

Legal Considerations for Employers relating to the COVID-19 Outbreak

The novel coronavirus known as SARS-COV-2 and the disease it causes, called coronavirus disease 2019 ("COVID-19") will likely have broad legal consequences. This Client Update outlines the most common legal issues that clients with employees should consider. Fraser Stryker is available to answer questions and assist clients with employees in preparation for, or response to, any legal issues related to COVID-19. The following is a non-exhaustive list of legal issues for employers to consider in relation to the COVID-19 outbreak.

Exempt/Non-Exempt Employee Issues

- Under the Fair Labor Standards Act ("FLSA"), employees are characterized as being either "exempt" or "non-exempt" from the overtime requirements contained in the FLSA.
- With respect to exempt employees, if the employer shuts down its place of work for a period of time, exempt employees who performed any work during the workweek in which the shutdown occurred must be paid their entire weekly salary. If an exempt employee contracts COVID-19 and has to be quarantined, then the employer need not pay the employee for any absences greater than one day if the employee has paid leave available from a PTO or sick leave bank. If the exempt employee misses an entire workweek then the employee need not be paid in accordance with the FLSA.
- For non-exempt employees, in a scenario where a workplace must temporarily close due to COVID-19, those employees may be allowed to use paid time off and then unpaid time if they cannot work due to a closure of the workplace in accordance with the employer's policies. Further, an employer generally need not pay non-exempt or exempt workers for time spent in quarantine. But, to the extent an employee works remotely during a quarantine, then the employee will need to be compensated for the time worked (in the case of non-exempt employees, they are compensated for the time they actually worked, while exempt employees must be compensated and should be paid their full salary for that workweek).
- The employer may consider voluntarily paying non-exempt employees for their regularly scheduled hours; however, employers should be mindful about setting precedent and should specify exactly how long the employer will continue the pay (rather than stating it will continue until the COVID-19 emergency has ended).

Family and Medical Leave Act ("FMLA")

- The federal Family and Medical Leave Act ("FMLA") guarantees unpaid, job-protected leave for workers at businesses with at least 50 employees who have a "serious health condition" or must care for a family member with a "serious health condition." In all

likelihood, an employee who tests positive for the COVID-19 coronavirus likely would qualify as having a "serious health condition."

- Employees who are self-quarantining but do not have COVID-19 and employees who refuse to come to work out of fear of contracting COVID-19 would not typically qualify for FMLA leave. Nevertheless, employers may be wise to allow employees who present with the symptoms of the virus to take unpaid leave under the FMLA rather than waiting for a diagnosis or health care provider's certification. At the very least if such employees are allowed to work from home, an employer may allow them to do so for the incubation period.

Americans With Disabilities Act ("ADA")

- The Americans With Disabilities Act ("ADA") is also applicable in the current situation. While COVID-19 is probably not a "disability" under the ADA, the ADA prohibits discrimination against perceived disabilities or association with those with actual or perceived disabilities. The ADA also limits a number of the medical inquiries an employer can make of employees. Employers may ask employees about which countries they have recently traveled to and if they may have had any exposure to COVID-19. Employers should not, however, only ask employees of a particular ethnic background or citizenry, i.e., China or Iran, such questions to avoid violating Title VII. Employers may ask if employees have had close contact with others who have traveled to at-risk countries and/or otherwise have been exposed to the virus. Employers can order medical tests for employees where there is an established job-related necessity, as such tests otherwise may violate the ADA.
- Employers must be aware of the employee rights to privacy in their medical condition. If employees test positive or the employer concludes an employee may pose a health threat to other employees, the employer can request that the employee stay home for COVID-19's incubation period (which is currently identified as a 14 days). Employers should not identify or explain why the person is not at work. Any communications with the employee about their medical condition and documents should be kept confidential. Under the ADA, medical files should be kept separately from other personnel documents. An employer could tell co-workers that they may have been exposed to an employee who has tested positive for the virus.
- Employers may require that employees report on their recent travels to assess exposure risks. Employers can encourage employees not to travel during this time and cancel business travel to high risk destinations. Employers should be sensitive to employee requests to avoid travel, particularly to high risk countries.

Worker Adjustment and Retraining Notification Act ("WARN")

- If the employer chooses to close a facility or lay off employees, the federal Worker Adjustment and Retraining Notification (WARN) Act imposes notice requirements on employers with 100 or more employees for certain types of plant closings and other "mass layoffs." The WARN Act includes an "unforeseeable business circumstance" exemption, which might apply to a layoff or plant closing caused by the effects of the virus. Make certain that counsel is consulted before any plant closing or mass layoff is initiated because of the epidemic.

Occupational Health and Safety Administration ("OSHA")

- There is no specific OSHA standard covering COVID-19. However, some OSHA requirements may apply to preventing occupational exposure to COVID-19. OSHA's General Duty clause requires employers to provide "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." Among the most relevant OSHA standards are:
 - OSHA's Personal Protective Equipment (PPE) standards (in general industry, 29 CFR 1910 Subpart I), which require using gloves, eye and face protection, and respiratory protection.
 - When respirators are necessary to protect workers, employers must implement a comprehensive respiratory protection program in accordance with the Respiratory Protection standard (29 CFR 1910.134).

Employer Recommendations

Fraser Stryker encourages employers to take the following actions now:

- Review leave and telecommuting policies to ensure sick leave, paid time off and other policies are flexible and consistent with applicable laws.
- Communicate with employees about the importance of remaining home when sick, available resources, and contact persons.
- If possible, permit employees to stay home to care for sick family members.
- Create or update emergency action plans and implement heightened hygienic practices or social distancing techniques.
- Encourage employees with symptoms of acute respiratory illness to stay home and not come to work until they are free of fever (100.4° F [37.8° C] or greater using an oral thermometer), signs of a fever, and any other symptoms for at least 24 hours, without the use of fever-reducing or other symptom-altering medicines (e.g. cough syrup).
- Require employees to notify their supervisor and stay home if they are sick.
- Talk with subcontractors that provide temporary employees about the importance of sick employees staying home.
- Separate employees who appear to have acute respiratory illness symptoms (i.e. cough, shortness of breath) upon arrival to work or become sick during the day from other employees and be sent home immediately.
- Instruct sick employees to cover their noses and mouths with a tissue when coughing or sneezing (or an elbow or shoulder if no tissue is available).
- Provide tissues and no-touch disposal receptacles for use by employees.
- Instruct employees to clean their hands often with an alcohol-based hand sanitizer that contains at least 60-95% alcohol, or wash their hands with soap and water for at least 20 seconds. Soap and water should be used preferentially if hands are visibly dirty.

- Provide soap and water and alcohol-based hand rubs in the workplace. Ensure that adequate supplies are maintained. Place hand rubs in multiple locations or in conference rooms to encourage hand hygiene.
- Perform routine environmental cleaning.
- Be mindful that employees who refuse to come to work may be engaged in protected activities. Contact counsel before taking such disciplinary action.

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