

Guidance for Employers in the Face of the Coronavirus Pandemic

In these unprecedented times of the COVID-19 pandemic, employers are understandably looking for guidance on whether and how employment laws impact their response to the evolving situation in the workplace. There is some guidance on these workplace issues from the Equal Employment Opportunity Commission (EEOC) and the Department of Labor (DOL) that can assist employers as they navigate the interplay between the circumstances of a pandemic and the federal wage and hour and anti-discrimination laws.

ADA Issues

The EEOC enforces anti-discrimination laws, including the Americans with Disabilities Act (ADA). In 2009, during the H1N1 outbreak, the EEOC issued Guidance titled “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act.” This Guidance continues to be valid today. The EEOC makes clear that while it provides this Guidance, ultimately, employers should follow public health guidance and are not prevented from following the guidelines and suggestions made by the Centers for Disease Control and Prevention.

First, there are limits on what medical questions and examinations employers can conduct. For example, you should not take an employee’s temperature, as that would be considered a medical examination. You also need to be careful about the questions asked of employees. During a pandemic, an employer may ask employees who call in sick if they are experiencing influenza-like symptoms. Employers must still keep the medical information confidential. Second, if an employee becomes ill in the workplace or exhibits symptoms at work, the employer can send the employee home. Also, employers may require a medical note from employees returning to work, certifying fitness for duty.

The EEOC Guidance also states that if the CDC or federal, state or local public health authorities recommend that people who visit specified locations remain at home for several days until it is clear they do not have pandemic symptoms, an employer may ask whether employees are returning from these locations, even if the travel was personal. You should not make general inquiries to employees about whether they are immune-deficient, or have other medical conditions. If an employee voluntarily discloses that he or she has a specific medical condition that puts him or her at an increased risk of complications, the EEOC Guidance provides that employers may ask the employee to describe the type of assistance the employee thinks will be needed (i.e., telework) and engage in the interactive process for potential reasonable accommodations.

Finally, during a pandemic, employers may encourage employees to work from alternative locations, such as teleworking from home, as an infection-control strategy. It should also be noted that during a pandemic, employers must continue to provide reasonable accommodations for employees with known disabilities that are unrelated to the pandemic, barring undue hardship.

Wage and Hour Issues

Many employers are forced to drastically reduce their operations and furlough workers or reduce hours, which can lead to questions about Wage and Hour laws. There are a few things to keep in mind.

First, the Fair Labor Standards Act (FLSA) and other wage and hour laws still apply. That means that salaried, exempt employees must still be paid for all weeks when they are performing work. Non-exempt, hourly employees, on the other hand, are paid for hours worked. If you have non-exempt, hourly employees

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working remotely, you must still keep track of all hours worked, and if they work more than 40 hours, they must be paid overtime.

Some employers are considering temporary wage reductions for salaried employees. It is important to make sure the salary paid still exceeds the FLSA salary minimum of \$685 per week. If the employee has an employment agreement, the agreement needs to be modified with the new temporary payment plan.

Employers that are forced to furlough or terminate employees need to make sure that they provide the employees with their last paycheck. Unionized work forces must consult their Collective Bargaining Unit, which may provide additional benefits to bargaining unit employees and may have additional requirements for employers. Employees who are furloughed or whose work schedules are reduced may be eligible for unemployment compensation.

If employees lose their medical benefits as a result of the reduction in hours or furloughs, Consolidated Omnibus Budget Reconciliation Act (COBRA) notices may be required. Finally, larger employers (i.e. those with more than 100 employees) may be required by the Worker Adjustment Notification Act (WARN) to provide notices to employees and state/local governments.

FMLA and Sick Pay Issues

Employees that are unable to work may be eligible for paid sick leave under the employer's policies, or state or local laws. Employees may also be eligible for unpaid leave under the Family and Medical Leave Act (FMLA) if they have an illness that is covered by the act, which could include COVID-19. However, the Department of Labor has said that FMLA leave is not available to employees who are absent from work to avoid exposure or to care for healthy children who are home because schools are closed.

Remember to maintain employee confidentiality. Employee medical information must be kept confidential and documentation secured.

Keeping Employees Safe

Employers should also consult the "Guidance on Preparing Workplaces for COVID-19" published by the Occupational Safety and Health Administration (OSHA), which sets forth steps employers may take to protect their employees in the workplace.

Comment: As the COVID-19 pandemic is an ever-evolving situation, the Weber Gallagher Employment Group will continue to provide updates.