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COVID-19: Planning Considerations for Employers

March 10, 2020

Agenda

- Leave/Benefits
- Disability
- Wage & Hour
- Discrimination
- Labor
- Immigration

Background

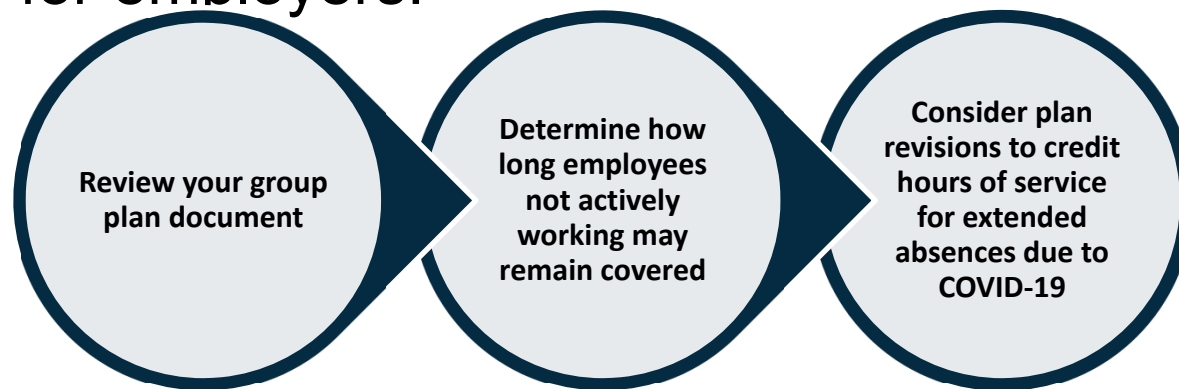
- A new virus first identified in Wuhan, China, in late 2019 has been spreading across the globe and is now in the United States
- The illness caused by the new coronavirus, COVID-19, is not a flu but a pneumonia-like infection
- The virus symptoms manifest as a mild to severe respiratory illness with fever, cough and difficulty breathing
 - The Centers for Disease Control and Prevention (CDC) believes at this time that symptoms may appear in as few as two days or as long as 14 days after exposure



Leave/Benefits – Issues to Consider

Group Health Plan Coverage

- If employees are no longer working, they may not be entitled to group health plan coverage
- Steps for employers:

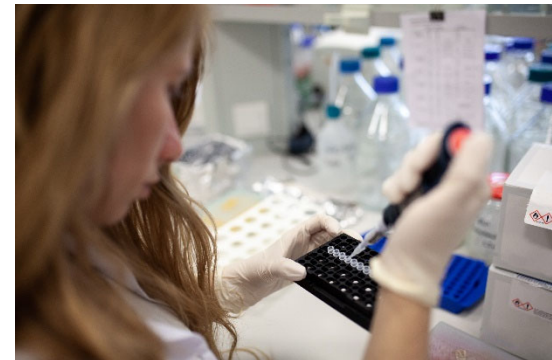


Group Health Plan Coverage

- If employees are not working and they are unable to pay their share of premiums → coverage may cease
 - Depends on whether it qualifies as FMLA leave
 - Employer may be able to take action to allow coverage to continue
 - Each situation requires individual assessment, including checking insurance policy or plan documents

Cost-Sharing & HDHP Issues

- Employers want to offer free testing, doctor's visits and hospitalization related to treatment for COVID-19
- NYDSF Directive for New York insurers
- Cigna waiving all cost-sharing for COVID-19 testing for insured plans



Cost-Sharing and HDHP Issues

- High-Deductible Health Plan (HDHP) concerns
 - HSA-compliant HDHP cannot provide coverage to an individual until the minimum deductible is satisfied, except for preventive care
 - Services associated with COVID-19 currently do not fall under the preventive care exception
 - Employees become ineligible to contribute to an HSA

Develop a Pandemic Plan

- Designate both a team and a point person
- Follow a checklist to ensure you have addressed as many issues as possible



Address Environmental Issues

- Failure to do so could create legal risk
- Educate employees about safe practices



Infection-Control Practices

- Employers may require employees to adopt infection-control practices at the workplace
 - Infection-control practices such as hand washing, coughing/sneezing etiquette, and proper tissue usage/disposal, do not implicate the ADA

Business Continuity Plans

- Employers should be prepared to change their business practices if needed to maintain critical operations
 - Identify alternate suppliers, prioritize customers, consider digital meetings, temporarily suspend some operations, etc.

Recruiting & Hiring Considerations

- Consider remote interview options
- Implement controls regarding discrimination against candidates from high-risk areas
- Permissible post-offer questions

Visitors

- More latitude than with employees
- Travel questions permitted
- Health questions permitted

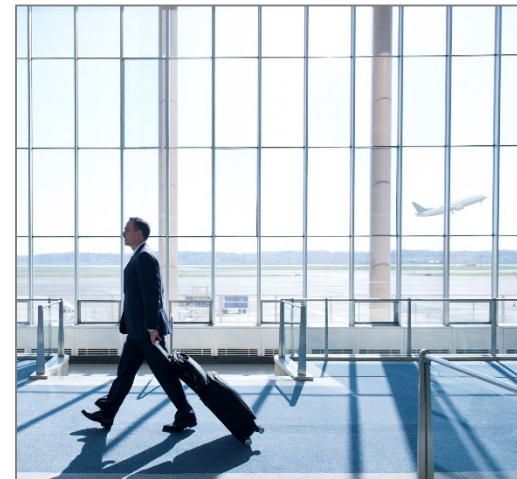


Managing Employee Fears

- OSHA provides that employees may refuse to work if they believe they are in imminent danger. Most work conditions in the United States do not meet the elements required for an employee to refuse to work
 - Employees cannot refuse to come to work out of fear of exposure
 - Employees cannot refuse to travel out of fear of exposure

Travel Restrictions – Business

- An employer may restrict business travel
 - The CDC advises that employers restrict all nonessential travel to areas with a Warning Level 3, and to exercise caution regarding travel to Warning Level 2 areas



Travel Restrictions – Personal

- Employers cannot prevent employees from traveling to affected areas for personal reasons
 - Employers may deny time off if the denial is based on the destination, business cost of a resulting quarantine or other legitimate business-driven reasons, not the employee's national origin

Travel Restrictions – Personal

- If an employer has a reasonable belief that an employee has traveled to a high-risk area, it may ask that the employee not return to work for 14 days or may send the person home
 - Employer should consult various leave and wage and hour laws to determine entitlement to leave and pay

Questions about Employee Travel

- If an employee returns from travel during the COVID-19 outbreak, employers may ask questions about exposure to COVID-19 during his or her trip
 - Do not have to wait until employee develops symptoms
 - Does not matter if travel was personal

Business Travel Accident Insurance

- Review business travel accident insurance policies to determine if they cover:
 - evacuation services
 - global medical services



Telework – Infection-Control Strategy

- Employers may encourage employees to telework as an infection-control strategy
 - Note: It might demonstrate that telecommuting is an accommodation that permits the employee to perform the essential functions of the job if the employee makes that request later (separate and apart from COVID)

Telework – Accommodation Requests

- Employees with disabilities that put them at high risk for complications of COVID-19 may request telework as an accommodation to reduce their chances of infection during a pandemic
 - Whether that accommodation is reasonable depends on whether the employee can perform the essential functions of the job while teleworking

Questions about Employee Illness

- ADA-covered employers may ask such employees whether they are experiencing influenza-like symptoms, such as fever or chills and a cough or sore throat
 - Employer must maintain all information about the employee's illness as a confidential medical record

Required Testing

- Employers may only administer medical tests for employees where there is an established job-related necessity or where the employer has a reasonable belief that the employee poses a direct threat to health or safety
 - Such tests otherwise may violate the ADA and rights to privacy
 - Whether an illness rises to the level of a “direct threat” depends on its severity
 - Employers are permitted to *ask* employees to seek medical attention and get tested for COVID-19

Employee Absences

- Employers may ask an employee why he or she has been absent from work
 - Asking “why” an individual did not report for work is not a disability-related inquiry



Sending Employees Home

- The ADA allows employers to send employees home, or require employees to stay home, if they have COVID-19 symptoms or test positive for COVID-19
 - Advising such workers to go home/stay home is not a disability-related action

Employee Privacy Concerns

- If an employee is confirmed to have COVID-19, the employer should inform fellow employees of their possible exposure to COVID-19 in the workplace
 - Employer should **not** disclose the identity of the quarantined employee because of confidentiality requirements under federal law

HIPAA

- Group health plan is a covered entity
- HIPAA restricts use and disclosure of “protected health information” (PHI)
- Employers ***cannot*** get COVID-19 status information from their group health plans

HIPAA

- Exceptions:
 - Disclosure to public health authority
 - Disclosure to family, friends and others involved in an individual's care and for notification
 - Disclosure to prevent a serious and imminent threat
- Minimum necessary

Employee – Positive for COVID-19

- Send home all employees who worked closely with that employee for 14 days to ensure the infection does not spread
- Consider asking a cleaning company to undertake a deep cleaning of your affected workspaces
- If you work in a shared office building or area, you should inform building management so they can take whatever precautions they deem necessary

Employees with Potential Exposure

- Employers should handle employees who have been exposed to individuals outside the workplace with COVID-19 symptoms or positive testing the same as exposure in the workplace
- The CDC does not recommend testing, symptom monitoring or special management for people exposed to asymptomatic people with potential exposures (such as in a household), i.e., “contacts of contacts”
 - These people are not considered exposed to COVID-19

Doctor's Notes

- When an employee returns to work after experiencing COVID-19 symptoms, employer can require a doctor's note certifying their fitness for duty
 - Not be disability-related; or
 - Justified under the ADA standards for disability-related inquiries for employees (in the case of a more severe pandemic)

FMLA Leave

- Employees likely cannot use FMLA leave because they, or a covered family member, tested positive for COVID-19
 - COVID-19 may not necessarily constitute a serious health condition as defined by the FMLA
 - Many states and localities have passed paid and unpaid leave laws that may apply

FMLA Leave

- Employees may *not* use FMLA leave to stay at home and avoid potential exposure to COVID-19 at work
- For an employee to invoke their 12 weeks of unpaid FMLA leave, he or she must have a “serious health condition” and otherwise satisfy the FMLA eligibility criteria
 - COVID-19 may be considered a serious health condition depending on the circumstances

Paid Time Off

- Federal law does not govern the terms or use of PTO
 - Whether an employer may require an employee to use PTO should be determined through reference to the company's policies and practices
 - Many states and localities have passed paid and unpaid leave laws that may alter this analysis

Short Term Disability (STD)

- If governed by ERISA, change in eligibility or waiver of elimination period requires plan amendment and disclosure
 - Coordination with insurer or TPA may also be required

Additional Leave in Connection with COVID-19

- A private employer may choose to provide their employees with additional leave, paid or otherwise
 - Absent law or agreement (e.g., CBA) to the contrary, private employers are generally free to create, adopt or modify policies to meet business needs

Unemployment Compensation

- Workers are generally entitled to unemployment insurance if they are furloughed when a business temporarily shuts down and all other unemployment requirements are met
- Depending on the size and length of the temporary shutdown, the jurisdiction may require notification to the applicable unemployment department as a mass separation

401(k) Plans

- Hardship distributions
- Plan loans
- Market volatility
 - Investment performance
 - Investment option changes



Benefit Plan Vendor Performance

- Force majeure clauses in contracts
- Loosening plan requirements during pandemic
 - Decreasing waiting periods and larger supplies for prescription drugs
 - Waiving prior authorizations or other plan limitations in affected areas



Wage & Hour – Issues to Consider

Non-Exempt Employees

- Employers are generally not required to pay non-exempt employees for non-working time if business operations are temporarily closed because of an outbreak of COVID-19
 - Federal law requires employers to pay non-exempt employees minimum wage and overtime for hours **worked**
 - Some exceptions apply



Exempt Employees

- Employers typically must pay their employees their full salary for non-working time
 - Some exceptions may apply



Temporary Closures

- Employers are generally required to pay exempt employees for non-working time if business operations are temporarily closed because of an outbreak of COVID-19 for less than one full work week
 - Exceptions may apply if the employer has implemented certain benefit plans

WARN Act

- Employers have an obligation to provide notice under the WARN Act if forced to suspend operations due to COVID-19
- The WARN Act provides a specific exception when layoffs occur due to unforeseeable business circumstances
 - This provision may apply to COVID-19



Discrimination – Issues to Consider

National Origin Issues

- Employers may not request or require that employees stay home if their national origin is a country with a Level 3 Travel Health Notice
 - Employers must closely monitor any disparate treatment or harassment



Workers' Compensation Considerations

- Employees who contract COVID-19 as a result of exposure on the job may be entitled to workers' compensation benefits



Insurance Policies & Expenses

- Employers should talk with their insurance agents and review their policies to see what expenses caused by COVID-19 might be covered
 - Business interruption insurance, liability insurance, etc.
 - Case-by-case analysis



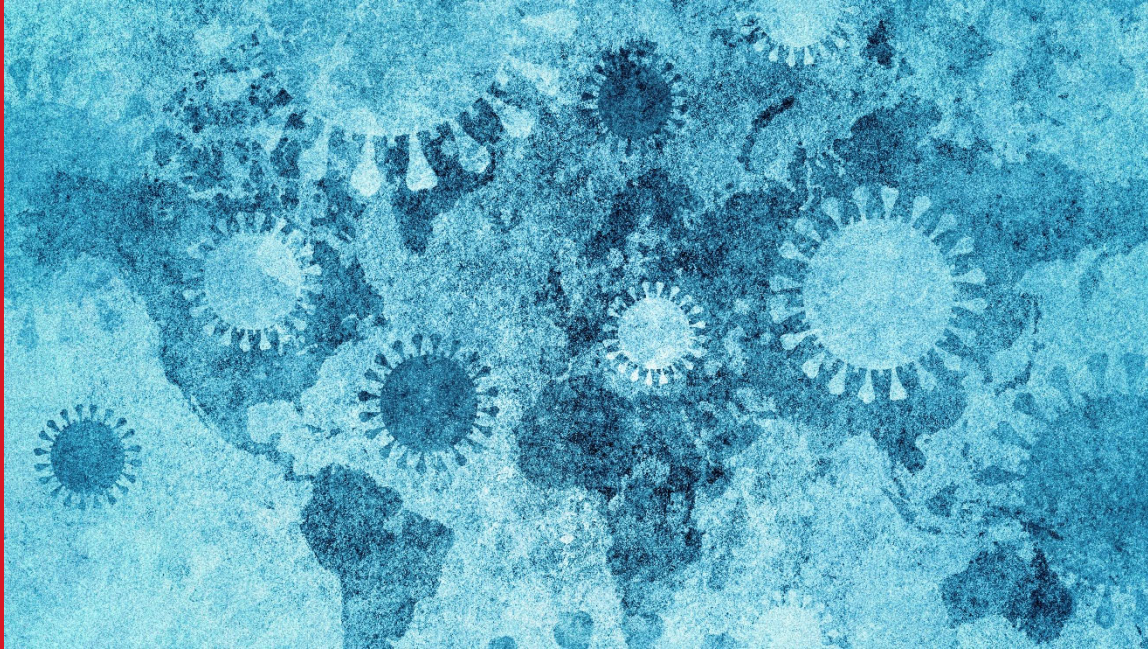
Labor – Issues to Consider

Unionized Workforces

- The NLRA imposes on employers the duty to bargain in good faith over mandatory subjects of bargaining such as wages, hours, and terms and conditions of employment
 - Employers who make unilateral changes to schedules or duties in response to COVID-19 may be subject to unfair labor practice charges that would apply even in emergency situations such as this one, unless the collective bargaining agreement provides otherwise

Unionized Workforces

- The law requires employers to give the union “adequate” notice of a proposed change to the collective bargaining agreement
 - There is no hard and fast rule as to how much notice is adequate
 - Where an employer can show a need for a prompt change and time is of the essence, a notice period as short as a couple of days might be considered adequate under the circumstances



Unions – Issues to Consider

Criticism of Company's COVID-19 Response

- Employers cannot terminate a union employee for criticizing the company's COVID-19 response or safety protocols
 - Employers cannot even fire a non-union, non-management employee for leveling such criticism because it is likely to be considered “protected activity” under the National Labor Relations Act



Union Work Schedule Changes

- A unionized employer may not in general make unilateral changes in the terms and conditions of employment without first bargaining such changes with the union
 - The vast majority of collective bargaining agreements contain management rights provisions
- Unionized employers should meet with the union prior to implementing any changes

No-Strike Clause

- A no-strike clause in a collective bargaining agreement prohibits employees from going on strike because they do not want to report to work and risk exposure to COVID-19
 - Employers should be aware of “sick-outs”
 - Likelihood of that happening depends on whether the missed time is paid or unpaid





Immigration – Issues to Consider

Immigration – Considerations

- Review where expats are located on assignments and consider if they should be moved back to home countries
- Review visa expiration dates and determine if those visas will be able to be timely renewed in light of limited consulate services and/or limited travel policies
- Review international assignments scheduled for the upcoming months and determine if they will be able to proceed
- Consider H-1B required wage compliance if “benching” employees
- Consider H-1B required wage compliance if H-1B workers request time off





QUESTIONS?

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