



AGC
THE CONSTRUCTION
ASSOCIATION

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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?

Patricia Anderson Pryor

pryorp@jacksonlewis.com

513.322.5035

Jackson Lewis P.C.

Leslie Stout-Tabackman

Leslie.stout@jacksonlewis.com

703.483.8345

Jackson Lewis P.C.



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ADA Considerations

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



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Privacy Considerations

Privacy



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- 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.

Government Contractors



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- 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.



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Workers' Compensation

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?



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NLRA Considerations

Protected Activity



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- 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



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- 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.



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FLSA Considerations

Paying Exempt and Non-Exempt Employees



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- 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



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- 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.



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Health Insurance and COBRA Considerations

Health Insurance



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- 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.



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WARN Act Considerations

WARN Act



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- 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.



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Unemployment Considerations

Unemployment Compensation



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- 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



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



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Questions?