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Navigating the Outbreak, Part II: What the federal and many state labor and employment laws are likely to require of you, as you adjust your operations to meet the latest contingencies?

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ADA Considerations
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- Reasonable accommodation of individuals with disabilities unless undue hardship.
- When disciplining employees who are unwilling to work due to concerns about acquiring COVID-19 infection, be mindful of whether an employee’s concern about workplace safety is (1) reasonable and/or (2) whether the employee is seeking to be excused from work, or physically present in the workplace, as a disability-related reasonable accommodation.
- Can exclude from the workplace if a “direct threat” to themselves or others.
- Cannot require medical exams or ask medical questions unless job-related and consistent with business necessity.
  - EEOC has stated that under the current circumstances employers may measure body temperature even though a medical exam under the ADA.
  - EEOC has also stated that an employee may ask questions regarding COVID-19 symptoms
- Required to maintain confidentiality of medical and related information
Privacy Considerations
Privacy

• Employers generally are Not Covered Entities or Business Associates under HIPAA—But Still Have Privacy and Confidentiality Obligations

• If an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure in the workplace but must maintain confidentiality as required by the ADA.

• Employees exposed to a co-worker with confirmed COVID-19 should refer to CDC guidance for how to conduct a risk assessment of their potential exposure.

• Be aware of differing state obligations.
Many government contractors are now faced with requests from contracting or funding agencies requesting information about employees taking sick leave or who test positive for COVID-19.

There are no current exceptions regarding the release of otherwise protected information.

Some contractors are being asked to provide COVID-19 response or preparedness plans both for health and safety reasons and contract progress and completion preparedness.
Workers’ Compensation
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• Ordinarily requires an illness to be work related to be covered.
• The Problem - How do you tell if the coronavirus was contracted at work?
NLRA Considerations
Protected Activity

• Employees who collectively complain about terms and conditions of employment, including safety issues at work, may be engaging in protected activity.
• Refusing to work, may also be protected activity in some circumstances.
• Legal considerations include whether the employee’s refusal to work is conduct protected by one or more statutory or regulatory frameworks (including the NLRA, LMRA, and OSHA).
• Practical considerations, such as operational needs, the risk of COVID-19 exposure at work, the risk of litigation, and employee and public relations may shape an employer’s approach and response to employees’ concerns over working during the COVID-19 pandemic.
Collective Bargaining Agreements

• Employers have an obligation to bargain with the union over changes in terms and conditions of employment, even during these times.

• Applicable collective bargaining agreements will drive whether an employer is obligated to pay employees who are out from work. Relevant sections may include PTO/sick time/vacation/leave.

• In the event of a forced closure, other CBA provisions may apply.

• Many employers are contemplating staggering employees’ work schedules as recommended by government agencies as a way to reduce the spread of COVID-19. Hours of work and overtime provisions in applicable collective bargaining agreements may limit employers’ ability to do so unilaterally.
FLSA Considerations
Paying Exempt and Non-Exempt Employees

• Cannot make deductions from the salary of an exempt employee because did not have enough work for them in a work week.

• Can reduce an exempt employee’s salary on an indefinite basis as long as the salary minimum of $684 per week (equivalent to $35,568 per year) is paid.

• Non-exempt employees only need to be paid for hours worked, but check state laws for minimum hours requirements once an employee is scheduled to or reports to work.

• Non-exempt employees who work remotely must be paid for all hours worked. Best practice is to send a reminder and require accurate timekeeping.

• Be aware of potential issue with expenses employees incur, particularly those caused by telework.
Final Paycheck

• When to make payments of final checks depends on who terminates the employment relationship.

• Final pay on temporary furlough depends on the state and whether an employee is given a return to work date.

• Payments of accrued PTO will depend on your own policies and state law - whether they were “earned” as that state defines it, but also check any CBAs.

• Vacation or other paid leave if used as a bona fide credit toward prevailing wages under the Davis-Bacon Act or related acts, or state prevailing wage laws must be paid out if not used.

• Sick leave generally not paid out under most laws requiring leave, but check policies and any CBAs.
Health Insurance and COBRA Considerations
Health Insurance

• If taking traditional or expanded FMLA leave, the employee continues to receive coverage and employer/employee pay the same amounts as before.

• If not FMLA leave, need to check your policy to determine if the leave, reduced hours or a layoff or furlough will affect coverage. If there is a loss of coverage, the employee (and covered spouse and dependents) are entitled to continue coverage under COBRA at their expense.

• Make sure required COBRA notices are timely sent.
WARN Act Considerations
• Employers (i.e., those with 100 or more full-time employees, subject to certain caveats) must provide 60 days’ notice of an “employment loss” if there is a “plant closing” or a “mass layoff” impacting 50 or more employees over a 90-day lookback period.

• For “mass layoffs,” it must impact at least 50 full time employees and at least 33% of the active full-time employees at a “single site of employment,” unless the layoff impacts 500 or more employees, in which case the one-third requirement does not apply.

• An “employment loss” is:
  1. an employment termination, other than a discharge for cause, voluntary departure, or retirement;
  2. a layoff exceeding six consecutive months; or
  3. a reduction in hours of more than 50% during each month of any six-month period.

• Exception for unforeseeable business circumstances but notice required as soon as practical.

• Some states have other notice requirements.
Unemployment Considerations
Unemployment Compensation

- Unemployment compensation normally provided when loss of employment due to no fault of the employee.
- Some states allow benefits for a reduction in hours.
- Many states have waived their usual one-week waiting period.
- Many states allow unemployment whether furlough or layoff.
Resources

- Please visit our JL COVID-19 website for resources, news alerts and guidance at https://www.jacksonlewis.com/practice/coronaviruscovid-19
Questions?