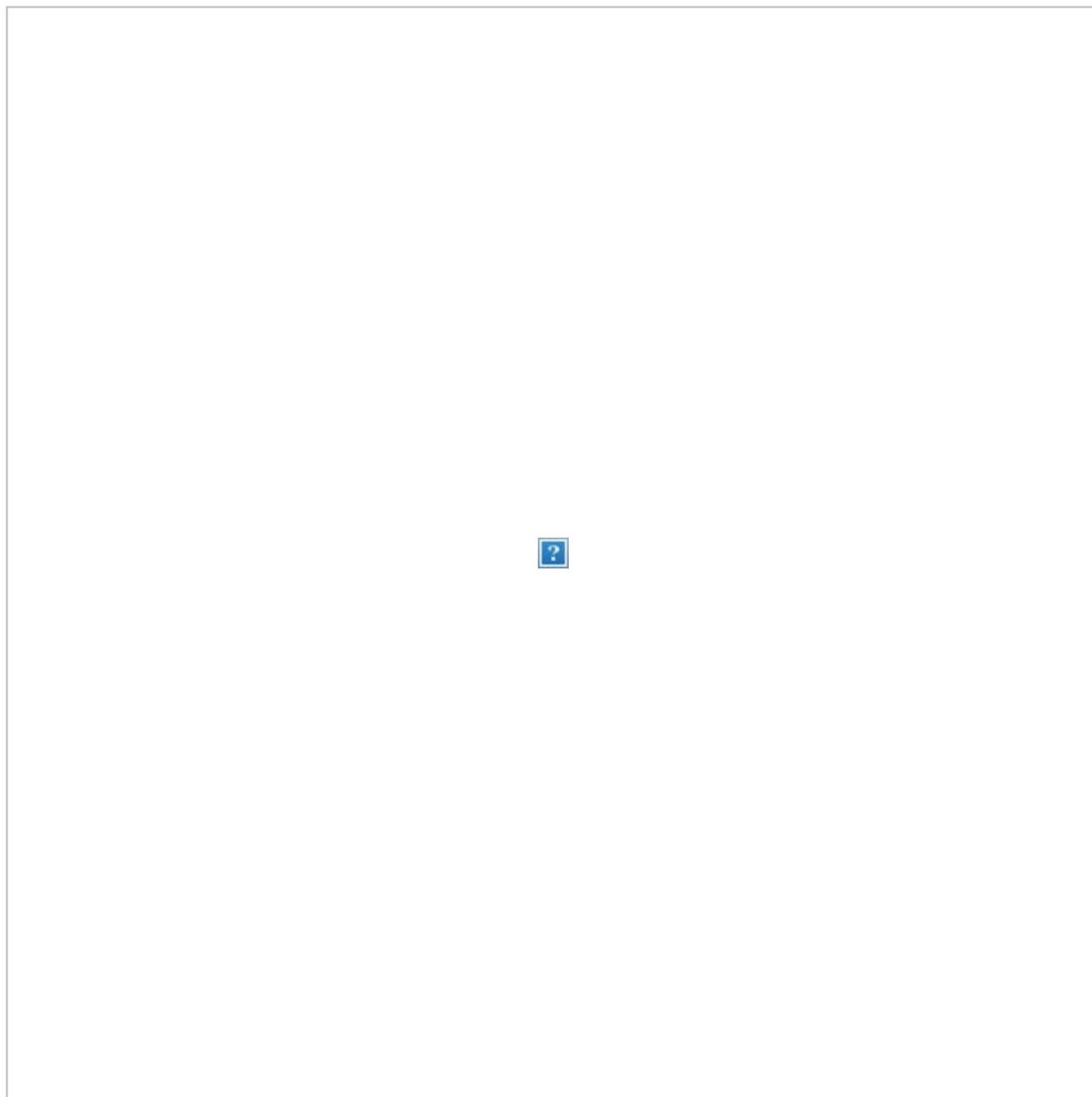


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Subject: COVID-19: Update & Mitigation of Employment Law Risks
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COVID-19: Update & Mitigation of Employment Law Risks

By: *Beth A. Slagle*

Introduction

Coronavirus disease 2019, dubbed COVID-19, is a new respiratory virus that, as of March 11, 2020, the World Health Organization ("WHO") has deemed a global pandemic.

According to the CDC, pandemics happen when a new virus emerges to infect people and can spread between people sustainably. Because there is little to no pre-existing immunity against the new virus, it spreads worldwide.

As of March 6, 2020, the U.S. Center for Disease Control ("CDC") has provided the following information about the virus:

Reported illnesses have ranged from very mild to very serious. Some individuals with the illness have no reported symptoms while others have been severely impacted, including in a small percentage of cases, illness resulting in death. The information so far suggests that most persons who get COVID-19 have mild symptoms. Of the tens of thousands of cases thus far, only about 2% were in people younger than 19, which suggests that this illness impacts adults. Older people and people of all ages with severe underlying health conditions - like heart disease, lung disease, and diabetes - are reported to be at higher risk of developing serious COVID-19 illness.

The following symptoms may appear 2-14 days after exposure:

- fever
- cough
- shortness of breath

How COVID-19 Spreads

The virus is thought to spread mainly from person-to-person between people who are in close contact with one another (within about 6 feet). Respiratory droplets are produced when an infected person coughs or sneezes. These droplets can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs.

People are thought to be most contagious when they are showing the most severe symptoms (i.e., the most sick). COVID-19 may spread before people show symptoms. There have been reports of this occurring with this new virus, but this is not thought to be the main way the virus spreads. It may be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or possibly their eyes, but this is not thought to be the main way the virus spreads.

Preventive Measures

For most people, the immediate risk of being exposed to the virus that causes COVID-19 is thought to be low. However, people in places where ongoing community spread of the virus that causes COVID-19 has been reported are at elevated risk of exposure. Close contacts of persons with COVID-19 are at elevated risk of exposure. Not surprisingly, travelers returning from affected international locations where community spread is occurring are at elevated risk of exposure, with the increase in risk dependent on the location.

In light of these risks, the CDC recommends the following steps be taken by all businesses:

1. Avoid close contact with people who are sick. When you are sick, keep your distance from others to protect them from getting sick too.
2. If possible, stay home from work, school, and errands when you are sick. This will help prevent spreading your illness to others.
3. Cover your mouth and nose with a tissue when coughing or sneezing or use the inside of your elbow.
4. Washing your hands often (at least hourly) according to CDC protocol will help protect you from germs. If soap and water are not available, use an alcohol-based hand rub.

5. Avoid touching your eyes, nose or mouth. Germs are often spread when a person touches something that is contaminated with germs and then touches his or her eyes, nose, or mouth.
6. Clean and disinfect frequently touched surfaces at home, including tables, doorknobs, light switches, desks, phones, keyboards, toilets, faucets and sinks.
7. If you are sick, wear a facemask when you are around other people. If you are NOT sick, you do not need to wear a facemask unless you are caring for someone who is sick.

For further information related to CDC about the virus, prevention and travel, check here for updates: <https://www.cdc.gov/coronavirus/2019-ncov/travelers/index.html>

Employer's Risk Mitigation Strategies

The Department of Labor (DOL) currently advises that, absent "sustained human-to-human transmission, most American workers are not at significant risk of infection." However, if the U.S. experiences outbreaks tantamount to what has happened in Italy and China, there is a heightened risk of employer liability and the laws related to Workers Compensation, Americans with Disabilities Act (ADA), Fair Labor Standards Act (FLSA) and the Occupational Health and Safety Act (OSHA) are potentially impacted.

The issue that most employers are facing right now is the dilemma of how to balance the law, workplace practices, policies and procedures versus the operational and cultural issues of employees experiencing severe anxiety and stress. In other words, when does an organization look beyond what is legally required in the workplace to minimize employee anxiety and to maximize employee relations. At this juncture, a middle ground between the two is best practice, recognizing that this is an evolving situation requiring fluidity and flexibility in dealing with employment-related issues. Also, every employer must continue to monitor risk assessment when or if COVID-19 becomes evident or prominent in the state, county, or city where the business is based.

The Practical

Employers should disseminate information to its employees providing updates about COVID-19 (similar to above), and also regarding prevention and treatment. Employers should also implement basic policies regarding travel, meetings (internal and external), work from home policies (if possible to telecommute), and sick leave policies. Above all, it is important for employers to understand basic guidance and preparation guidelines provided by the CDC, WHO and OSHA. See: [CDC Guidance for Businesses and Employers; Pandemic Preparedness in the Workplace and the ADA](#); OSHA's [COVID-19 Overview and Resources for Preventing Workplace Exposure](#); and the WHO's [Update on COVID-19 Outbreak](#).

Infection Prevention Measures

An example of some of the basic internal practices that employers are implementing include:

- Any employee who is experiencing flu-like symptoms or who has a household member with such symptoms is directed to stay home and not come to work until after the symptoms have ended. Employee is also encouraged to see a physician and provide Employer with any pertinent information about whether Employee is likely to be contagious. FMLA leave (if FLMA applies -- FMLA only applies to organizations of over 50 employees -- and for those eligible based on FMLA qualifications such as length of service), personal leave, and Employer's paid time off benefits (vacation and sick pay) will be available to those who are ill or otherwise

not working while off.

(Note on this: The question of whether a doctor's note upon return to work should be required has brought much debate to the legal, professional and medical community. Some workplaces require a doctor's note upon return from work after a period of absence and some do not. In either case, a dilemma is presented. It has been suggested by a number of authorities that a doctor's note should not be required in an area that has been widely impacted by COVID-19 because the medical community may be so overwhelmed with dealing with the ill that they will not have time or give attention to someone who needs a doctor's note to return to work. On the other hand, for businesses that do not require a doctor's note to return to work, should they now require one to protect the remainder of the work staff? This gets into the tricky issue of how much information can you derive from a sick employee about their illness. While various laws, including the ADA, prohibit employers from asking about a specific diagnosis, employers are able to understand symptoms, and if the symptoms are similar to flu or COVID-19, then it is fair to require a doctor's note IF the area has not overwhelmed the medical community. If requiring a doctor's note is not feasible, then requiring the employee to stay out of the office for a specified period of time would be deemed appropriate.)

- If employee is directed to stay at home by virtue of exposure, but is asymptomatic, please inform employer of this situation so that employer can determine whether remote computer access is feasible.
- All employees are directed to follow good contamination prevention measures which, in addition to the above, include properly washing your hands (20 seconds or longer with soap and water) as recommended by the CDC. (see here for further information: https://www.cdc.gov/coronavirus/2019-ncov/about/prevention.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fabout%2Fprevention-treatment.html)
- Request that employees refrain from shaking hands, hug or any other physical contact.
- Ask that staff consider and/or evaluate when to use alternatives to in-person meetings, regardless where such meetings are sought to be held. Serious thought and a preference should be given to using computer/internet-based applications to video conference or to use telephone conference calls.
- Except in situations which are absolutely necessary, serious consideration should be given about attendance of seminars or other group functions.
- Employees who are traveling out of the country are, until further notice, required to inform Employer/Employer's supervisor and Human Relations of the country(ies) and area(s) therein to which they are traveling. If it is a country or area considered to have a high incidence of COVID-19, the employee may be required to not come to Employer's offices for a designated time period following such travel.
- If feasible, make work from home arrangements for those restricted from coming to work, provided the employee does not have symptoms for which work is not advised. This will be done through phone and remote computer access arrangements and will be arranged on a case-by-case basis. Further, Employer will (may) require employee's agreement to Employer's telecommute policy.
- Employees should practice proper respiratory etiquette, including covering coughs and sneezes.
- Employees, when possible, should avoid using other staff members' phones, desks,

offices, or other work tools and equipment.

- Maintain regular housekeeping practices, including routine cleaning and disinfecting of surfaces, equipment, and other elements of employee's work environment and living spaces.

The Hard Questions

I. Employee anxiety and reluctance/refusal to come to work.

Given the media attention COVID-19 has received, employee anxiety is at an all-time high, and numerous employers are being faced with the question of what to do with an employee who does not want to come to work.

The best practice for an employer to combat employee-related stress is communication. Regularly update employees about the virus and prevention (see above), what is being done internally at the organization for prevention, provide hand sanitizers, and Clorox (or other cleaning) wipes and continually reinforce appropriate preventive etiquette. Additionally, if an employer has a COVID-19 Policy in place, that should be distributed to employees to provide staff with a sense of ease that the business is taking the issue seriously.

However, if the workplace, itself, has experienced an outbreak or exposure, various laws, including OSHA, protect employees from being exposed to work conditions which cause serious danger or imminent threat. Thus, should an employee refuse to come to work because of a COVID-19 outbreak, OSHA may be implicated.

Employees are only entitled to refuse to work if they believe they are in imminent danger. OSHA defines "imminent danger" to include "any conditions or practices in any place of employment where a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act." OSHA states that imminent danger is where there is "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." The threat must be immediate or imminent, which means that an employee must believe that death or serious physical harm could occur within a short time.

II. Telecommuting/Work From Home

The CDC has recommended that telecommuting is one of the most effective methods of reducing the spread of COVID-19. However, whether that is possible or feasible for your company's business structure is another thing. Additionally, there is the increased employer liability that comes with a work from home policy. Workers compensation, OSHA and other employment-related liability comes into play. Further, if you have not had an existing telecommuting policy that has been tested in the past, then implementing one without consideration to the needs of staff/clients/customers and without established policies in place is a recipe for failure.

If considering a telecommuting policy, you will need to first identify whether an individual can, in fact, carry out their job duties and responsibilities remotely. If so, is technology and security in place? Does the employee have an appropriate place to telecommute from; one that is safe from distraction and in which they carry out the duties of their position effectively and efficiently?

If you have gotten to this step and think that a work from home policy is feasible for your organization, know that telecommuting has many advantages for employers and

employees. It reduces overhead costs for employers while giving employees the flexibility to structure their workdays in a way that suits their schedule and family status. But at-home worksites are not without their disadvantages. Liability for off-site work premises claims can present a number of challenges for any discerning employer. Workers compensation laws as well as potential liability for third-party claims create exposure for employers that they do not encounter in a typical office setting.

Employers can mitigate such risk by taking a few precautionary steps to lessen the chance of employee claims.

1. Create a Telecommuting Policy: Establishing clear ground rules for telecommuting employees is critical. The policy, preferably in written format, should outline the employer's expectations for the employee during regularly scheduled work hours.

2. Office Area: Employer and employee should agree what area in the employee's home will be the designated office area. Confining the work area to a specific site in the home will mitigate against claims for damages or bodily injury that occur in other areas of the house.

3. Site Check: Employers can be held liable for providing a safe work environment for employees, regardless of where that office is located. Thus, an employer is wise to do a site check (or regular site checks depending on the length of time telecommuting is in force), when appropriate, to determine if there are known and/or apparent hazards that should be removed or eliminated.

4. Fixed Hours: An employer and employee should agree on regular and fixed working hours, as well as rest breaks. If there are no established fixed hours, an employee could arguably claim that an injury occurring at ANY time during the day is a worker's compensation claim.

5. Job Description: The employee's job description should be detailed so that there is no discrepancy as to what activity is part of the employee's job and what is not.

When an employee works from home, workers compensation boards and courts typically consider that the hazards encountered at home are also hazards of his or her employment. As such, eliminating much of the risk that goes along with at-home work sites is possible if a few basic steps are followed. A carefully-designed telecommuting policy goes a long way towards mitigating those claims.

III. Establish Sick Leave and Time Off Guidelines (FMLA, FLSA)

Generally, FMLA would not be available to individuals who refuse to come to work for fear of getting sick. However, in the early hours of March 14, the U.S. House of Representatives passed a sweeping paid leave bill, "Families First Coronavirus Response Act," (H.R. 6201) which will head to the Senate early this week where it is expected to pass. The text of the bill can be viewed here:

<https://www.congress.gov/bill/116th-congress/house-bill/6201/text>.

President Trump has already expressed support for this bill. The bill, as drafted, currently only applies to employers with fewer than 500 employees. It is an unknown whether additional legislation is forthcoming for employers with over 500 employees.

Families First Coronavirus Response Act (FFCRA)

- 12 weeks of FMLA leave is provided, of which the first 14 days may be unpaid.

Accrued personal or sick leave during the first 14 days may be used, but employers may not require employees to do so.

- To be eligible for benefits under the FFCRA, an employee must have worked with the employer for at least 30 days.
- An employee may use this leave benefit to respond to quarantine requirements, to care for family members who are quarantined, and/or to care for a child whose school has been closed due to COVID-19.
- After the first 14 days, employers must compensate employees in an amount that is not less than 2/3 of the employee's regular rate of pay.
- FFCRA provisions are to go into effect 15 days after the act is passed and enacted and set to expire on December 31, 2020.

Note that FFCRA, as currently drafted, provides tax credits to assist employers in making the leave payments.

Paid Sick Leave

- The FFCRA also requires employers to provide full-time employees with 80 hours of paid sick leave for issues related to COVID-19, such as quarantine, doctor's visits, etc.
- Part time employees will be eligible for paid sick leave equivalent to the number of hours that they work on average over a two week period.
- Employers are required to post a notice of requirements and obligations under the FFCRA.
- FFCRA provisions related to Paid Sick Leave are to go into effect 15 days after the act is passed and enacted and set to expire on December 31, 2020.

Note that the FFCRA, as currently drafted, provides \$1 billion in emergency unemployment insurance relief.

Fair Labor Standards Act (FLSA)

And what about if an employee is quarantined and not working? Is there a requirement to pay that individual under the Fair Labor Standards Act (FLSA)? The answer is - it depends. If you are dealing with a non-exempt individual, and they are not working at all, then generally, the answer is that there is no obligation to pay wages as the requirements of the FLSA is attached to hours actually worked. If, however, you have an exempt (basically, salaried manager) who is at home, and if they even do a little work during the regular work week, then FLSA requires that the individual be paid for his/her salary for that entire work week.

These general statements about FLSA, obviously, do not take into consideration any union collective bargaining agreement and obligations attendant thereto.

While the legal requirements are relatively clear about when pay is required for a non-working individual, again it must be emphasized that we are dealing with an incredibly unique time and situation in which employee stress and anxiety is heightened. So the decision to not pay when there is no legal obligation to do so should not be looked at in a vacuum, but must be weighed against the equally important issue of employee morale and public relations.

As we continue to monitor this ever-evolving situation, updates will be provided as appropriate. For further information, please reach out to Attorney Beth A. Slagle of Meyer, Unkovic & Scott LLP at 412.456.2890 or e-mail Beth at bas@muslaw.com

This material is for informational purposes only. It is not and should not be solely relied on as legal advice in dealing with any specific situation.

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