



EMPLOYERS AND CORONAVIRUS (COVID-19)

By Jefferson P. Whisenant

On March 11, 2020, the World Health Organization officially designated COVID-19 a global pandemic. Not only is Wall Street in panic, but misinformation – and pure disinformation – is rampant and spreading as fast as the virus itself. If employers haven't been peppered with questions from their rightfully concerned employees, they are sure to be soon.

FMLA – A REFRESHER

While an emergency paid sick leave bill has stalled in the Senate, Congress has taken no action as of this writing to revise the application of the Family and Medical Leave Act (FMLA). You'll likely get questions from employees about how the FMLA applies to COVID-19, so let's run through the analysis with that lens.

FMLA requires a covered employer and an eligible employee. Covered employers are (1) all public agencies, and (2) any private sector employers with 50 or more employees for at least 20 workweeks. Employees are eligible when they have worked for the employer for at least 12 months, with at least 1,250 hours of service over the previous 12 months (which works out to be about 24 hours per week)¹, and work at a location where at least 50 employees are employed by the employer within 75 miles.

If those conditions are met, the employee is entitled to job-protected *unpaid* leave for serious health conditions (the employee can elect, or employer require, that the employee use accrued paid vacation or sick leave). The best we can do is compare this to the flu, which is not, by itself, a "serious health condition." 29 CFR 825.114(c). *However*, the flu can become a "serious health condition" if the employee is incapacitated for three or more consecutive days and received continuing treatment. (See Opinion Letter from Administrator Maria Echaveste, FMLA – 87, December 12, 1996). Analysis is made on a case-by-case basis. It is likely that some diagnosed with COVID-19 will have a "serious health condition." FMLA does not apply to employees who want to stay home to avoid the virus, but are not ill. However, the Department of Labor encourages employers to adopt flexible leave policies in response to this virus.

Employers can require that employees provide a doctor's note, but remember: health care resources will be limited during a pandemic. It's important to be flexible and reasonable in this regard. Now is a good time to remind your employees of any tele-health options so that they can obtain doctor's notes if needed.

¹ Keep in mind that special exceptions apply to the time requirements for members of the National Guard. Let us know if you run into that issue.



OSHA

While there are not yet any COVID-19 specific directives, some existing OSHA standards may apply. For example, OSHA's Personal Protective Equipment standards: when respirators are necessary to protect workers, employers must implement a comprehensive respiratory protection program in accordance with the Respiratory Protection standard (29 CFR 1910.134). The General Duty Clause also requires "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." If COVID-19 gets as bad as some are predicting, it may be wise to explore tele-commute possibilities if applicable. Certain sensitive areas of employment (especially in the health care arena) may want to consider respiratory measures immediately.

DISCRIMINATION VERSUS PROTECTION

When excluding employees from the workplace, it is important to avoid discriminating against protected classes of employees. You cannot discriminate on the basis of race, sex, age (40 and over), color, religion, national origin, disability, union membership, or veteran status. You may still exclude an employee with a disability from the workplace if you (1) obtain objective evidence that the employee poses a direct threat (significant risk of substantial harm); and (2) determine that there is no reasonable accommodation that would not pose an undue hardship to eliminate that direct threat.

PRIVACY

If an employee has COVID-19, that employee still has a reasonable expectation to privacy regarding their medical information. Remember, health and disability information must be kept separate from the employee's personnel file. You must maintain confidentiality of the exposed individual employee's medical information. However, this does not mean you cannot discuss exposure generally with employees in your business. Best practice is to immediately contact your local health department for recommendations and strategy for containment, while continuing to consider employee privacy.

NC LEAVE LAWS

North Carolina does not require employers to provide paid vacation or sick leave. However, the state does require employers to follow the leave policies the employers have adopted. This is especially important during times when multiple employees may be taking leave time to avoid exposure to the public. If you've made a policy in a handbook or a contract, you must honor that policy².

² Caps on vacation leave, or "use-it-or-lose-it policies are legitimate, so long as that policy is clear and written notification is provided to the employees.

HELPFUL RESOURCES

It is important to have a trusted source of information. The following are a few resources to keep up to date on COVID-19 as it relates to employers:

- General Information (CDC):
https://www.cdc.gov/coronavirus/2019-ncov/about/index.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2Fabout%2Findex.html
- OSHA (DOL):
<https://www.osha.gov/SLTC/covid-19/>
- FMLA (DOL):
<https://www.dol.gov/agencies/whd/fmla/pandemic>
- Recommended Strategies for Employers (CDC):
<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

Remember to keep your own organization's messaging clear and consistent!

APPLICABLE BENEFITS

While COVID-19 is certainly making the news, employment considerations presented are comparable to any other illness. It is important to consider all employee benefits available to employees that may be utilized with greater frequency, especially depending on how severe the virus is. Particularly relevant benefits may be:

- ✓ **Sick Leave, Vacation and/or Paid Time Off (PTO):** If schools close and employees are forced to stay home with children, should they log the time as sick, vacation, PTO or unpaid leave? If an employee suspects exposure, but there is no diagnosis, is their time out sick, vacation, PTO or unpaid leave? If an employee has used all of their accrued leave time, will you allow them to take unearned time for any of these circumstances? Consider scenarios like these before they happen.
- ✓ **Short-Term and Long-Term Disability:** Which employees are eligible? If there is a length of service requirement, who is close to being eligible?
- ✓ **Health Care:** Is your health care provider offering special coverage related to testing or other treatment specifically related to the virus? Does your provider offer telemedicine options? If so, do your employees know how to access?
- ✓ **Retirement Accounts:** Employees are probably worried about their 401k. Make sure you can answer questions about their access to these funds, the penalties associated with early withdrawal, and who manages their funds.

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