

COVID-19: Considerations for Employers

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In this time of uncertainty, employers face new challenges in the areas of workplace safety, regulating employee conduct, implementing new forms of work, administering employee leaves of absence, and controlling costs through layoffs and other measures. The below checklist is intended to highlight many of the key considerations for employers in confronting these challenges.

Leaves of Absence

- ✓ Determine whether employees are entitled to leave. Employees requesting leave for COVID-19 related reasons (including due to their own illness, to care for someone else who is ill, or to care for children whose schools or child care providers are closed or unavailable) may be eligible for federal Family and Medical Leave Act (“FMLA”) or emergency sick leave (as recently enacted/expanded) and/or leave under state or local family and medical, sick, or other leave laws and regulations. Consider any recent developments as federal, state and local governments implement legislation to address COVID-19 outbreak.
- ✓ Determine whether employees are entitled to pay during leave and how much.
- ✓ Consider whether employees can be requested or required to use accrued leave.
- ✓ Determine job-protection requirements under applicable leave laws and any exceptions based on employer size.
- ✓ Consider impact of leave on benefits.

Layoffs

- ✓ Consider whether employment terminations trigger notice obligations under the federal Worker Adjustment and Retraining Notification (“WARN”) Act and/or any state equivalents. Federal WARN applies to employers with 100 or more employees and is triggered by plant closings or mass layoffs resulting in 50 or more employment losses (including employment terminations, layoffs exceeding 6 months, or 50% or greater reduction in hours for 6 months) at a single site of employment. Certain state laws have different triggers.
- ✓ Ensure that selection criteria for terminations and other measures are non-discriminatory. Consider conducting disparate impact analysis.
- ✓ Comply with any applicable state-law requirements regarding contents of termination letter and timing of final pay (some states require payment on the date of termination).
- ✓ If severance will be offered in exchange for release agreements, review release agreements for compliance with applicable federal, state, and local laws and consider whether Older Worker Benefit Protection Act (“OWBPA”) disclosures are required (i.e., when two or more employees are being separated at the same time, at least one of whom is over the age of 40).

Other Cost Reduction Measures (Furloughs, Reduction of Hours, Reduction of Compensation)

- ✓ Ensure reduced pay meets minimum wage requirements as well as minimum pay requirements to qualify for exempt, as applicable.
- ✓ Consider special issues for exempt employees (who are entitled to their full pay regardless of hours worked but can be subject to full-week furloughs and/or have their compensation reduced prospectively for bona fide, long-term business reasons and the reduction is not directly tied to a reduction in hours).
- ✓ Consider impact on benefits. For example, many plans determine eligibility based on average hours worked in a defined period. Some plans permit continuation of coverage when employees are out on employer-approved leave. Consider COBRA requirements if any employees will lose benefits eligibility as a result of loss of employment, furlough, or reduction in hours.

Workplace Safety

- ✓ Consider Occupational Safety and Health Act (“OSHA”) requirement to furnish a workplace “free from recognized hazards that are causing or likely to cause death or serious physical harm.”
- ✓ Limit non-essential work travel.
- ✓ Consider having employees work remotely (see further discussion below).
- ✓ For employees coming to worksite, implement social distancing and consider whether additional personal protective equipment is necessary or advisable.
- ✓ Consider whether medical inquiries or exams (such as temperature checks) are permissible and advisable (including inquiries regarding employee’s family members and other contacts).
- ✓ Send employees home if they are exhibiting symptoms of illness.
- ✓ Develop a response plan for if an employee tests positive for COVID-19 including: (1) excluding the impacted employee until he/she is recovered, (2) requiring other employees that worked in close proximity to the impacted employee to stay home for 14 days, and (3) notifying third parties such as vendors or customers that were in close proximity to the impacted employee. Do not disclose the identity of the impacted employee to other employees or any third party without the impacted employee’s express written consent; and maintain confidentiality of all medical information in compliance with the Americans with Disabilities Act (“ADA”).
- ✓ Implement appropriate cleaning and sanitizing protocols.
- ✓ Consider OSHA recording and reporting requirements (which apply if an employee contracts COVID-19 at work and other criteria are met).

Employee Conduct Policies

- ✓ Consider appropriate response to employees who fail to follow employer instructions because of fear of COVID-19 (e.g., refusal to report to work, travel, or interact with colleagues, etc.).
- ✓ Consider appropriate response to employees who fail to adhere to policies implemented to safeguard employees.
- ✓ Consider legality of employee searches (especially in healthcare contexts if there is a concern about theft of supplies) and implement/review policies to provide maximum employer flexibility.
- ✓ Consider implications of off-duty activity laws on ability to limit personal travel and employees' other outside-of-work activities.

Remote Work

- ✓ Implement or review and update remote working policies.
- ✓ Consider implications of “shelter-in-place” and similar government curfew/isolation orders.
- ✓ Ensure appropriate timekeeping practices for non-exempt employees.
- ✓ Develop appropriate policies and procedures for reimbursing employees for additional expenses incurred a result of remote work (e.g., telephone or data charges, printing and shipping costs, etc.).

International Considerations

- ✓ For employers with personnel outside the United States, consider local law requirements which may impose additional requirements and restrictions related to leaves of absence, employment terminations, workplace safety and privacy, and other matters.

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