Comprehensive FAQs For Employers On The COVID-19 Coronavirus

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Fisher Phillips has assembled a cross-disciplinary task force of attorneys across the country to address the many employment-related issues facing employers in the wake of the COVID-19 coronavirus. The COVID-19 Task force has created a Frequently Asked Questions (FAQ) document, which will be continually updated as events warrant. You can contact any member of the Taskforce with specific questions, and a full listing of the Taskforce members and their practice areas is at the end of this publication.

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 new coronavirus, COVID-19, is not a flu but a pneumonia-like infection. Coronaviruses, so called because of their crownlike shape, ranging from the common cold to SARS-CoV and 2012's MERS (Middle East Respiratory Syndrome). They differ from Avian (H1N1) influenza and swine flu.

What are the symptoms of the current COVID-19 coronavirus?

The virus symptoms manifest as a mild to severe respiratory illness with fever, cough, and difficulty breathing. The Centers for Disease Control (CDC) believes at this time that symptoms may appear in as few as two days or as long as 14 days after exposure. Unfortunately, at this point there is no easy way to test for the COVID-19 coronavirus. A CDC-developed laboratory test kit to detect the COVID-19 coronavirus began shipping in February to select qualified

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SERVICES

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U.S. and international laboratories.

How is the current COVID-19 coronavirus transmitted?

People can catch COVID-19 from others who have the virus. The disease can spread from person to person through small droplets from the nose or mouth which are spread when a person with COVID-19 coughs or exhales. These droplets also land on objects and surfaces around the person. Other people then catch COVID-19 by touching these objects or surfaces, then touching their eyes, nose, or mouth. Therefore, it is important to stay more than 1 meter (3 feet) away from a person who is sick. The CDC recommends as much as 6 feet. It is possible to catch the virus from someone even before they have symptoms, but little is known about this aspect of the virus at this time.

Can the virus spread from contact with infected surfaces or objects?

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.

WORKPLACE SAFETY ISSUES

What if an employee appears sick?

If any employee presents themselves at work with a fever or difficulty in breathing, this indicates that they should seek medical evaluation. While these symptoms are not always associated with influenza and the likelihood of an employee having the COVID-19 coronavirus is extremely low, it pays to err on the side of caution. Retrain your supervisors on the importance of not overreacting to situations in the workplace potentially related to COVID-19 in order to prevent panic among the workforce.

Can we ask an employee to stay home or leave work if they exhibit symptoms of the COVID-19 coronavirus or the flu?

Yes, you are permitted to ask them to seek medical attention and get tested for COVID-19, and under most circumstances you can ask them to leave work.

What steps can we take now to minimize risk of transmission?

Repeatedly, creatively, and aggressively encourage employees and others to take the same steps they should be taking to avoid the seasonal flu, which is already one of the worst flus in the last 10 years. For the annual influenza, SARS, avian flu, swine flu, and the COVID-19 virus, the best way to prevent infection is to avoid exposure. Perhaps the most important message employers can give to employees is to stay home if sick. In addition, instruct your workers to take the same actions they would to avoid the flu. For example:

- Wash your hands often with soap and water for at least 20 seconds. If soap and water are not available, use an alcohol-based hand sanitizer.
- Avoid touching your eyes, nose, and mouth with unwashed hands.
- Avoid close contact with people who are sick.
- Stay home when you are sick.
- Cover your cough or sneeze with a tissue, then throw the tissue in the trash.
- Clean and disinfect frequently touched objects and surfaces.
- Ensure that employees have ample facilities to wash their hands, including tepid water and soap, and that third-party cleaning/custodial schedules are accelerated.
- Teleconference in lieu of meeting in person if available.
- Educate your employees about COVID-19, its symptoms, and the potential health concerns associated with any travel at this time.
- Have a single point of contact for employees for all concerns that arise relating to health and safety.
- Wear personal protective equipment, such as gloves and goggles, if touching or working bloodborne pathogens.
- Follow updates from the CDC and the World Health Organization (WHO) regarding additional precautions.

You may reference the Occupational Safety and Health Administration's (OSHA's) Guidance on Preparing Workplaces for an Influenza Pandemic for additional information on preparing for an outbreak.

Can an employee refuse to come to work because of fear of infection?

Employees are only entitled to refuse to work if they believe they are in imminent danger. Section 13 (a) of the Occupational Safety and Health Act (OSH Act) defines "imminent danger" to include "any conditions or practices in any place of employment which are such that 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 discusses imminent danger as 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, for example, before OSHA could investigate the problem. Requiring travel to China or to work with patients in a medical setting without personal protective equipment at this time may rise to this threshold. Most work conditions in the United States, however, do not meet the elements required for an employee to refuse to work. Once again, this guidance is general, and employers must determine when this unusual state exists in your workplace before determining whether it is permissible for employees to refuse to work.

In addition, Section 7 of the National Labor Relations Act (NLRA) extends broad-based statutory protection to those employees (in union and non-union settings alike) to engage in "protected concerted activity for mutual aid or protection." Such activity has been defined to include circumstances in which two or more employees act together to improve their employment terms and conditions, although it has been extended to individual action expressly undertaken on behalf of co-workers.

On its own website, the National Labor Relations Board (NLRB) offers a number of examples, including, "talking with one or more employees about working conditions," "participating in a concerted refusal to work in unsafe conditions," and "joining with co-workers to talk to the media about problems in your workplace." Employees are generally protected against discipline or discharge for engaging in such activity.

Can employers in the United States refuse an employee's request to wear a medical mask or respirator?

Yes, under most circumstances. Under the OSHA respiratory protection standard, 29 C.F.R. 1910.134, which covers the use of most safety masks in the workplace, a respirator must be provided to employees only "when such equipment is necessary to protect the health of such employees." Likewise, OSHA rules provide guidance on when a respirator is not required: "an employer may provide respirators at the request of employees or permit employees to use their own respirators, if the employer determines that such respirator use will not in itself create a hazard" (29 C.F.R. 1910.134(c)(2)). In almost all work situations, however, there is no currently recognized health or

safety hazard – even when employees work near other people and thus there is no need for a mask or respirator.

The WHO has stated that people only need to wear face masks if they are treating someone who is infected with the COVID-19 coronavirus. The WHO has also said that wearing masks may create a false sense of security among the general public. Doctors agree that the best defense against the COVID-19 coronavirus and influenza is simply washing your hands. Thus, the consensus is that there are more appropriate measures of defense than wearing a surgical mask or respirator.

Can an employee refuse to work without a mask?

OSHA has addressed the common question of whether an employee can simply refuse to work in unsafe conditions. The safety agency provides the following guidance, which wouldn't require the use of a mask or respirator in most situations. An employee's right to refuse to do a task is protected if all of the following conditions are met:

1. Where possible, you have asked the employer to eliminate the danger, and the employer failed to do so;
2. You refused to work in "good faith." This means that you must genuinely believe that an imminent danger exists;
3. A reasonable person would agree that there is a real danger of death or serious injury; and
4. There isn't enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.

Given the consensus that face masks are only necessary when treating someone who is infected with the COVID-19 coronavirus or influenza, masks are likely not necessary to protect the health of most employees. Therefore, most employers do not have to provide, or allow employees to wear, a surgical mask or respirator to protect against the spread of the COVID-19 coronavirus or influenza. The use of the word "may" in OSHA's respiratory protection standard makes it clear that when a respirator is not necessary to protect the health of an employee, it is within the discretion of the employer to allow employees to use a respirator. Accordingly, you are well within the applicable OSHA standard to deny an employee's request to wear a surgical mask or a respirator in almost all situations.

Absent a legally recognized disability, unique physical condition, or an occupation where employees work directly with those impacted by a condition such as the COVID-19 coronavirus or flu, you are generally not required to allow workers to wear masks at work.

What steps should we take if we use chemicals to combat the COVID-19 coronavirus?

Be mindful of the specific requirements of OSHA's Hazard Communication standard if new chemicals, or temporary employees, are introduced into work areas to combat the COVID-19 coronavirus. You are required to provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new chemical hazard the employees have not previously been trained about is introduced into their work area. A comprehensive hazard communication program should include contain labeling and other forms of warning, safety data sheets, and employee training. Now is also a good time to retrain employees under OSHA's bloodborne pathogens standard, including revisiting and communicating the elements of your exposure control plan.

What should healthcare employers do to protect workers from exposure to the COVID-19 coronavirus?

Healthcare personnel caring for patients with confirmed or possible COVID-19 should adhere to CDC recommendations for infection control and prevention (ICP):

- Assess and triage these patients with acute respiratory symptoms and risk factors for COVID-19 to minimize chances of exposure, including placing a facemask on the patient and isolating them in an Airborne Infection Isolation Room (AIIR), if available;
- Use Standard Precautions, Contact Precautions, and Airborne Precautions and eye protection when caring for patients with confirmed or possible COVID-19;
- Perform hand hygiene with alcohol-based hand rub before and after all patient contact, contact with potentially infectious material, and before putting on and upon removal of PPE, including gloves. Use soap and water if hands are visibly soiled;
- Practice how to properly don, use, and doff personal protective equipment (PPE) in a manner to prevent self-contamination; and
- Perform aerosol-generating procedures in an AIIR, including collection of diagnostic respiratory specimens, while following appropriate IPC practices, including use of appropriate PPE.

In addition, healthcare employers must comply with any state-specific requirements to protect healthcare workers from exposure. For instance, healthcare facilities in California are required to follow recommendations under CAL/OSHA's Aerosol Transmissible Diseases (ATD) Standard, Title 8 of the California Code of Regulations Section 5199. Because COVID-19 meets the criteria for a novel aerosol transmissible pathogen under the ATD Standard, California healthcare employers must provide a powered air-purifying respirator with a HEPA filter(s), or a respirator providing equivalent or greater protection, to employees who perform high hazard procedures on COVID-19 persons under investigation or confirmed cases.

ISSUES FOR WORKFORCES THAT TRAVEL

What current travel restrictions are in place?

In light of the COVID-19 coronavirus outbreak in China, President Trump issued a Presidential Proclamation limiting the entry of foreign nationals who were physically present in China during the 14-day period before their attempted entry into the United States. And while the U.S. had already instituted a travel ban related to Iran for political reasons, the administration announced that the ban is being expanded to include any foreign national who has visited Iran within the last 14 days due to the outbreak that has taken place in that country.

Does the Chinese travel restriction apply to those visiting Taiwan, Hong Kong, and Macau?

No. It only applies to those who were present in the People's Republic of China, and specifically exempts Hong Kong and Macau. In addition, the U.S. immigration law and various other regulations treat Taiwan (a.k.a. Republic of China) separately from the People's Republic of China. Therefore, Hong Kong, Macau, and Taiwan are all exempt from these travel restrictions.

Who is exempt from the travel restrictions?

The order provides a long list of exempt immigration statuses. For example, people traveling on crew member visas, or diplomatic or International Organization visas are exempt. It also exempts Lawful Permanent Residents (green card holders), spouses and children (unmarried under 21) of U.S. citizens and green card holders, and parents and siblings of unmarried under 21-year-old U.S. citizens and green card holders.

The proclamation also includes a provision that permits entry of any foreign national whose entry would not pose a significant risk of spreading the virus, as determined by the CDC. This provision would appear to allow anyone to otherwise seek entry. However, in reality, U.S. Customs and Border Protection may simply utilize the travel restriction rules to deny entry instead of deferring to the CDC's conclusion.

Are there conditions for the return of those who are exempt from the travel restrictions?

Yes, any U.S. citizen returning to the United States who has been in Hubei province, China in the previous 14 days may be subject to up to 14 days of quarantine. Any U.S. citizen returning to the United States who has been in the rest of mainland China within the previous 14 days may undergo a health screening and possible self-quarantine.

Can employees returning from China fly into any airport?

No. The Department of Homeland Security (DHS) has directed "all operators of aircraft to ensure that all flights carrying persons who have recently traveled from, or were otherwise present within, the People's Republic of China" only land at one of the following airports:

1. John F. Kennedy International Airport (JFK), New York
2. Chicago O'Hare International Airport (ORD), Illinois
3. San Francisco International Airport (SFO), California
4. Seattle-Tacoma International Airport (SEA), Washington
5. Daniel K. Inouye International Airport (HNL), Hawaii
6. Los Angeles International Airport (LAX), California
7. Hartsfield-Jackson Atlanta International Airport (ATL), Georgia
8. Washington Dulles International Airport (IAD), Virginia
9. Newark Liberty International Airport (EWR), New Jersey
10. Dallas/Fort Worth International Airport (DFW), Texas
11. Detroit Metropolitan Wayne County Airport (DTW), Michigan

According to DHS, these are airports "where enhanced public health services and protocols are being implemented."

Can we prohibit an employee from traveling on their personal time?

No, you generally cannot prohibit otherwise legal activity, such as travel abroad by an employee. This includes pregnant employees or those with medical conditions. However, you should educate your employees before they engage in travel to risky environments, and you can – and should – monitor those employees returning from such travel for signs of illness.

What should I do if an employee has recently traveled to an affected area or otherwise may have been exposed to the COVID-19 coronavirus?

The Americans with Disabilities Act (ADA) places restrictions on the inquiries that an employer can make into an employee's medical status. The ADA prohibits employers from making disability-related inquiries and requiring medical examinations, unless (1) the employer can show that the inquiry or exam is job-related and consistent with business necessity, or (2) where the employer has a reasonable belief that the employee poses a direct threat to the health or safety of the individual or others that cannot otherwise be eliminated or reduced by reasonable accommodation.

According to the Equal Employment Opportunity Commission (EEOC), whether a particular outbreak rises to the level of a "direct threat" depends on the severity of the illness. The EEOC instructs employers that the assessment by the CDC or public health authorities provides the objective

evidence needed for a disability-related inquiry or medical examination. To date, the CDC has not classified the COVID-19 coronavirus as a pandemic.

Can employees refuse to travel as part of their job duties?

Employees who object on behalf of others or act in groups could be covered by the NLRA's protection of concerted protected activity. You will want to proceed with caution and consult with your attorney before taking any steps in this regard. Moreover, under the federal OSH Act, employees can only refuse to work when a realistic threat is present.

Therefore, if employees refuse your instruction to travel for business to any other country for fear of catching the COVID-19 coronavirus, try to work out an amicable resolution. For example, the employer and the employee can check and discuss the CDC (avoid Nonessential travel), State Department (Do Not Travel to China), and DHS Travel Advisories, which provide guidance on China Travel.

The CDC is also advising that some individuals may be more at risk of infection than others in the general population. Thus, follow the CDC direction on pregnant employees or on related reproductive issues, and do not make decisions without medical support. Moreover, actions by other countries, especially in Asia, may cause employee concerns, and absolute warnings and restrictions like those on China may not exist.

INTERNATIONAL WORKFORCES

What should we do about expats working abroad and our global workforce?

Generally, the reaction to the COVID-19 coronavirus varies from country to country (or even jurisdiction to jurisdiction within a particular country). Employers with expats or other employees abroad should ensure copies of all expat assignment agreements and contracts are nearby if needed for reference. Most often the resolution of issues related to obligations with respect to these employees begin with reviewing applicable contractual obligations and agreements. You should also review all travel, medical, and other insurance policies to determine coverage limitations and to help assess risk.

Should we bring our expats home?

In some circumstances, it may be best practice to do so. You should undertake a careful evaluation of conditions in the location where they are living and working on a frequent basis. It would be a good practice to require your expat employees to regularly report back on conditions and their circumstances.

What if one of our expat employees becomes quarantined abroad?

If an expat or employee is quarantined abroad, you should seek legal and other advice regarding the particular facts and circumstances of the situation. You will need to develop a plan to meet your obligations to the employee and their family, as well as your company's needs. Each situation will be different, so your advice will need to be tailored to the situation.

What about our expats located in an area that is heavily affected by the COVID-19 outbreak?

In areas currently heavily affected, you should undertake a thorough review of conditions as they pertain to all employees within the area on a daily basis. The applicable laws vary from jurisdiction to jurisdiction. Some countries impose significant obligations concerning a duty of care to employees on employers that are more comprehensive than U.S. rules. You should not assume the law in other jurisdictions applies as it does here.

IMMIGRATION ISSUES

What will happen to my foreign national's immigration status if they are stuck outside the U.S.?

Generally speaking, U.S. immigration law only applies to a foreign national when that person is physically in the country. In most situations, a person is not considered to have failed to maintain lawful immigration status if they are not physically in the U.S. The employee's absence from the U.S., however, could trigger other collateral immigration issues. It is important to seek specific legal advice for each impacted case.

Does the Presidential Proclamation mean that the U.S. consulates will deny all visa applications filed in China in those non-exempt categories?

The State Department has not yet made specific announcements. However, some U.S. consulates in China have already postponed interview scheduling. A blanket visa denial rule is unlikely, however, because the terms of this order make it permissible to depart from China, remain in a third country for 14 days, and then lawfully seek entry into the U.S.

At the very least, visa applications filed in China will likely be delayed. On February 1, 2020, the U.S. Embassy in China announced: "Mission China will be closed to the public from February 3-7 in accordance with Chinese government guidance. Emergency American citizen services will be available." On February 10, 2020, the U.S. Embassy posted: "As of February 10, 2020, regular visa services at the U.S. Embassy in Beijing and the U.S. Consulates General in Chengdu, Guangzhou, Shanghai and Shenyang are suspended. Due to the ongoing situation relating to the novel coronavirus, the U.S. Embassy and Consulates have very limited staffing and may be unable to respond to requests regarding regular visa services."

Does the Presidential Proclamation affect those with visas?

The Proclamation specifically exempts any alien seeking entry into or transiting the United States pursuant to an A-1, A-2, C-2, C-3 (as a foreign government official or immediate family member of an official), G-1, G-2, G-3, G-4, NATO-1 through NATO-4, or NATO-6 visa.

If my foreign national employee is subject to these travel restrictions, what are my options to get them back to the U.S. as soon as possible?

This will be a case-by-case analysis, but most likely the employee will have to consider going to a third country, remain in that third country for at least 14 days, and then proceed to the U.S. This may require extra planning, such as dealing with a visa to go to the third country. In addition, when several other countries have started to implement similar travel restrictions, the situation remains in flux. It is also unclear if the administration would expand this order to include more countries and regions depending on the ongoing situation of the outbreak.

What issues can we expect green card holders to encounter?

Travel restrictions may cause issues for green card holders who have already been outside of the United States for an extended period of time. Extended absences from the United States by green card holders may lead to extensive questioning upon re-entry or a determination that the green card holder has abandoned their permanent resident status.

What happens to employees on temporary visas who cannot work?

Pending specific guidance from DHS, these workers would presumably be treated as if they were on an approved, unpaid leave, and therefore would not be out-of-status for failing to work.

Must I pay an H-1B alien the salary listed in the petition even if that person cannot now work?

Again, you could presumably put such a person on an unpaid leave of absence until they are able to work again.

HEALTHCARE/HIPAA ISSUES

Does the COVID-19 coronavirus emergency trump HIPAA privacy rules?

No, the government recently sent a stern reminder to all employers, especially those involved in providing healthcare, that they must still comply with the protections contained in the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule during the COVID-19 coronavirus outbreak. The Office for Civil Rights of the U.S. Department of Health and Human Services (HHS) issued a reminder after the WHO declared a global health emergency. In fact, the Rule includes provisions that are directly applicable to the current circumstances.

What are our obligations under the HIPAA privacy rules if we are contacted by officials asking for emergency personal health information about one of our employees?

The privacy restrictions mandated by HIPAA only apply to "covered entities" such as medical providers or employer-sponsored group health plans, and then only in connection with individually identifiable health information. Employers are not covered entities, so if you have medical information in your employment records, it is not subject to HIPAA restrictions.

Nevertheless, disclosures should be made only to authorized personnel, and care should be taken even in disclosures to government personnel or other groups such as the Red Cross. Further, you should be careful not to release information to someone until you have properly identified them.

How should we treat medical information?

We recommend you treat all medical information as confidential and afford it the same protections as those granted by HIPAA in connection with your group health plan. In certain circumstances, if you have plan information, you can share it with government officials acting in their official capacity, and with health care providers or officially chartered organizations such as the Red Cross. For example, you can share protected health information with providers to help in treatment, or with emergency relief workers to help coordinate services.

In addition, you can share the information with providers or government officials as necessary to locate, identify, or notify family members, guardians, or anyone else responsible for an individual's care, of the individual's location, general condition, or death. In such case, if at all possible, you should get the individual's written or verbal permission to disclose.

However, if the person is unconscious or incapacitated, or cannot be located, information can be shared if doing so would be in the person's best interests. In addition, information can be shared with organizations like the Red Cross, which is authorized by law to assist in disaster relief efforts, even without a person's permission, if providing the information is necessary for the relief organization to respond to an emergency.

Finally, information can be disclosed to authorized personnel without permission of the person whose records are being disclosed if disclosure is necessary to prevent or lessen a serious and imminent threat to the health and safety of a person or the public.

May covered entities share protected health information with public health authorities?

When there is a legitimate need to share information with public health authorities and others responsible for ensuring public health and safety, covered entities may share PHI to enable them to carry out their public health responsibilities. This may arise with the current outbreak of COVID-19. The key, as always, is to limit disclosures to the *minimum necessary* to the purpose, strictly in

accordance with these parameters.

For example, covered entities may share information *as necessary* with the Centers for CDC, as well as health departments authorized by law to receive such information, to prevent or control disease or injury. You may even disclose PHI to foreign government agencies that are working with authorized public health authorities.

BENEFITS/GROUP HEALTH PLAN ADMINISTRATION

If our employees are no longer working, are they still entitled to health insurance coverage?

Not necessarily. You need to check your plan document (if self-insured) or call the insurance company (if fully insured) to determine how long employees who are not actively working may remain covered by your health plan. Once this period expires, insurance coverage must be terminated (unless the insurance company or self-insured plan otherwise agrees to waive its eligibility provisions), and a COBRA notice must be sent. If your plan is self-insured and if you decide to waive plan eligibility provisions, you must make sure stop-loss insurers are notified and agree to cover claims relating to participants who would otherwise be ineligible for coverage.

What happens to health coverage if employees are not working and unable to pay their share of premiums?

In the normal course of events, health coverage will cease when premium amounts are no longer paid. However, several actions might be taken that would allow coverage to continue.

First, the insurer providing the health coverage may voluntarily continue the coverage while the disaster is sorted out and the employer reopens its doors. More likely, the employer may make an arrangement with the insurer providing health coverage to pay the employees portion of premiums to keep coverage in place (at least temporarily) and possibly until the employer can reopen its doors. Each situation will be different, depending upon the insurer and the relationship between the employer and the insurer. Therefore, each fact situation will have to be individually investigated.

WAGE AND HOUR ISSUES

Must we keep paying employees who are not working?

Under the Fair Labor Standards Act (FLSA), for the most part the answer is "no." FLSA minimum-wage and overtime requirements attach to hours worked in a workweek, so employees who are not working are typically not entitled to the wages the FLSA requires.

One possible difference relates to employees treated as exempt FLSA "white collar" employees whose exempt status requires that they be paid on a salary basis. Generally speaking, if such an employee performs at least some work in the employee's designated seven-day workweek, the

salary basis rules require that they be paid the entire salary for that particular workweek. There can be exceptions, such as might be the case when the employer is open for business but the employee decides to stay home for the day and performs no work. A U.S. Department of Labor (USDOL) opinion letter addressing these matters can be accessed here.

Also, non-exempt employees paid on a "fluctuating-workweek" basis under the FLSA normally must be paid their full fluctuating-workweek salaries for every workweek in which they perform any work. There are a few exceptions, but these are even more-limited than the ones for exempt "salary basis" employees.

Of course, an employer might have a legal obligation to keep paying employees because of, for instance, an employment contract, a collective bargaining agreement, or some policy or practice that is enforceable as a contract or under a state wage law.

Finally, we caution employers to consider the public relations aspect of not paying employees who may not be working if they have contracted or are avoiding the COVID-19 coronavirus. Given the publicity surrounding this outbreak, it is possible that situations involving these kinds of issues could reach the media and damage your reputation and employee morale. Consider the big picture perspective when making decisions regarding paying or not paying your employees.

Can we charge time missed to vacation and leave balances?

The FLSA generally does not regulate the accumulation and use of vacation and leave. The salary requirements for exempt "white collar" employees can implicate time-off allotments under various circumstances. The USDOL has provided some guidance on this topic in an opinion letter that is accessible here. Again, however, what an employer may, must, or cannot do where paid leave is concerned might be affected by an employment contract, a collective bargaining agreement, or some policy or practice that is enforceable as a contract or under a state wage law.

EMPLOYEE LEAVE/ADA

Does family and medical leave apply to this situation?

Employees requesting leave could conceivably be protected by the Family and Medical Leave Act (FMLA) to the extent they otherwise meet FMLA-eligibility requirements. Even in the absence of state or federal protection, an employer's internal policies may extend protection to such individuals. Of course, there is nothing to prevent you from voluntarily extending an employee's leave, even in the absence of any legal obligation.

Generally, employees are not entitled to take FMLA to stay at home to avoid getting sick. As with many employment laws, the worst thing an employer (or as is often the case, an untrained supervisor) can do at times like this is to reject immediately an unorthodox leave request before the

facts are in. When in doubt, the wisest approach is to work with counsel to ensure legal compliance, thereby minimizing exposure to costly litigation.

Does contraction of COVID-19 coronavirus implicate the ADA?

Generally, no, because in most cases the COVID-19 coronavirus is a transitory condition. However, some plaintiffs could make an argument that the ADA is implicated if the virus substantially limited a major life activity, such as breathing. Moreover, if an employer "regards" an employee with COVID-19 as being disabled, that could trigger ADA coverage.

Can I send employees home who exhibit potential symptoms of contagious illnesses at work?

Yes, sending an employee home who displays symptoms of contagious illnesses would not violate the ADA's restrictions on disability-related actions.

May an employer encourage employees to telework as an infection-control strategy?

Yes. The EEOC has opined that telework is an effective infection-control strategy. The EEOC has also stated that employees with disabilities that put them at high risk for complications of pandemic influenza may request telework as a reasonable accommodation to reduce their chances of infection during a pandemic.

DISCRIMINATION/HARASSMENT/EEO ISSUES

Do we have any EEO concerns related to the COVID-19 coronavirus?

Employers cannot select employees for disparate treatment based on national origin. The CDC recently warned: "Do not show prejudice to people of Asian descent, because of fear of this new virus. Do not assume that someone of Asian descent is more likely to have COVID-19."

Employers will need to closely monitor any concerns that employees of Asian descent are being subjected to disparate treatment or harassed in the workplace because of national origin. This may include employees avoiding other employees because of their national origin.

An employer may not base a decision to bar an employee from the workplace on the employee's national origin. However, if an employee, regardless of their race or national origin, was recently in China and has symptoms of the COVID-19 coronavirus, you may have a legitimate reason to bar that employee from the workplace.

LABOR RELATIONS

My workforce is unionized. Can my company make changes to unionized employees work schedules or duties in response to the COVID-19 coronavirus?

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. Generally speaking, employers who make unilateral changes to these facets of employment may be subject to unfair labor practice charges that would apply even in emergency situations such as this one, unless your collective bargaining agreement provides otherwise. Many collective bargaining agreements contain provisions that allow for employer flexibility in determining work assignments, scheduling, and layoffs. The first authority for determining your rights and obligations is your own collective bargaining agreement.

I have a "force majeure" clause in my contract. Does it cover an outbreak such as the COVID-19 coronavirus?

Possibly. A "force majeure" clause is a contract provision that relieves the parties from performing their contractual obligations when certain circumstances beyond their control arise, making performance inadvisable, commercially impracticable, illegal, or impossible. Whether an outbreak like the COVID-19 coronavirus triggers the force majeure clause in a contract, and the effect of that clause on the provisions of the contract, will vary significantly with each employer.

There is no force majeure clause in my contract. Does that mean I still have to abide by all of the contract provisions during the outbreak?

The general duty to bargain over changes in contractual terms may be suspended where compelling economic exigencies compel prompt action. The law views "compelling economic exigencies" as extraordinary, unforeseen events having a major economic effect that requires the employer to take immediate action and make a unilateral change.

Although an outbreak like the COVID-19 coronavirus would seem to fit the description of a "compelling economic exigency," realize that its effect will be different for every employer. That is, while it may suspend the duty to bargain for one employer whose only facility was infected, it will likely not suspend the duty for an employer that has lost significant accounts or contracts as a result of the outbreak. In practice, the safest course of action (and the one most likely to avoid future litigation) is to notify the union in all cases, even if you believe that your particular situation fits into the "compelling economic exigency" category.

How much notice do I have to give the union before I make a change to my contract?

The law requires employers to give the union "adequate" notice of a proposed change to the collective bargaining agreement, so as to engage in meaningful bargaining over that change on request. There is no hard and fast rule as to how much notice is adequate. But 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.

Wouldn't our no-strike clause prohibit bargaining unit members from refusing to work?

That would likely depend on a host of factors ranging from the articulated rationale for withholding services to specific language within the no-strike clause itself. Most such provisions effectively preclude covered employees from striking or otherwise refusing to perform work as scheduled. By the same token, long-standing labor relations doctrine generally requires bargaining unit members to, "work now, and grieve later."

That being said, such provisions do not necessarily trump those aspects within Section 13(a) of the OSH Act entitling all employees to refuse to work if they reasonably believe they are in imminent danger, and compelling employees (particularly in high-risk industries) to report for work under such circumstances may also present adverse public relations implications. Consequently, circumstances like these are best examined on a case-by-case basis under advice of counsel and – in some circumstances, following dialogue with the authorized bargaining representative.

WARN ACT/PLANT CLOSINGS

Do we have an obligation to provide notice under the WARN Act if we are forced to suspend operations on account of the coronavirus and its aftermath?

Yes, if your company is covered by the Worker Adjustment and Retraining Notification (WARN) Act. The federal WARN Act imposes a notice obligation on covered employers (those with 100 or more full-time employees) who implement a "plant closing" or "mass layoff" in certain situations, even when they are forced to do so for economic reasons. It is important to keep in mind that these quoted terms are defined extensively under WARN's regulations, and that they are not intended to cover every single layoff or plant closing.

Generally speaking, employers must provide at least 60 calendar days of notice prior to any covered plant closing or mass layoff. Note, however, that if employees are laid off for less than six months, then they do not suffer an employment loss and, depending on the particular circumstances, notice may not be required. Unfortunately, in situations like this, it is hard to know how long the layoff will occur so providing notice is usually the best practice.

Fortunately, even in cases where its notice requirements would otherwise apply, the WARN Act provides a specific exception when layoffs occur due to unforeseeable business circumstances. This provision may apply to the COVID-19 coronavirus. But due to the fact-specific analysis required, this exception is often litigated.

Moreover, this exception is limited, in that an employer relying upon it must still provide "as much notice as is practicable, and at that time shall give a brief statement of the basis for reducing the notification period." In other words, once you are in a position to evaluate the immediate impact of the outbreak upon your workforce, you must then provide specific notice to "affected employees." You must also provide a statement explaining the failure to provide more extensive notice, which in this case would obviously be tied to the unforeseeable nature of the outbreak and its aftermath.

The WARN Act has specific provisions requiring notice to employees, unions and certain government entities. The Act further specifies the information that must be contained in each notice. Keep in mind that some states have "mini-WARN" laws that may apply. Please work with your employment counsel to ensure compliance notices are provided.

Will this law really be enforced this law in light of the outbreak?

In the aftermath of an outbreak, the extent to which the USDOL will focus upon enforcement of the WARN Act remains to be seen. Nonetheless, the law provides stiff penalties for non-compliance, including up to 60 days of back pay and benefits, along with a civil penalty of up to $500 per day. More importantly, it provides for a private cause of action in federal court, suggesting that employers may soon be responding to lawsuits arising under the WARN Act regardless of the enforcing agency's official position.

Consequently, we advise that you evaluate your current situations to ascertain whether the most recent outbreak has triggered a WARN Act qualifying event in your organization. If so, provide as much notice to affected employees as is practicable under the circumstances. When in doubt, the best approach is to work through counsel to arrive at a safe but practical solution to a potentially thorny situation for many employers that are impacted by the outbreak, either directly or indirectly.

EDUCATIONAL INSTITUTIONS

Our Education Practice Group has published its own set of FAQs and a 10-Point Action Plan For Educational Institutions which can be accessed here.

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CONCLUSION

We will continue to monitor this rapidly developing situation and provide updates as appropriate, including updating this FAQ on as-needed basis. Make sure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. For further information, contact your Fisher Phillips attorney or any member of our COVID-19 Taskforce, headed by Travis Vance and Howard Mavity.

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.