general rule is that an employer need only pay for time worked. No doubt this is a harsh result, but that is the law. For employees who have paid time off, such as sick and vacation leave, employers can allow employees to utilize this time. (In the City of New York, the Employee Safe and Sick Time Act mandates that employees be allowed to use their sick time if their employer closes due to a public health emergency, even if they are not actually ill at this time.) Many in government are calling on employers to pay absent employees voluntarily.

For exempt employees (salaried employees whose duties are executive, administrative or professional), an employer need not pay the employee in any week in which the employee performs no work. If the employee works at all in a workweek, the employee must be paid the full week's pay, with certain exceptions. One is for businesses that have a bona fide sick leave plan. If the exempt employee uses all available time under that plan, the employer can make deductions from pay in full day increments if the employee doesn't work. (Partial-day or hourly deductions are not permitted.)

This landscape may change. On March 14, 2020, the U.S. House of Representatives passed the "Families First Coronavirus Response Act". Under this bill, employers who employ fewer than 500 employees must pay eligible employees an amount equal to 2/3 of the employee's average monthly earnings, not to exceed \$4,000, for up to 12 weeks. Eligible employees include (1) employees who have a current diagnosis of COVID-19; (2) employees that are under quarantine; (3) employees who are engaged in caregiving for an individual who has a current diagnosis of COVID-19 or is currently under quarantine; and (4) employees who are engaged in caregiving for a child, or other individual unable to provide self-care, because of a COVID-19 related school, care facility, or program, closing. To obtain emergency paid leave, the employee must have been employed by the employer for at least 30 days.

Further, employers who employ fewer than 500 employees must pay eligible full-time employees two weeks (80 hours) of paid sick leave in addition to any paid sick leave to which they were already entitled. Eligible employees include employees who live or work in an area in which a public health emergency has been declared and: (1) who cannot go to work because their presence would potentially harm others due to exposure to COVID-19 or symptoms relating to the virus; (2) who have to care for a family member who has been told to stay home due to COVID-19; and (3) who have to care for their children because of school closings.

The Senate has not yet taken up the bill, and changes may well be forthcoming. We'll keep you informed.

New York State may also enter the legislative arena by imposing a paid sick leave requirement.

If you have questions regarding any aspects of employment law and any implications the COVID-19 virus has caused or will cause to your place of business, feel free to contact Thomas B. Wassel at (516) 357-3868 or via email at twassel@cullenllp.com, James G. Ryan at (516) 357-3750 or via email at jryan@cullenllp.com, or Hayley B. Dryer

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