

What Employers Should Know About Coronavirus and the Workplace

Available Government Guidance

When implementing company policies and procedures to address the impact of the coronavirus in the workplace, employers should continue to monitor key directives and guidance from local, state and federal governments. This material includes the following:

- **CDC** has issued [interim guidance](#) for employers regarding the coronavirus.
- **New York City** issued an [initial guidance](#) in February and has subsequently issued a [major update](#) on March 12 largely following the CDC's guidance.
- **New York State** issued "interim containment" [guidance](#) on March 6, and issued "interim [guidance](#) for procedures when identifying an employee with concerns for COVID-19 Exposures" on March 11.
- **Occupational Health and Safety Administration (OSHA)** has issued a [guide](#) for preparing workplaces for the coronavirus.
- The World Health Organization (WHO) has declared the coronavirus a "pandemic." The **Equal Employment Opportunity Commission (EEOC)** previously issued a pandemic [guidance](#) for navigating the Americans with Disabilities Act, and the EEOC's recent [guidance](#) suggests it applies to the current coronavirus.

Responsibilities to Employees in the Workplace

Employers have an affirmative legal duty of care to employees under the Occupational Health and Safety Act's "General Duty Clause," Section 5(a)(1), which requires employers to provide a safe and healthy workplace for all employees. Therefore, employees should be actively encouraged to work from home if they are ill, and especially if they are displaying symptoms associated with coronavirus, such as fever, cough or shortness of breath. In addition, because the WHO has designated the coronavirus a pandemic, sick employees now likely constitute a "direct threat" (which the EEOC explains is "a significant risk of substantial harm even with reasonable accommodation") under the Americans with Disabilities Act. This means that during this crisis employers may generally: (1) order employees to go home from work if they become ill with symptoms of coronavirus; (2) ask employees if they are experiencing coronavirus-like symptoms; (3) take employees' body temperatures; or (4) require employees to adopt infection-control practices, such as regular hand washing, or to wear personal protective equipment (e.g., face masks, gloves, or gowns) designed to reduce the transmission of pandemic infection. Employers must address illness-related inquiries on a neutral basis, and avoid racial, age, national origin or other stereotyping.

The CDC recommends that employees who call out sick with acute respiratory symptoms should not be required to provide a note from a health care provider to validate their illness because health care providers may be extremely busy responding to more urgent public health needs. Employees should not return to the workplace until they have been

asymptomatic of a fever for twenty-four hours. Employers should err on the side of caution with all questionably sick employees.

Employees Not Coming to the Workplace

Employers with remote work capabilities, and whose business needs allow for it, may want to deemphasize in-person attendance at work and instead encourage the availability of telecommuting and conference calls for meetings. While some employers have already implemented mandatory work from home policies, and some municipalities have capped the amount of people that can congregate (e.g., New York City has prohibited gatherings of 50 or more people) or ordered that businesses close (e.g., Bergen County, NJ is ordering the closure of malls and non-essential retailers), many businesses remain open, and employers should start reviewing their teleworking policies and test their remote access capabilities in order to address any deficiencies. The CDC and New York City recommend employers explore whether they can put in place additional policies to encourage telecommuting or flexible work hours (e.g., staggered shifts) to increase the physical distance among employees as part of social distancing strategies for limiting the spread of the coronavirus.

Wage and Hour Laws

Employers must be cognizant of local, state and federal wage and hour laws regarding when employees work remotely or cannot come to work. Whether or not an employee kept out of the workplace by the coronavirus is compensated during the time off will depend on whether the employee can work from home, whether the employee is exempt or non-exempt, and the employer's applicable leave policies. Generally, if an employee exempt from the Fair Labor Standards Act's ("FLSA") overtime requirements performs any work during the week, such as through remote access or checking their emails from home, an employer is required to pay them their full weekly salary under the FLSA's salary basis test, which generally provides that an exempt employee must be paid the same minimum weekly salary regardless of how many or few hours they work each week. And, generally, non-exempt (hourly) employees do not need to be paid for time not worked.

Disability and Leave Laws and Paid Time Off

Employees who are sick or have sick family members should be reminded of any rights they may have to paid time off under any company policies or state or local leave laws. This includes under New York City's paid sick and safe leave law, providing employees of employers with at least five employees the right to accrue and use up to five days of paid sick or safe leave, including for their own or a family member's health condition, or if a public health emergency causes their employer's business to close or their child's school or child care provider to close. New York State also provides employees up to 10 weeks of paid leave to care for a family member with a serious health condition, and is likely to pass a paid sick leave bill in response to the Coronavirus to provide additional benefits. Congress has passed a federal paid sick leave bill (the Families First Coronavirus Response Act) that, if enacted, would provide affected employees additional rights, and will be covered with New York State's new bill in a subsequent client alert. Employees may also have rights to compensation under employee benefit programs such as short-term disability.

Employers should also keep in mind that an infected employee may be covered under state and federal disability laws, including the ADA. To this end, if an employee requires time off from work, employers should remember to engage in a cooperative dialogue and interactive process with that employee regarding her potential need for accommodations. Therefore, even if an employee exhausts available paid time off, she may be entitled to an unpaid leave of absence if she becomes infected with the coronavirus. The duration of an unpaid leave is based on a fact-specific individualized assessment of the employee's circumstances, but federal courts interpreting the ADA have held that unpaid leave should not be for an indefinite period of time. The entitlement to unpaid leave may also apply to employees caring for a family member infected by the disease if they qualify under the Family Medical Leave Act (i.e., those employees who have been employed with the employer for 12 months, have worked at least 1,250 hours during the 12 months prior, and the employer employs 50 or more employees within a 75-mile radius of the employee's worksite).

Employers may wish to consider implementing interim leave policies to compensate employees who exhaust their paid leave and time off during a quarantine, especially if mandated by employers. In addition, they may wish to consider waiving eligibility requirements for sick leave use, such as the need to be employed for a period of time after hiring before using sick leave (e.g., 120 days under New York City sick and safe leave law). Employers may also consider implementing alternative PTO policies, such as PTO loans, pools or advances that provide a one-time front load of the annual amount of sick leave.

If employers are considering short-term layoffs or furloughs for employees who cannot work remotely, they should take care to adhere to wage and hour laws and be aware of potential notice obligations under the Federal Worker Adjustment and Retraining Notification (WARN) Act and similar state statutes. While most short-term layoffs or furloughs should not implicate WARN, obligations under some state statutes, such as the California WARN Act, may be triggered.

Confidentiality

If an employee reports symptoms or diagnosis of coronavirus, employers should record that information in a confidential file, pursuant to the ADA and other privacy laws, kept separate and apart from the employee's personnel file. Employers should also limit the distribution of this confidential information to individuals with a need to know. Similarly, if an employee tests positive for coronavirus, the CDC [recommends](#) employers should alert other employees but be sure to maintain the confidentiality of the sick employee. It is especially important that employers alert those employees who have been in direct contact with the infected employee of their possible exposure to coronavirus in the workplace.

With any or all of these practices in place, employers can prevent legal pitfalls associated with this extraordinary and changing situation.

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Kasowitz Benson Torres' Employment Practices and Litigation Group has been named 2019 Litigation Department of the Year for Labor and Employment by *The New York Law Journal*. They have extensive experience and familiarity with workplace policies and how

to manage emerging workplace issues like the coronavirus. If you would like to discuss these issues, please contact Mark W. Lerner (212-506-1728) or Jessica T. Rosenberg (212-506-1789).