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COVID-19 - Answers to Questions on Every Employer's Mind

Seemingly overnight, COVID-19 has changed the employment landscape across the country. As COVID-19 continues to spread, employers will have to make a number of business and employment decisions. Employers should know which laws govern those decisions and what their possible implications will be. The following are some of the most common questions being asked about COVID-19 and the workplace, and guidance for employers in New York, New Jersey, Connecticut and Massachusetts in response to those questions.

If employees are unable to work because they test positive for COVID-19 or have symptoms of COVID-19, what employment leave laws are triggered?

State Paid Sick Leave Laws

Under the New York City, Westchester County, New York, New Jersey, Massachusetts and Connecticut paid sick leave laws, employees may use paid sick leave to cover their time off from work because of their own mental or physical illness, injury or health condition; to care for a covered family member; or to obtain preventive medical care. The laws provide eligible employees with up to 40 hours of paid sick leave per year. An employer may require employees to confirm their intent to use earned sick time, but may not compel the use of earned sick time under the New York City, Westchester County, New York or New Jersey laws.

State Temporary Disability Insurance

Once earned sick leave is exhausted, employees may apply for state temporary disability insurance in New York or New Jersey. The state determines the amount and duration of benefits based on employees' weekly wages and the period of time that they are unable to work because of illness.

Workers' Compensation Insurance

If employees establish that they contracted COVID-19 through work, they may be eligible for state workers' compensation benefits. This may include employees contracting the virus through a co-worker or customer, or during work-related travel.

State Family and Medical Leave Laws

Under the Connecticut Family & Medical Leave Act, employees are allowed to take up to 16 weeks of unpaid leave in any two-year period to care for their own serious illness.

The Federal Family and Medical Leave Act (FMLA)

Under the FMLA, eligible employees may take time off from work for their own serious health condition. Employees who want to take time off from work solely for the purpose of avoiding possible exposure to COVID-19, however, would not qualify for FMLA leave. While FMLA leave is not paid leave (unless an employer policy provides for using other paid time off during

FMLA leave), employees taking such leave are entitled to reinstatement to the same or substantially equivalent position in terms of pay, benefits and responsibility. Employers may designate employees' absences as FMLA leave.

Pending Federal Emergency Paid Sick Leave Act

Currently pending before the U.S. Senate is the Families First Coronavirus Response Act (FFCRA). This bill, which passed the House of Representatives on March 16, is a compilation of several proposed laws relating to COVID-19, including the Emergency Paid Sick Leave Act (EPSLA).

As currently written, the EPSLA applies to employers with fewer than 500 employees. Employees are eligible for EPSLA paid sick leave if they are unable to work or telework and (1) are subject to a federal, state, or local quarantine or isolation order related to COVID-19; (2) have been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19; or (3) are experiencing symptoms of COVID-19 and seeking a medical diagnosis.

Full-time employees are eligible for up to 80 hours of paid sick leave. Part-time employees are eligible for the total number of hours they work, on average, over a two-week period. Employees are to be paid no less than two-thirds their regular rate of pay. Pay is capped at no more than $511 per day and $5,110 in the aggregate. Employers may not require that employees use other paid time off (PTO) before using EPSLA leave.

If employees are unable to work because they need to care for a family member who has contracted or is exhibiting symptoms of COVID-19, what employee leave laws are triggered?

Paid sick leave laws, the FMLA, the pending legislation discussed above and a number of state family leave laws (e.g. New Jersey Family Leave Act and Connecticut Family & Medical Leave Act) provide employees with leave to care for their family members with a serious health condition. Some states, including New York and New Jersey, have insurance benefits that provide partial income continuation during such leave.

If employees are unable to work because their child's school or day care is ordered closed by a public official for a public health reason, what employee leave laws are triggered?

State Paid Sick Leave Laws

The New York City, Westchester County, New York and New Jersey paid sick leave laws permit employees to use earned sick leave to care for their child when the child's school or day care has been ordered closed by a public official because of an epidemic or other public health emergency.

Pending Amendments to the FMLA

As currently written, the FFCRA amends the FMLA employer threshold from employers who "employ 50 or more employees" to employers with "fewer than 500 employees." It does provide an exemption for employers with fewer than 50 employees where compliance with the amendments would jeopardize the viability of the business as a going concern. Under the amendments, employees may take FMLA leave to care for a child under 18 years of age if the child's school or day care has been closed or the child's regular care provider is unavailable due to a COVID-19 public health emergency. The first 10 days of FMLA leave may consist of unpaid leave, whereby employees may elect to use accrued vacation, PTO or other paid medical/sick leave. After the initial 10 days, employers must pay employees for FMLA leave at no less than two-thirds of their regular rate of pay. Pay is capped at no more than $200 per day and $10,000 in the aggregate.

Pending Federal Emergency Paid Sick Leave Act (EPSLA)

The proposed EPSLA will provide paid sick leave to employees who care for a son or daughter under 18 years of age if their child's school or day care has been closed or the child's regular care provider is unavailable due to a COVID-19 public health emergency. Employees are to be paid no less than two-thirds their regular rate of pay. Pay is capped at no more than $200 per day and $2,000 in the aggregate.

Can an employer take its employees' temperatures to determine whether they have a fever?

Possibly, depending on the circumstances. Taking an individual's temperature is considered a medical examination under the Americans with Disabilities Act (ADA). Under the ADA, employers may require medical examinations if, after conducting an individualized analysis of several factors, they have a reasonable belief that employees pose a direct threat to the health or safety of themselves or others that cannot otherwise be eliminated or reduced by a reasonable accommodation. Further, under EEOC guidelines, employers may take employees' temperatures if the Centers for Disease Control and Prevention (CDC) or state or local health authorities determine that a pandemic such as COVID-19 has become widespread in the community.

What obligations does an employer have if it decides to lay off or furlough employees because of COVID-19?

The Worker Adjustment and Retraining Notification (WARN) Act imposes notice requirements on employers with 100 or more employees for certain plant closings and other mass layoffs. The WARN Act includes an unforeseeable business circumstance exemption, which arguably may include a closure due to COVID-19. Many states, including New York, New Jersey and Massachusetts, have their own mini-WARN Acts that provide differing obligations and thresholds. Connecticut does not have a mini-WARN Act, but it requires extension of employer-provided health insurance in the event of a plant closing. Layoffs or furloughs may trigger employees' eligibility for unemployment benefits. They may also have an impact on employee benefits, triggering the need to issue COBRA notices for affected employees.

Can an employer mandate that employees telework or work from home as a result of COVID-19?

Yes, employers may mandate that employees telework or work from home. If such a policy is not implemented for all employees, employers must be careful not to cause a discriminatory disparate impact on any one group of employees because of their protected class. In addition, employers should not generally require employees to pay or reimburse the employer for the costs associated with working from home. Doing so may inadvertently reduce employees' wages to below minimum wage or overtime compensation. If employees work from home, employers are still required to keep accurate time records and pay minimum wage and any required overtime compensation. Workers' compensation laws also apply to employees asked to work from home.

Must employers pay nonexempt/hourly employees if they voluntarily close because of COVID-19?

There is no obligation to pay nonexempt/hourly employees for time that they do not work, including because the employer closes as a result of COVID-19. Employers should, however, review their policies and, in a unionized workforce, the applicable collective bargaining agreement (CBA) to determine whether there are any contractual obligations to pay employees under such circumstances. Employees may also be eligible for unemployment insurance benefits. In New Jersey, if the voluntary closing lasts less than eight weeks, the state will consider employees temporarily laid off and suspend the requirement that employees be "able, available and actively seeking work" in order to receive benefits.

Must employers pay exempt employees if they voluntarily close because of COVID-19?

Many employers are requiring exempt employees to work from home while their brick-and-mortar locations are closed. Exempt, salaried employees generally must receive their full weekly pay for any week in which they perform any work. Thus, for any weeks in which the exempt employee works from home, the employer must pay employees their full weekly salary unless there is a permissible deduction from the exempt employees' pay. If the employer deducts pay from exempt employees because they work less than a full week, the employer runs the risk of affecting employees' exempt status. An employer is not required to pay exempt employees for any week in which such employees perform no work.

Is an employer required to reinstate employees after mandated isolation or quarantine?

In New Jersey, yes. Under N.J.S.A. 26:13-16, if employees have been isolated or quarantined by the New Jersey Commissioner of Health, they must be reinstated to their position or a position of like seniority, status and pay, unless the employer can show that its circumstances have changed so as to make doing so impossible or unreasonable.

Is an employer required to reinstate employees after a voluntary isolation or quarantine?

Whether an employer is required to reinstate employees after voluntary isolation or quarantine will be determined by whether the leave was designated as and protected by either a state paid sick or leave law or the FMLA.

What does the employer do if employees in the workplace test positive for, believe they have been exposed to or have symptoms of COVID-19?

OSHA mandates that an employer provide a workplace free of recognized hazards that are likely to cause death or serious physical harm to its employees. Employees with COVID-19 would constitute such a recognized hazard. Thus, if employees, while at the worksite, notify an employer that they have contracted, have been exposed to or have symptoms of COVID-19, the employer should immediately isolate those employees from others and then send them home to self-quarantine for at least 14 days. If employees notify the employer from home that they have contracted COVID-19, the employer should direct them to remain home and self-quarantine for at least 14 days.

While the employer can require employees to submit a medical release to work prior to allowing them to return, the CDC is requesting that employers consider relaxing such requirements for employees with acute respiratory illness because of the difficulty in obtaining such medical certifications at this time, and to reduce the strain already being placed on the healthcare system by COVID-19.

Pursuant to CDC guidelines, the employer must notify fellow employees of their possible exposure to COVID-19 in the workplace. The employer must do so while maintaining confidentiality of the COVID-19-infected individuals as required by the ADA. Co-workers should be referred to the CDC guidance for how to conduct a risk assessment of their potential exposure. See link here.

Can employers mandate that employees notify their employer if employees or their family members have tested positive for, have been exposed to, or are exhibiting symptoms of COVID-19?

There is no prohibition against mandating that employees notify the employer if employees or their family members have tested positive for, have been exposed to, or are exhibiting symptoms of COVID-19. Any policy mandating such disclosure

should contain language stating that employees will not be discriminated or retaliated against because of their disclosure or illness, and that the employer will strive to keep such medical information confidential to the extent possible.

For more Day Pitney alerts and articles related to the impact of COVID-19, as well as information from other reliable sources, please visit our COVID-19 Resource Center.

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