Coronavirus (COVID-19) Update for Employers

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An update on the coronavirus

What we know:

- It is a virus that attacks the lungs
- Causes a fever, labored breathing and a dry cough (can’t clear it)
- Incubation period is likely up to 14 days, and people can spread it for days before they know they have it
- Symptoms start slow and can feel like a cold at first
- Quickly turns to pneumonia
- Death rate is growing (in number and percentage of people who are infected die from it)
- It is spreading exponentially
An update on the coronavirus

What we are learning:
- Illness lasts for weeks (4-5)
- Death rate is 2x for males
- Those immunocompromised or the elderly are particularly susceptible to acute conditions
- The young (<20 years old) do not seem terribly affected, but the very young can get very severe cases
- Believed to be able to survive air born for between 30 minutes to three hours
- Believed can live on cardboard for 24 hours
- Believed can live on steel for 2 days
- Believed can live on plastic for 3 days
- Vaccine could be as far as a year away.
Our current situation

As of last night, the US had:

- 66,048 confirmed cases
- 944 deaths
- 394 recovered

Every state had cases

Our current death to recovered rate is 70%

The death to recovered rate worldwide is 15%
CDC reports found coronavirus RNA on cruise ship 17 days after evacuated

So, what do you do when:

-- You have a highly contagious superbug that can live for days (or even weeks) outside of a host

-- People spread it for days before knowing they are spreading it

-- There is no current cure

-- and the death rate (compared to recovered is anywhere from 15%-70%)?
Solution

Avoid spread through:

- Fanatical hygiene
- Remote work
- Social distancing (6’)
- No congregating
- Shelter in place
- Close the schools
- Shut down non-essential businesses
  - Voluntarily or, involuntarily by governmental order
How did China do it?

Chinese officials are only letting people leave their homes every 2 days and have forbidden weddings and funerals.

How does the US compare to this?
To be frank, we are in a partial shutdown

College Students Say They Won’t Let Coronavirus Ruin Their Spring Break…

BTW, all these kids are coming home…

- And several have already tested positive for COVID-19
What’s my point?

Once China mobilized, it took them over a month of serious shuttering in place to turn the tide.

A partial shutdown means it may just slow it down, not reverse the tide. It will definitely take longer, if it works at all.
What happens when you shut down non-essential businesses and tell everyone to stay at home (indefinitely)?

What is the government doing to help?

- Shut everything (they can) down
- Pause
- Put economy on life support
- Buoy everyone until we get through it
The New Norm For EMPLOYERS

- Protocols for the new workplace
- Keeping a close eye on governmental activity (including closure orders) and adjusting to economic stimulus packages (such as new paid leave)
- Making tough decisions about their own business and people
The New Workplace
Different Considerations

Essential Businesses
- Keeping up with demand
  - Safety protocols
  - Telecommuting (where possible)
  - Worker fatigue
  - Requests for hazard pay
- Required closures
  - Safety protocols
  - Reduced hours
  - Telecommuting
  - Furlough & layoffs

Non-Essential Businesses
- Safety protocols
- Telecommuting
- Furlough & layoffs
Safety Protocols

- Reduce Transmission Among Workers
- Maintain Healthy Business Operations
- Maintain a Healthy Work Environment

CDC Resources for Businesses and Employers
OSHA’s Guidance on Preparing Workplaces for COVID-19
CDC Resources for Businesses and Employers

Summary of Changes to the Guidance:

Below are changes as of March 21, 2020

- Updated cleaning and disinfection guidance
- Updated best practices for conducting social distancing
- Updated strategies and recommendations that can be implemented now to respond to COVID-19
Are the CDC and OSHA Guidelines Mandatory?

• No, but . . .
  • Will be relied upon by OSHA and other agencies in investigations
  • Also sets a reasonable standard to avoid negligence claims
Reduce Transmission

- Actively encourage sick employees to stay home or employees who are well but have sick family members
- Minimize face to face contact (especially with high risk employees) – six feet distance from others or telework
- Separate employees with symptoms and send home & advise to contact healthcare provider
- If an employee tests positive, inform fellow employees while maintaining confidentiality and ask fellow employees to monitor for symptoms
- Educate employees on how to minimize exposure - good hygiene and social distancing
Return to Work from Home Isolation

Updated

Was 24 hours symptom free without aid of medication

Now (Non-test strategy):

- At least 3 days (72 hours) have passed since recovery defined as resolution of fever without the use of fever-reducing medications and improvement in respiratory symptoms (e.g., cough, shortness of breath); and,

- At least 7 days have passed since symptoms first appeared.
CDC Position

Employers should not require a positive COVID-19 test result or a healthcare provider’s note for employees who are sick to validate their illness, qualify for sick leave, or to return to work in order to avoid overburdening healthcare system.
Healthy Business Operations

- Identify a workplace coordinator
- Implement flexible sick leave and supportive policies
- Assess essential functions
- Determine how to operate if absentism spikes
- Consider implementing policies for social distancing (remote work, rotating work schedules, increase physical space, deliver services remotely)
Healthy Work Environment

- Consider increasing ventilation rates
- Support respiratory etiquette and hand hygiene for employees & visitors (provide tissues, hand sanitizer, etc.)
- Perform routine environmental cleaning
- Perform enhanced cleaning & disinfecting after suspected or confirmed COVID-19 positive
- Advise employees on travel precautions
- Take care with regard to meetings & gatherings
ADA Considerations

• Medical questions and exams subject to business necessity

Updated EEOC Guidance on March 19, 2020
COVID-19 pandemic = business necessity

• Temperature Checks?
  • Best practices:
    • Look for temperature under 100.4 F
    • Have employee take own temperature or provide PPE for temperature taker

• Confidentiality
Can an employee refuse to work out of generalized fear of getting COVID-19?

• No, but . . .
  • OSHA considerations
  • NLRA considerations
  • ADA considerations if at high-risk due to pre-existing condition
  • Best practice to allow without attendance penalty but may be unpaid leave
Remote Work Policies

- Strongly encouraged by CDC, federal, state & local governments and closure orders to allow employees who can to work remotely
- Mandatory vs. Voluntary?
Remote Work Policies Considerations

1. Security Procedures & Equipment
2. Performance Standards
3. Expense Reimbursements
4. Time Keeping Controls
5. Acknowledgement (temporary; not all essential functions can be performed)
PTO and Leave Policies

• Follow normal PTO/Sick Leave Policies (except consider the CDC request to limit or suspend instances where certification required)

• Be mindful of state and local paid leave laws
  • Some state and local paid sick leave laws provide for paid leave due to school closures
  • These states (currently) provide for quarantine leave (more could pass):
    • Arizona
    • San Francisco, CA
    • Maine
    • Montgomery County, MD
    • Michigan
    • New Jersey
    • New York
    • Oregon
    • Pittsburg, PA
    • Rhode Island
What does your company sick leave cover vs common COVID-19 situations?

- School closures?
- Quarantine?
- Care for family?
- Isolation?
- Employees with COVID-19?
- Immunocompromised (High Risk) persons who are currently healthy?
- Older workers (High Risk) who are currently healthy?

BTW, you aren’t stuck – you can always amend your own policy.
FMLA and ADA

• FMLA
  • Own Serious Health Condition
  • Family Serious Health Condition
  • And EFMLA for more

• ADAA
  • Could be a disability under the ADAA
  • Leave Can Be a Reasonable Accommodation
Traditional types of leave provided by federal law vs common COVID-19 situations

• ADA Cover?
  • Quarantines of healthy persons? (benching employee because they are high risk to others)
  • Care for family members with COVID-19? (what about CA?)
  • Isolation of those believed to be sick?
  • Those with COVID-19?
  • High risk persons who are immunocompromised and seek to work from home or leave?
  • Older workers who seek to work from home or leave?
  • Governmental closure orders?
  • School closures?
Traditional types of leave provided by federal law vs common COVID-19 situations

- **FMLA** Cover?
  - Quarantines of healthy persons? (benching an employee because they are high risk to others)
  - Care for family members with COVID-19?
  - Isolation of those believed to be sick?
  - Those with COVID-19?
  - High risk persons who are immunocompromised and seek to work from home or leave?
  - Older workers who seek to work from home or leave?
  - Governmental closure orders?
  - School closures?
Families First Coronavirus Response Act (FFCRA)

- Expanded FMLA “EFMLA”
- Created New Paid Sick Leave “EPSL”
- Required amendments to benefit plans
FFCRA

• Effective April 1, 2020 (according to DOL) – December 31, 2020
• Applies to schools, governmental employers of any size, and private employers with less than 500 employees
• Poster -

• NOTE – Any LEAVE GIVEN PRIOR TO APRIL 1 FOR THE REASONS WE ARE ABOUT TO DISCUSS GETS NO CREDIT UNDER THE NEW REQUIREMENTS
Expanded FMLA or Emergency FMLA (E-FMLA) – Key Points

• If Leave is granted, and you are already an FMLA Covered Employer, any leave taken will count against the normal 12 week period for other types of FMLA

• It provides leave for ONLY ONE type of COVID-19 situation
  • If the employee has a minor child
  • The child’s school or daycare closes because of COVID-19 concerns or if the child’s normal, paid care provider is unavailable because of COVID-19
  • As a result, the employee cannot work or telework
  • Because they need to care for the child
Expanded FMLA or Emergency FMLA (E-FMLA) – Key Points

• Changed the definition of employer (SOLELY FOR E-FMLA)
  • Any employer (the W-2 employer) with under 500 US employees
    • After adding any temps, leased employees
    • After adding any “shared” employees (if other kinds)
    • Consider integrated employer test (BUT BE CAREFUL)
      • Common management: Significant overlap between management and human resources functions at the different entities.
      • Interrelation between operations: Beyond just typical parent/sub relationship -- such as common offices, common record keeping, shared bank accounts, and shared equipment. Mere administrative overlap (shared services) may not be enough
      • Centralized control of labor relations: Look for shared policies regarding hiring, firing, and training employees, and in developing and implementing personnel procedures.
      • A degree of common ownership and financial control (least relevant)

• NOTE – employers under 50 must comply, unless let out by DOL (temporarily, must submit request to DOL, eventually regulations will be issued – expected by April 17) – DOL may let out if demonstrate economic viability compromised
Expanded FMLA or Emergency FMLA (E-FMLA) – Key Points

• Changed the definition of eligible employee (SOLELY FOR E-FMLA)
  • Any employee who has been on payroll for more than 30 calendar days (whether working or not)
  • If not eligible when requested, but they become eligible because they are still on payroll, then they get it when they hit 30 days

• Healthcare providers and emergency responders may not get the leave
  • Healthcare provider (definition under normal FMLA)
  • Emergency responder (waiting on guidance or regs)
Expanded FMLA or Emergency FMLA (E-FMLA)
– Key Points

• Provides for pay to employees for weeks 3-12
  • At 2/3rds regular rate of pay (over past 6 months)
    • Regular rate of pay is same definition as FLSA (includes all non-discretionary bonuses)
  • Capped at $200 per day

• Tax credit available (at amounts that were mandated) for covered employers
  • Non-covered employer who give, and any employer who gives more, may not be able to get tax credits for voluntary payments or portions that were voluntary.
New Emergency Paid Sick Leave (EPSL)
--- Key points

- 80 hours for full time; average number of hours an employee works over two week period for the rest (on top of what already giving)

An employee is entitled to take leave related to COVID-19 if the employee is unable to work, including unable to **telework**, because the employee:

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<td><strong>1.</strong></td>
<td>is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;</td>
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<td><strong>2.</strong></td>
<td>has been advised by a health care provider to self-quarantine related to COVID-19;</td>
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<td><strong>3.</strong></td>
<td>is experiencing COVID-19 symptoms and is seeking a medical diagnosis;</td>
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<td><strong>4.</strong></td>
<td>is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);</td>
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<td><strong>5.</strong></td>
<td>is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or</td>
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<td><strong>6.</strong></td>
<td>is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services.</td>
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Only commonality with E-FMLA is “school’s out” leave – see 5
New Emergency Paid Sick Leave (EPSL)
-- Key points

• Changed the definition of employer (SOLELY FOR E-FMLA)
  • Any employer (the W-2 employer) with under 500 US employees
    • After adding any temps, leased employees
    • After adding any “shared” employees (if other kinds)
    • Consider integrated employer test (BUT BE VERYVERY CAREFUL)
      • Integrated employer test MAY not apply to EPSL – we don’t know yet

• NOTE – employers under 50 must comply. THEY absolutely must comply for all EPSL reasons other than “school’s out” leave. There, to get out temporarily, must send request to DOL to receive temporary exemption if can demonstrate to the DOL that to provide would result in continued viability being compromised. Eventually regs will be issued to address (expected by April 17)
New Emergency Paid Sick Leave (EPSL)
-- Key points

• Who is eligible?
  • Everybody on payroll

• Healthcare providers and emergency responders may not get the leave
  • Healthcare provider (definition under normal FMLA)
  • Emergency responder (waiting on guidance or regs)
New Emergency Paid Sick Leave (EPSL)
-- Key points

• Provides for pay to employees in amounts dependent on the reason for the leave
  • For reasons 1-3 (employees personal needs – health or quarantine)
    • At 100% of regular rate of pay (over past 6 months)
      • Regular rate of pay is same definition as FLSA (includes all non-discretionary bonuses)
      • Capped at $511 per day
  • For reasons 4-6 (including school leave and caring for ‘an individual’)
    • At 2/3rds regular rate of pay (over past 6 months)
      • Regular rate of pay is same definition as FLSA (includes all non-discretionary bonuses)
      • Capped at $200 per day

• Tax credit available (at amounts that were mandated) for covered employers
  • Non-covered employer who give, and any employer who gives more, may not be able to get tax credits for voluntary payments or portions that were voluntary.
Phase 3 of stimulus package – some version likely to become law

- US government is planning to pump close to $2 trillion into the economy.
- Payments directly to citizens
- Payments through unemployment system with considerable incentives to loosen requirements (but still a state issue)
- Loans to businesses
  - But be careful of requirements and make sure you can live with them
    - As currently drafted, some of the distressed loans would require an employer to agree to neutrality (with unions)
Reduced Hours, Furloughs & Layoffs
Generally

Furlough or Temporary Layoff (with recall expectation)
Employee remains on payroll & generally benefits continue or some period of time subject to terms of plans

Permanent Layoff
Separation from Employment
Reduced Hours, Furloughs & Layoffs Considerations

State law advance notice requirements

Federal WARN Act

State Mini-WARN Act

Eligibility for Unemployment Compensation

Benefits Continuation

Employment Contracts and Severance Plans
Wage & Hour Considerations

Two Primary Scenarios:

- Employees are instructed not to work for whatever reason
- Business/economic conditions require employee work schedule modification or pay reductions
Exempt Employees

• Exempt employee must receive guaranteed salary of at least $684 per week that represents all or part of their compensation

• Employee must receive salary for any workweek in which any work is performed but deductions against PTO bank allowed

• If no work is performed in a workweek, then employer does not have to pay salary

• Deductions from salary for absences or changed business operations required by employer are not allowed

• However, subject to state notification laws, salary can be reduced for reduced workweek
Key Benefits Issues

- Most health plans limit eligibility to employees who work full-time. If employees lose health coverage because of a reduction in working hours or furlough, COBRA will be triggered.

- This may not happen for a while, depending on the Affordable Care Act (ACA) measurement method that the employer uses.

- Must look at plans and make sure plans are amended to effectuate what the business does.
Key Benefits Issues

• Employees could also lose eligibility for other hours- or status-based benefits as well (i.e., life, disability, etc.)

• Also consider whether your 401(k) plan offers hardship distributions or loans that may apply to COVID-19
Recommendations

• Take this seriously. It truly is a health crises
• Remain Calm and Measured
• Monitor the latest guidance
• Communicate Regularly with Workforce
• Be flexible, but consistent
• Communicate and analyze individual issues with HR and Legal

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