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Preparing Your Business for the New Coronavirus, COVID-19

Employers across the country now brace for the inevitable impact of the Coronavirus Disease 2019, or COVID-19, on their employees and workplace. During this time, it is essential that businesses have not only an understanding of the illness and the guidance from the Centers for Disease Control (CDC) but also the overlay of other employment laws and policies that will govern decision-making. Given the CDC's statement on February 29, 2020, that" [i]t's likely that at some point, widespread transmission of COVID-19 in the United States will occur," employers should open the line of communication with employees now even if policies may evolve over time.

All employers have a duty to provide "employment and a place of employment which are free from recognized hazards that are causing or likely to cause the death or serious physical harm to employees" under OSHA's General Duty Clause. Employees also have the legal right to refuse to perform work if they have a good faith belief that they will be exposed to imminent danger. Employers should keep this in mind as they navigate the health and safety risks posed to employees by COVID-19.

Basics of COVID-19

Coronaviruses are a large family of viruses that may cause illness in animals or people. COVID-19 is a new coronavirus that was unknown until its outbreak in Wuhan, China, in December 2019. According to the World Health Organization (WHO), the most common symptoms of COVID-19 are fever, tiredness, respiratory issues and dry cough. Other symptoms include aches and pains, nasal congestion, runny nose, sore throat, and diarrhea.

COVID-19 spreads from person to person when people infected with COVID-19 cough or exhale and project small droplets from their nose or mouth. According to the CDC, those droplets can land in the nose or mouth of people standing close by (within 3 to 6 feet) and be inhaled into their lungs. In addition, droplets land on objects or surfaces, and people catch the virus by touching those objects or surfaces and then touching their eyes, nose or mouth. The WHO currently believes the virus is mainly transmitted this way, as opposed to being transmitted through the air. Both the CDC and the WHO are regularly publishing guidance on the disease, including symptoms and transmission, travel advice, and outbreak updates.
See here and here.

Considerations for a COVID-19 Policy

As an initial matter, employers should take the following steps:

1. Educate employees on the virus and transmission.
2. Instruct employees in a verbal or written communication to:

   a. wash their hands frequently and avoid touching their own eyes, nose and mouth;
   b. cover their mouth and nose with a flexed elbow or tissue when coughing and sneezing;
   c. discard tissues in a garbage can and clean their hands after coughing and sneezing;
   d. maintain at least a 3-to-6 foot distance from people;
   e. disinfect frequently touched objects and surfaces;
   f. stay home if they're sick, and seek medical care early when showing symptoms; and
   g. restrict or limit nonessential travel to affected regions.

3. Provide employees and others entering the workplace tissues, trash receptacles, hand sanitizer and a place to wash their hands.
4. Communicate available employee health services and encourage employees to obtain the seasonal influenza vaccine.
5. Maintain and improve workplace cleaning/maintenance routines, including providing supplies to clean employee work surfaces and electronic equipment.
6. Evaluate existing leave of absence/sick leave policies to determine how to address the various leave scenarios that may arise.
7. Encourage ill employees to stay home without fear of job loss or reprisal.

Business Travel Restrictions

As employers struggle with scheduled business travel, they should be mindful of CDC threat level assessments and warnings about travel. See here. With regard to international travel, as of March 2, 2020, the CDC has issued the highest threat level, a level 3 travel notice, and recommends that people avoid all nonessential travel to China, Iran, Italy and South Korea. It has issued a level 2 travel notice for Japan, advising high risk travelers—including older adults and people with chronic medical conditions – to use increased precautions when traveling or postpone any nonessential travel. Employers should consider curtailing business travel to affected areas.

As for travel within the United States, some employers have suspended nonessential domestic business travel and have postponed large conferences and gatherings. Employers should be prepared to address concerns raised by employees about business travel, whether international or domestic, considering reasonable alternatives to travel, such as videoconferencing, when feasible. When travel is essential or planned for the coming months, employers may consider advising employees to purchase refundable airline tickets. Some airlines are waiving change fees for airfare to accommodate travelers who want to book travel now but have the option to cancel later depending on how this situation develops.

Employees' Personal Travel

Employers should be mindful that it is more difficult to restrict employees' personal, nonbusiness-related travel. Nevertheless, an employer may ask employees if they have traveled to affected areas and whether they have been exposed to the virus during travel. Employers who make such inquiries, however, must ask all employees who have traveled recently to impacted areas and must not direct these inquiries to employees of a particular national origin or race. Employers should avoid other behavior or travel restrictions that may be perceived as motivated by national origin or race. Due to government-imposed restrictions on individuals returning from certain affected areas, an employer may require an employee who has traveled to China, Italy, Iran, South Korea or another affected area to remain at home for a period of time to make sure that symptoms do not develop during the 14-day incubation period for COVID-19.

Employers should also consider that concerns about illness associated with travel could result in future claims that an employee was regarded as disabled if adverse actions are taken against them. Notably, with respect to potential claims of disability discrimination, several federal courts have held that the Americans with Disabilities Act (ADA) protections do not apply if an employer bases an employment action on a potential that an employee may become sick or disabled at some later time. However, state and local laws on disability discrimination may reach a different conclusion.

Legal Issues Surrounding Leaves of Absence

As employers make decisions with respect to absences due to employee illness, school closures, exposure-based quarantines and voluntary quarantines, they must consider state and federal leave laws, privacy, and their own time-off policies. Although certain jobs may be performed remotely, others require employees to be physically present in the workplace and, therefore, absences may impact their pay and use of leave.

Employers must be conscious of whether any leave of absence triggers protections under the Family and Medical Leave Act (FMLA) and state or local sick leave laws or workers' compensation laws. For eligible employees, depending on the symptoms experienced, COVID-19 may qualify as a serious health condition allowing the employee to take job-protected FMLA leave if either the employee or a covered family member contracts the disease. In addition to providing paid time off for illness, a number of state sick leave laws, such as in New York and New Jersey, allow employees to use earned sick leave due to a public health emergency or if they need to care for a child whose school or child care provider is closed due to a public health emergency. Workers' compensation laws may also come into play if employees contract the disease as a result of business travel and claim their illness is work related.

Privacy rights may also be triggered by absences. Under many state sick leave laws, employees cannot be required to disclose personal health information. Thus, employers must carefully manage what they ask employees about their leave. If employees do disclose such information, employers must use discretion to protect the employees' confidentiality while balancing the safety of others in the workplace. Finally, all of these laws prohibit the employer from retaliating against an employee for exercising their rights.

Legal Impact of a Temporary Layoff

The spread of COVID-19, declaration of a public health emergency and/or curtailment in a company's supply chain may result in an employer closing one or more offices/facilities, implicating other legal issues. As a preliminary matter, employers should evaluate existing policies and consider whether to permit or require employees to use available vacation or sick time when an office/facility is closed.

There may be changes to employees' wages and hours if they continue working even if the facility is closed. Employers must pay exempt employees their full salary for any week in which they perform any work, even if they are now telecommuting. Employers should ensure that all nonexempt employees accurately report all time worked so that they are appropriately paid for all hours worked, including overtime for hours over 40. Under federal and most state wage and hour laws, employers do not need to pay nonexempt employees when they are not working due to a temporary business closure. An exception exists for nonexempt employees who receive fixed salaries for a fluctuating workweek, as they must receive their full salary for any week in which they performed any work. Because many states, including New York and New Jersey, mandate that employers pay employees who report to work on a scheduled workday only to find out that their place of employment is closed, employers must develop a communication plan to prevent unnecessary reporting.

If the employer chooses to lay off employees, the federal 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 may arguably include a closure due to the effects of COVID-19. However, some states have mini-WARN Acts with differing obligations and thresholds. Employee benefits may be impacted by layoffs, and consultation with benefits providers is recommended to determine whether certain benefits can be maintained.

Labor Union Issues

Under the National Labor Relations Act (NLRA) there is a duty to bargain with the representative union(s) regarding wages, benefits, and other terms and conditions of employment unless there are "compelling economic exigencies" compelling prompt action. The NLRA defines "compelling economic exigencies" as extraordinary, unforeseen events having a major economic impact on the employer that requires the employer to act immediately and make a unilateral change. Employers with unionized workforces should also consult all applicable collective bargaining agreements (CBAs) to determine whether there is any language regarding *force majeures*.

Implementing a Business Contingency Plan

Due to the overwhelming legal and practical issues that COVID-19 may present over the coming weeks and months, many employers are considering and implementing business contingency plans with the following issues in mind:

1. Developing a telecommuting policy to minimize business interruption.
2. Determining essential functions that must be performed and cross-training employees.
3. Considering the legal impact of a temporary shutdown.
4. Evaluating whether positions open due to illness or quarantine can be temporarily filled by workers through temporary employment agencies and solidifying a relationship so that the agency is prepared to fill open positions quickly.
5. Reviewing service or product deadlines to determine how the company will meet those deadlines if a significant number of employees are absent.
6. Involving employees and their union representatives, if any, in the contingency plan process.
7. Communicating with outside vendors/suppliers to confirm their business contingency plan.

The COVID-19 landscape is changing on a daily basis, and we are regularly monitoring it. Given the complex and novel legal issues, we recommend that employers consult with counsel before taking significant actions with respect to their workforce in order to evaluate present and future legal implications.

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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