Tucker Ellis LLP

CLIENT ALERT

COVID-19: HOW SHOULD BUSINESSES MANAGE THEIR EMPLOYEES IN LIGHT OF THE GLOBAL PANDEMIC?

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The COVID-19 global pandemic is affecting Americans and American businesses in unprecedented ways. The World Health Organization (WHO), the Centers for Disease Control and Prevention (CDC), and federal, state, and local health organizations are issuing updated guidance on a regular basis to advise individuals on how to protect themselves from exposure and infection. Federal, state, and local governments have also implemented measures to control the spread of COVID-19 and assist businesses and individuals in responding to the virus. Those measures have been changing frequently, and they will continue to change as the pandemic develops in the days, weeks, and months to come.

In response to the pandemic, Tucker Ellis LLP has assembled the following guidance in response to common questions from our clients on how to respond to the unprecedented impact of COVID-19 on their businesses and employees. Many determinations will depend on state and local laws and must be made on a case-by-case basis, so while the following questions and answers are intended to provide general information and assist employers in better understanding the issues surrounding the impact of the virus on the workplace, employers should consult with counsel to evaluate their specific circumstances. The Tucker Ellis attorneys listed at the end of this Client Alert are available to assist with specific questions.

1. What should we do if an employee has tested positive for COVID-19?

If an employee tests positive for COVID-19, the focus of any business should be on preventing the spread of the virus to other employees. In all cases, the infected employee should be sent home or remain at home, instructed to seek medical attention, and not be permitted to come into work until they have recovered, as documented by a healthcare provider. Currently, the CDC advises that individuals with COVID-19 not return to work until:

- their fever resolves without the use of fever-reducing medications; **and**
- their respiratory symptoms have improved (e.g., cough, shortness of breath); **and**
- they test negative for the virus twice in tests taken 24 or more hours apart;

or (if the employee cannot obtain additional tests for COVID-19)

- at least three days (72 hours) have passed since their fever resolved without the use of fever-reducing medications; **and**
- their respiratory symptoms have improved (e.g., cough, shortness of breath); **and**
- at least seven days have passed since symptoms first appeared.

Additionally, employers should determine the identity of other employees who had close contact (within 6 feet) with the infected employee or worked in an area in which they would have been in contact with the same equipment or other surfaces during the 14 days prior to the employee's positive test result. Asking the infected employee to identify those coworkers with whom they had close contact during the relevant time is likely an important first step, but the best method for identifying those employees will vary based upon the particular circumstances of the employer and the workplace. Any identified employees should be informed that they may have been in contact with an infected individual and instructed to self-quarantine for 14 days and seek medical attention if they develop symptoms.

Remember that, generally, the best way to avoid panic and overreaction is to keep employees informed about what is happening at their workplace and steps the employer is taking to address COVID-19. The exact message to employees will depend on the specific circumstances.

Employers should also retain a cleaning company to conduct an intensive cleaning of any affected workspaces. Additionally, if the employer is located in a shared office building, it should inform building management which should determine any additional precautions on a building-wide level.

2. One of our employees self-reported that they came into contact with someone who has the virus, and now our employee has symptoms. What should we do?

Follow the same general guidance described above. Send the employee home and advise the employee to contact his/her healthcare provider. Identify all employees who worked closely with that employee for the past 14 days, notify them that a coworker with whom they had close contact is exhibiting COVID-19 symptoms, and advise them to self-quarantine and contact their healthcare providers if they develop symptoms.

3. Do we have a responsibility to report to the CDC a positive test result from one of our employees?

At this time, there is no obligation to report a suspected or confirmed case of COVID-19 to the CDC. The healthcare provider that receives the positive test result will handle that responsibility; however, companies should be aware that, under the Occupational Safety and Health Act, they must track and report to the Occupational Safety and Health Administration ("OSHA") instances of employees who contract COVID-19 while on the job. Moreover, employers should refer to state and local authorities for any additional reporting obligations.

4. Can an employer take an employee's temperature regularly or upon reporting for work?

Until recently, the answer was "no"; however, the CDC has escalated the seriousness of the pandemic, and the Equal Employment Opportunity Commission ("EEOC") has advised that employers are now permitted to perform temperature checks on employees. Employees with a temperature of 100.4 or higher should be sent home and advised to contact their healthcare providers and follow the same procedure described above.

5. How should we decide whether to send home an employee who appears to have a cold or the flu?

Because COVID-19 shares some of the same symptoms as other conditions, ranging from seasonal allergies to the common cold and the flu, it is difficult to determine who may have COVID-19. Employers should advise employees that if they develop symptoms associated with COVID-19, they should stay home and contact a medical provider. While the employee may not have the virus, employers should act out of an abundance of caution.

6. Can I ask employees who do not have symptoms to disclose whether they have medical conditions that could make them especially vulnerable to complications?

Again, until recently, the answer to this question was "no"; however, under the latest guidance from the EEOC, employers can ask or require medical examinations of employees to determine which employees are at a higher risk of infection or complications. This medical information should be kept confidential, and employees do not need to be sent home, but you should inform them if there are any positive tests for COVID-19 in the workplace or if they have worked with someone who is now experiencing symptoms.

State and local laws may have additional restrictions. For example, under California law, employers are generally not permitted to inquire about an employee's undisclosed medical conditions; however, employers may consider reminding employees that they are entitled to confidentially notifying their employer regarding any medical condition for which they wish to request a reasonable accommodation.

7. What if employees don't want to come to work because they are afraid of catching the virus?

In general, employees are entitled to refuse to work only if they believe they are in "imminent danger," which the Occupational Safety and Health Act describes as a "threat of death or serious physical harm" or "a reasonable expectation that toxic substances or other health hazards are present, and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency." Additionally, the threat must be "imminent," meaning that death or serious physical harm could occur within a short time. Currently, OSHA lists the risk of exposure to COVID-19 as "low" for most workers who work outside the healthcare field; however, depending on the circumstances (i.e., an employee tests positive), those conditions could be met, so an employer should evaluate each circumstance on a case-by-case basis. Further, if the employee is concerned about coming to work because he or she has an existing health condition that makes the employee more vulnerable to complications should they contract the virus, that concern may be construed as a request for a reasonable accommodation under the Americans with Disabilities Act ("ADA"). In such cases, the employer should discuss with the employee what reasonable accommodations may be available, such as wearing a mask, working remotely, and other potential reasonable accommodations. Given the complexities of the accommodation requirements under the ADA, employers should consult with counsel when faced with this situation.

8. An employee wants to wear a mask while at work. What should we do?

The WHO has stated that people need to wear masks only if they are treating someone who is infected with COVID-19 and that wearing masks may create a false sense of security. That being said, OSHA rules state that "an employer may … permit employees to use their own respirators, if the employer determines that such respirator use will not in itself create a hazard." Therefore, employers may permit employees to wear masks if they believe that doing so will make employees feel safer and they will not interfere with employees' job duties or interfere with the safe operation of equipment. If an employee feels that he or she needs to wear any additional protective equipment, the employee should ask management first to determine the basis for the need and whether any such equipment is advisable.

As noted above, if an employee requests to wear a mask because the employee has an existing health condition that makes the employee more vulnerable to complications should he or she contract the virus, a request to do so may constitute a request for a reasonable accommodation, in which case the employer should permit the employee to wear the mask unless doing so would unreasonably interfere with operations or create a safety hazard. Under the ADA, the employer may be required to provide the mask to the employee.

9. Should we institute a temporary remote work policy?

In light of the growing calls from the WHO, the CDC, and federal, state, and local governments for non-essential workers to stay home, it is generally recommended that companies implement a remote work policy for employees who are able to perform their jobs remotely. For employees who must be in the workplace to perform their jobs (such as production workers or machinery operators) and who are not ordered by state or local governments to stay at home, they can still be required to come to work.

While remote work may not be viable for every employer, allowing employees to work from home depends on a company's circumstances, the employees' duties or role within the organization, and the area of the country where the workers are located. If an employer decides to have some or all of its employees work remotely, the employer should consider a number of issues, including the following: (i) tracking employee time spent working and, if they are located in a jurisdiction like California, if and when they take their breaks; (ii) what expenses will need to be reimbursed if the employees use their own personal laptops or telephones to do work; (iii) data privacy and security concerns if the employees work with sensitive, personal, confidential, or proprietary information; and (iv) tracking work-related injuries that may occur from remote work.

For more information on how to implement a remote work policy, click here.

10. Some of our employees travel for work. What restrictions should we impose on travel?

The answer to this question changes almost daily as the virus continues to spread. It is advised that employers review and reconsider any non-essential domestic travel, especially to any areas that have been particularly impacted by the virus. It is also recommended that employers consider alternatives to travel, such as videoconferencing. The federal government has advised all U.S. citizens to cancel or postpone any international travel for the time being, and other countries are also severely restricting travel; therefore, it is advised that all international travel should be avoided if possible. For up-to-date travel guidelines, click here.

11. Are we required to keep paying employees who are at home and not working?

This will depend on the reason that the employee is home and not working and, depending on the circumstances, whether the employee is exempt or non-exempt.

Under the new Federal Families First Coronavirus Response Act ("FFCRA"), certain employees are entitled to paid sick or family leave depending on the reason they cannot come to work. For example, if an employee cannot come to work because he or she is experiencing symptoms of COVID-19 or because a healthcare provider or a federal, state, or local order directs him or her to isolate or quarantine, the employee is entitled to receive two weeks of paid sick leave under the sick leave protections of the FFCRA. Similarly, if employees cannot come to work because they need to care for their children because schools or care facilities are closed, they are entitled to paid leave under the FFCRA's expansions to FMLA, subject to daily pay caps. (For detailed information on the paid leave provisions under the FFCRA, please see our Client Alert here.)

If none of the protections under the FFCRA apply, whether or not employees who are home and not working must be paid can depend on the classification of the employee. Under the FLSA, non-exempt (hourly) employees have to be paid only for the time they actually perform work. For example, if a non-exempt employee is sent home and is not expected to work remotely, an employer should not email, text, or call such employee, or else the non-exempt employee must be paid for the time they spend responding to the communication. Generally, exempt employees must be paid their full salary for any workweek in which they perform any work, regardless of the actual number of hours or days worked. Therefore, if exempt employees are home, and if they perform any work within the workweek, they must be paid their full salary for that workweek.

An employer also might have a legal obligation to keep paying employees because of an employment contract, a collective bargaining agreement, or some policy or practice that is enforceable as a contract or under a state wage-and-hour law. For example, in certain jurisdictions like California, the definition of “wages” is extremely broad and has been construed to include such forms of earnings and fringe benefits as commissions; contributions to employee benefits plans, such as pension, profit-sharing, and health and welfare plans; vacation pay; and bonuses. Additionally, if the decision to not pay employees leads to them resigning or a constructive discharge, then, in California and certain other jurisdictions, the employer would be required to pay them all wages due and owed upon termination or within 72 hours or some other finite period of time from their resignation, including bonuses, PTO, and vacation pay they have vested.

Please note that issues related to pay for employees who are out of work due to the COVID-19 outbreak are changing rapidly. Employers should consult the latest information issued by federal, state, and local authorities and with counsel for guidance.

12. Are employees on leave eligible for unemployment benefits or other paid-leave benefits?

The answer varies widely depending on state and local law. For example, with respect to Ohio unemployment benefits, it depends upon the circumstances of the leave. Under a March 16, 2020, executive order issued by Governor Mike DeWine, otherwise eligible employees who are requested by a

medical professional, local health authority, or employer to isolate or be quarantined as a consequence of COVID-19 are eligible to receive unemployment benefits, regardless of whether the employee has actually been diagnosed with COVID-19. Those employees also are not required to actively look for work to receive unemployment benefits.

Unemployment benefits are not available, however, to asymptomatic employees who impose self-quarantines because of COVID-19. This is because the employee – not the employer – is choosing not to work and, thus, is not unemployed by no fault of his or her own. Further, like layoffs in other circumstances, unemployment benefits will be available to otherwise eligible employees who are laid off due to an employer's loss of production caused by COVID-19.

The executive order also does not change the basic eligibility requirements for unemployment benefits. To qualify, an employee generally must have worked for 20 weeks during the relevant base period before becoming unemployed and made an average weekly wage of at least $269.

Significantly, the changes to the rules for receiving unemployment benefits apply only to workers who lose wages and do not have access to leave benefits from their employers. So, if an employee who is under quarantine or in isolation has unused paid time off or vacation days, the employer can require the employee to use those benefits before applying for unemployment benefits.

Currently, no other Ohio law requires employers to provide paid-leave benefits to employees on leave due to COVID-19.

Under California law, employers cannot force their employees to use paid sick leave or PTO if they are unable to work because of COVID-19; however, employees may elect to use available paid sick time. When the paid sick time is exhausted, an employee may use PTO if the employer's vacation policy allows for such leave. Paid sick leave or PTO may be used for absences, diagnosis, care or treatment, and preventative care, which may include self-quarantine, as recommended by local authorities.

Additionally, California employees are eligible for unemployment benefits and disability insurance if they are affected by COVID-19. California's Employment Development Department ("EDD") states that workers may seek unemployment payments if:

- "[H]ours are reduced due to the quarantine";
- an employee is "separated from [the] employer during the quarantine," or
- an employee is subject to "quarantine required by a medical professional or state or local health officer."

Of note, even employees who maintain their jobs at reduced hours may seek unemployment benefits to make up for compensation lost due to the employer's decision to reduce their hours.

For disability insurance under California law, an employee must provide proof of the illness or symptoms, most commonly through a doctors' medical certification. Proof of the illness may also be satisfied by a written order – such as a mandate to quarantine – from a state or local official that is specific to the employee. If they obtain disability insurance, employees may receive 60-70% of their wages, with a range of $50-$1,300 per week.

13. Should we be aware of any HIPAA or employee privacy laws when dealing with affected employees?

The privacy restrictions mandated by the Health Insurance Portability and Accountability Act (HIPAA) apply only to "covered entities," such as medical providers or employer-sponsored group health plans and entities deemed "business associates" of those "covered entities." Typically, employers are not covered entities, so medical information in employer records is not subject to HIPAA restrictions, but it may be covered by the privacy protections contained in numerous other laws (i.e., ADA, FMLA, etc.). In general, employers should treat all medical information as confidential.

14. Where can I find additional guidance on COVID-19-related issues?

The Occupational Safety and Health Administration recently published "Guidance on Preparing Workplaces for COVID-19," which outlines steps employers can take to help protect their workforce. The document can be found here. The CDC also issued a direct threat assessment decision-making chart, which can be found here. The CDC's website on COVID-19 is also a good resource for up-to-date guidance, and it may be found here. Lastly, consult regularly with government resources for new developments: The federal government's webpage for COVID-19 preparedness is here, and all states and many counties have enacted their own webpages that should be monitored regularly as well.

In sum, employers should take any actions necessary to prevent and contain the spread of COVID-19 in their workplaces. Because the circumstances surrounding COVID-19 are rapidly changing and as new legislation and measures are implemented, employers are encouraged to contact one of the Tucker Ellis attorneys below with specific questions.

ADDITIONAL INFORMATION

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