GUIDANCE FOR EMPLOYERS ON THE NOVEL CORONAVIRUS

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Please note: this is preliminary information that is constantly changing and does not constitute legal advice—contact your Fisher Phillips or employment attorney with any questions.
AGENDA AND HOUSEKEEPING

- Review background of COVID-19 in the workplace
- Considerations and Best Practices for Employers
- FAQs and Examples
- Families First Coronavirus Response Act
  - Leave Available to Employees
  - Coverage and Employer obligations
- All participants are muted
  - May type questions in the side navigation panel
  - We will try to answer all questions
BACKGROUND

• Good news- a majority of individuals recover.
• Coronaviruses are a family of virus that can cause fever, respiratory problems, and sometimes gastrointestinal issues.
• They vary from the common cold to SARS and MERS. They differ from Avian (H1N1) influenza and swine flu.
• The latest novel coronavirus is being labeled COVID-19.
• The outbreak was first detected in December in Wuhan, the capital of China’s Hubei province.
• Spreads through coughs and sneezes like a common cold. You can also likely acquire the virus after touching a surface containing the virus and touching your mouth. 1 person on average spreads it to 2-3 others.
• Individuals in more than 100 countries have been infected.
• Declared a pandemic on 3/11 and national emergency on 3/13.
BACKGROUND

- Over 6,400 confirmed cases in the United States. Over 100 deaths.
- First possible community transmission case in U.S. confirmed on 2/27.
- CDC believes the you may be may be able to be spread COVID-19, like the Zika virus, prior to showing symptoms. Officials are not sure if the virus can be spread by handling or touching objects where the virus may have been present.
- House Bill passed on Saturday addressing sick pay and emergency FMLA. Updated on Monday with significant changes. Still waiting for Senate action.
Where We Are Now

- Accept that every day brings new facts and guidance. We must try to plan, but next week will be VERY different.
  - Federal, State, and Local Actions, and School and Business Closures.
- Bad News – cases will rapidly increase in all areas and disruptions in travel, gatherings, business, and education will occur.
  - More Cities considering Shelter-in-Place orders.
- Consider that an Italy-like response may be a wise move to limit spread.
  - See today’s news and more coming.
- We have to balance messages – not too dark versus being too optimistic.
  - Many people are still not taking this seriously. Others are nervous but hoping for few changes.
- It’s time for the CEO’s role – making the tough risk weighing decisions based on sound advice of HR, Legal, Operations, and Safety.
- Next step will be to set the tone for pulling together and protecting the business. Need Authentic Leadership.
CONSIDERATIONS FOR EMPLOYERS

Educate all employees about how the coronavirus can be contracted.

• Establish a point of contact in human resources or elsewhere in your company for employees that have concerns.

• Remind employees about policies concerning absences and working from home, including vacation, sick pay, FMLA, unemployment, and short term disability.

• Train supervisors on overreaction impacts and importance of adhering to antidiscrimination policies.

• Keep track of updates from CDC and WHO.

• Employee personal travel:
  Employers cannot prohibit otherwise legal activity, such as personal travel abroad by an employee. This includes pregnant employees or those with a medical condition.
  Employers should advise employees traveling to areas where Coronavirus is an issue to take proper precautions.
Continue Preparing and Adapting

• This week is crucial – time is running out for certain actions.
• Is your Remote/VPN ready?
• Ensure Business Continuity – and shift to preparing for shutdowns and limited operation for uncertain periods.
• Daily monitor developments and quickly weigh risks and make decisions.
• Guide your actions by public health guidance.
• Avoid knee jerk decisions and seek guidance on legal issues.
• Accept the lack of legal precedent and the need to weigh risk and make your best possible decision – process-driven and not prescriptive decision making.
• Consider rapidly developing legislative developments.
WARN Act Considerations

• Federal WARN Act requires 60 days advance notice of mass layoffs and plant closings
  • Applies to employers with 100+ employees
  • Exception for UBC and natural disasters

• Some states have “mini-WARN” acts with more restrictions
  • CA guidance last night
  • Other states (NY/NJ) to follow?
Tests show new virus lives on some surfaces for up to 3 days
To fight coronavirus, L.A. restaurant chain takes temperatures before letting patrons dine
Comprehensive And Updated FAQs For Employers On The COVID-19 Coronavirus

3.17.20

LAST UPDATED: March 17, 2020

Fisher Phillips has assembled a cross-disciplinary taskforce of attorneys across the country to address the many employment-related issues facing employers in the wake of the COVID-19 coronavirus – especially now that the World Health Organization has declared the outbreak as a pandemic. The COVID-19 Taskforce has created a Frequently Asked Questions (FAQ) document, which has been continually updated since first published on March 3 and will continue to be updated.
FREQUENTLY ASKED QUESTIONS
CONSIDERATIONS FOR EMPLOYERS

Schedule more teleconferences in lieu of travel.

Can you ask employees to stay at home if they exhibit symptoms of coronavirus or the flu? Yes. Ask them to seek medical attention and get tested for COVID-19.

Can you ask an employee why he or she missed work? Yes. Can you ask them to leave work? Yes, under most circumstances.

Many clients are requesting medical notes from employees prior to returning to work, especially that was a prior practice. However, EEOC and OSHA has cautioned employers that employees may not be able to reach physicians.

New CDC Guidance on returning to work: •At least 3 days (72 hours) have passed since recovery defined as resolution of fever without the use of fever-reducing medications and improvement in respiratory symptoms (e.g., cough, shortness of breath); and, at least 7 days have passed since symptoms first appeared.
List Your Issues

• Getting employees to come to work.
• Protecting Employees and limiting opportunities for spread.
  o Office setting? Employees going to commercial or home sites? Travel?
• Excluding people who may have been exposed.
• How to keep sick employees from coming to work?
• PTO/Sick Pay?
• Attendance rules.
• Wage Hour compliance.
• Avoiding setting precedents.
The World Health Organization (WHO) has stated that people only need to wear face masks if they are treating someone who is infected with the coronavirus. Doctors agree that the best defense is simply washing your hands. There are more appropriate measures of defense than wearing a surgical mask or respirator.
CAN AN EMPLOYEE SIMPLY REFUSE TO WORK?

- An employee’s right to refuse to do a task is protected by OSHA under certain circumstances.
- It likely would violate OSHA’s general duty clause if you fail to notify employees of a confirmed case working in close proximity.
- If several employees refuse to work in unsafe conditions, that may also be protected by the NLRA, which applies to even non-union employers.
TEMPERATURE CHECKS

EEOC Previous Guidance

If the Centers for Disease Control and Prevention (CDC) or a state or local health authority proclaims a pandemic has spread in an area . . . 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.

We are past any type of influenza we have dealt with in the past, so asking about symptoms and temperature testing is likely defensible under the ADA.
TEMPERATURE CHECKS

• Provide advance written notice to employees
• Infrared thermometer (less invasive but arguably less reliable)
• Threshold temperature currently indicated by the CDC - 100.4
• Perform in private area (keep social distancing guidelines in tact)
• Have HR (as opposed to supervisors) perform the testing if possible
• If you record temperature, place in separate confidential medical file
• Ask if have the other possible symptoms; a fever is one symptom that may or may not be present
PRACTICAL TAKEAWAYS

• Encourage employees to wash their hands. Ensure that proper hand washing tools/soap is available.
• Educate your workforce about issues such as social distancing and how to identify symptoms.
• Allow employees to work from home if possible.
• According to CDC, encourage employees to not return to work until:
  • If employee will not be tested, they have had no fever for at least 72 hours (without use of medicine), other symptoms have improved, and at least 7 days have passed since symptoms first appeared.
  • If employee will be tested, they no longer have a fever (without use of medicine), other symptoms have improved, and they receive two negative tests in a row, 24 hours apart.
• Encourage employees to not touch their faces, eyes, and mouth.
• Increase custodial/sanitizing schedules to the extent possible.
• Encourage employees to contact a doctor if they develop symptoms of the coronavirus and be tested.
Practical Steps to Protect Employees and Limit Spread

• Increase Availability of Hand Cleaner, screen and keyboard wipes, and Kleenex.
• Evaluate jobs for improving social separation.
• Evaluate remote work opportunities.
• Encourage seasonal flu shots.
• Emphasize Wellness Program efforts to maintain general health.
• Eldercare assistance.
• Provide PPE as appropriate and document training.
FAMILIES FIRST CORONAVIRUS RESPONSE ACT
OVERVIEW

- Passed House on 3/14/2020; House changes made late 3/16/2020 for “technical corrections”
- Not yet passed by Senate, which may pass it today or later this week
- **Paid and Unpaid Leave for Coronavirus-Related Reasons**
  - Emergency Paid Sick Leave
  - Emergency Family and Medical Leave Act (Expands FMLA)
- **Emergency Unemployment Insurance Stabilization And Access Act of 2020**
  - Unemployment Insurance Funding
- Reimbursement to Employers as Tax Credits
EMERGENCY PAID SICK LEAVE
EMERGENCY PAID SICK LEAVE

• Employers with 1-499 employees
  • Employees are counted if in the United States, the District of Columbia, or any territory or possession of the United States.
  • No small employer exemption

• Any employee who works for employer is eligible
  • No minimum days/hours of employment

• Employee is entitled to:
  • Full-time Employees – 80 hours of paid sick leave
  • Part-time Employees – Paid based on the average number of hours the employee works over 2 weeks
    • If schedule varies, use average over 6 months before leave or if employee did not work over such period, the reasonable expectation of the employee at the time of hiring
EMERGENCY PAID SICK LEAVE Qualifying Reasons

Must provide paid sick time “to the extent the employee is unable to work (or telework) due to a need for leave because:

(1) The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19.

(2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.

(3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

(4) The employee is caring for an individual who is subject to an order or self-quarantine as described above.

(5) The employee is caring for a son or daughter if school or child care is closed/unavailable.

(6) The employee is experiencing “any other substantially similar condition” specified by HHS (catch all).
EMERGENCY PAID SICK LEAVE

• At employee’s regular rate for qualifying reasons (1), (2) or (3)
  • Compensated at HIGHER of their regular rate, federal minimum wage or local minimum wage
• At 2/3 the employee’s regular rate for qualifying reasons (4), (5) or (6)
• Capped at the following levels:
  • $511 per day and $5,110 in the aggregate per person for qualifying reasons (1), (2) and (3).
  • $200 per day and $2,000 in the aggregate per person for qualifying reasons (4), (5) and (6).
EMERGENCY PAID SICK LEAVE CONT.

- If Employer previously provided paid leave to employees before the Act passed, paid sick leave shall be made available to employees of the employer \textit{in addition to such paid leave and any leave mandated under state or local law}.

- An employer \textbf{may not} change any existing paid leave policies on or after the date of enactment of the new law to avoid being subject to the Act.
EMERGENCY PAID SICK LEAVE CONT.

Additional General Rules
- Sick leave does not carry over
- Employer may not require employee as a condition of paid leave to find a replacement to cover scheduled hours
- Employee may first use this paid sick time under this law before other paid leave
- Employer may not require employee to use other paid leave provided by the employer before using this paid sick leave
EMERGENCY PAID SICK LEAVE
Notice Requirements

• **Employers:** Employers must post a notice regarding the requirements of the law.
  • The Secretary of Labor is required to make a model notice publicly available no later than 7 days after enactment of the new law.

• **Employees:** After the first workday (or portion thereof) an employee receives paid sick leave, the employer may “require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time.”

• **Law goes into effect no later than 15 days after enactment of the Act, until 12/31/2020**
  • Your business will have 15 days to comply
EMERGENCY PAID SICK LEAVE

Tax Credits

• Employers subject to the requirements are entitled to a refundable tax credit equal to the amount of the qualified paid sick leave requirements paid by the employer per quarter.

• The tax credits for qualified paid sick leave wages are capped at
  • $511 per day per person for qualifying reasons (1), (2) and (3).
  • $200 per day per person for qualifying reasons (4), (5) and (6).

• The tax credits are applied against employer Social Security taxes, but employers are reimbursed if their costs for qualified leave exceeds the taxes they would owe.
EMERGENCY FAMILY AND MEDICAL LEAVE
EMERGENCY FAMILY AND MEDICAL LEAVE ACT

- Employers with 1-499 employees
  - Employees are counted if in the United States, the District of Columbia, or any territory or possession of the United States.
  - A corporation is a single employer, rather than its separate establishments or divisions
  - Separate entities will be one employer if they meet either the joint employer or integrated employers tests (as set forth in FMLA regulations)

- Significantly expands FMLA on a temporary basis

- Any employee who worked for employer for 30 days prior to leave and has a qualifying reason is eligible (no requirement of 12 months/1250 hours)

- Provides up to 12 weeks of job-protected leave (paid after the first 10 days)
EMERGENCY FAMILY AND MEDICAL LEAVE ACT
Qualifying Reasons

12 weeks of job protected leave when:

• “The employee is unable to work (or telework) due to the need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.”

• Likely FMLA definition of “son or daughter” will apply.

“Public Health Emergency”

• An emergency with respect to COVID-19 declared by a Federal, State or local authority
EMERGENCY FAMILY AND MEDICAL LEAVE ACT
How Does it Work

- **First 10 days of EFMLA may be unpaid**
  - An employee may elect to substitute accrued PTO, vacation, or sick leave to cover any portion of first 10 days
  - Employer cannot require an employee to substitute such leave

- **After the first 10 days:**
  - Compensated at 2/3 of the regular rate
  - Part-time employees/irregular schedule entitled to be paid based on average number of hours employee worked in prior 6 months, or if employed less than 6 months, average number of hours employee would normally be scheduled to work
  - **Pay capped at $200 per day and $10,000 in aggregate per employee**
  - Bargaining unit employees – apply EFMLA consistent with the CBA
EMERGENCY FAMILY AND MEDICAL LEAVE ACT

• Secretary of Labor has the authority for good cause to issue regulations:
  • To exclude certain health care providers and emergency responders from the definition of “eligible employee”
  • To exempt small businesses with fewer than 50 employees from the new law when the imposition of such requirements would jeopardize the visibility of the business as a going concern
EMERGENCY FAMILY AND MEDICAL LEAVE ACT

Job Restoration/Reinstatement

- If 25 or more employees, traditional restoration obligation
- If fewer than 25 employees, the traditional job reinstatement provisions of the FMLA do not apply if the following conditions are met (note this does not excuse provision of E-FMLA):
  - The employee takes E-FMLA
  - The position the employee held when the leave started does not exist due to economic conditions or other changes in operating conditions of the employer (i) that affect employment; and (ii) are caused by a public health emergency during the period of leave
  - The employer makes reasonable efforts to restore the employee to an equivalent position, with equivalent pay, benefits, and other terms
  - If reasonable efforts to restore to an equivalent position fail, the employer makes reasonable efforts to contact the employee if an equivalent position becomes available during the 1 year period beginning on the earlier of (A) the date on which the qualifying need related to a public health emergency concludes; or (B) the date that is 12 weeks after the date on which the employee’s leave for E-FMLA commences.
EMERGENCY FAMILY AND MEDICAL LEAVE ACT
Interplay with Other Paid Leave

• Full-time employees may take Emergency Paid Sick Leave for first 80 hours of EFMLA leave so that it is paid.

• Employees may also elect to use other accrued paid leave (e.g. vacation and PTO) during the first 10 days.

• Eligibility for EFMLA and FMLA (for other non-COVID-19 related reasons) is 12 weeks total. This may mean use of EFMLA may affect eligibility under traditional FMLA (or vice versa). [This may be something the Senate tries to change. Intent is likely to make this “in addition to” traditional FMLA].
EMERGENCY FAMILY AND MEDICAL LEAVE ACT
Notice Requirements

- **Employers:** No new specific notice requirement. However, under the FMLA, all covered employers must display a general notice (FMLA poster) about the FMLA.

- **Employees:** Where the necessity for leave is foreseeable, an employee shall provide the employer with notice of leave “as is practicable.”

- **Law goes into effect no later than 15 days after enactment of the Act, sunsets 12/31/20**
  - Your business will have 15 days to comply
EMERGENCY FAMILY AND MEDICAL LEAVE ACT

Tax Credits

• Employers subject to the requirements are entitled to a tax credit equal to the amount of the paid family and medical leave requirements paid by the employer.

• The tax credits for qualified wages are capped at $200 per day and $10,000 per calendar quarter per employee.

• The tax credits are applied against employer Social Security taxes, but employers are reimbursed if their costs for qualified leaves exceed the taxes they would owe.
A FEW THINGS TO KEEP IN MIND

There is Some Speculation the Senate Will Make Changes Before the Bill is Final:

• Getting rid of 500 employee cap?
• Trying some alternative to address cash-flow challenge of employers paying leave wages and then seeking relief via tax credits.
• However, the dynamic seems to be shifting to the Senate passing the bill as is to focus on other parts of the coronavirus stimulus response

State and Local Laws

• Many states and local jurisdictions have their own paid sick days and family and medical leave laws, which may be in addition to these new federal requirements.
• Many states and locals are working quickly to amend their laws and/or add new requirements as well.
KEY HEALTH PROVISIONS

• Requires insured and self-insured group health plans to provide coverage for COVID-19 diagnostic testing without cost sharing (including deductibles, copayments and coinsurance)

• Requires insured and self-insured group health plans to cover provider and facility costs associated with COVID-19 diagnostic testing visits
UNEMPLOYMENT COMPENSATION

• Unemployment Compensation may be available to employees in the event of a shutdown of your business or furlough of employees

• Each state’s unemployment insurance agency will determine eligibility

• Proposed Bill includes federal funding to states to offer up to an additional 26 weeks (subject to certain conditions) of unemployment insurance
Thank You

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