Coronavirus Update: Workplace Safety, Paid Leave, Layoffs, Shutdowns, and Other Novel Legal Issues

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Webinar for ARTBA Members
March 20, 2020
2:00 pm ET
Speakers

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Agenda

- **Workplace Safety & Health (OSHA)**
  - Remote Working / Social Distancing
  - Employees with COVID-19 Diagnosis or Symptoms

- **Paid Leave Requirements**
  - New Law: Families First Coronavirus Response Act (effective 4/2/20)
  - Current Laws (FMLA, ADA) and Company Policies

- **Pay issues regarding exempt (salaried) and non-exempt (hourly) positions**

- **Layoffs**

- **Helpful resources**
Introductory Remarks

- Focus first on safety and health of your employees and their families and your community
- Focus on your business – survival of your business matters
- Employment and labor laws and systems don’t fully contemplate this unprecedented situation
  - Be careful about absolutes in advice and opinions
  - Get advice from reliable sources
  - General materials are not legal advice for specific situations
- Be safe, kind, and patient with each other
Unprecedented Challenges for Employers

- Construction projects halted
- Government ordering businesses to shut down
- Significant loss of business
- Economic recession
- Wage reductions, shift changes, furloughs, voluntary separation programs, reductions-in-force
Workplace Safety and Health

Guidance on Preparing Workplaces for COVID-19

What You Should Know About the ADA, the Rehabilitation Act, and COVID-19
Safety First –
A New Way to Work … For Now?
Emergency Remote Work Arrangements

- voluntary or mandatory
- equipment and services necessary to work from home (and properly handling expense reimbursements with regard to working from home)
- appropriate physical security and cyber-security precautions to safeguard confidential information
- appropriate timekeeping controls for non-exempt employees;
- the benefits of establishing an interim or emergency policy establishing the controls around remote work while making clear such arrangements are not intended to set future precedent.
Social Distancing – on the Job?

- For those who cannot work from home
- CDC recommends groups of no more than 10
- Workflow issues in the work zone area
- Job trailers
- Digital meetings or conference calls
- Conferences and conventions on hold
OSHA Guidance on Preparing Workplaces for COVID-19


This guidance is not a standard or regulation, and it creates no new legal obligations. It contains recommendations as well as descriptions of mandatory safety and health standards. The recommendations are advisory in nature, informational in content, and are intended to assist employers in providing a safe and healthful workplace.
OSHA Guidance on Preparing Workplaces for COVID-19

The Occupational Safety and Health Administration (OSHA) developed this COVID-19 planning guidance based on traditional infection prevention and industrial hygiene practices. It focuses on the need for employers to implement engineering, administrative, and work practice controls and personal protective equipment (PPE), as well as considerations for doing so.
OSHA Guidance: Steps All Employers Can Take to Reduce Risk of Exposure

1. Develop an Infectious Disease Preparedness and Response Plan
   - Plans should consider and address the level(s) of risk associated with various worksites and job tasks workers perform at those sites
     - Where, how, and to what sources of SARS-CoV-2 might workers be exposed, including:
OSHA Guidance: Steps All Employers Can Take to Reduce Risk of Exposure

- The general public, customers, and coworkers; and
- Sick individuals or those at particularly high risk of infection (e.g., international travelers who have visited locations with widespread sustained (ongoing) COVID-19 transmission, healthcare workers who have had unprotected exposures to people known to have, or suspected of having, COVID-19).

- Non-occupational risk factors at home and in community settings.
- Workers’ individual risk factors (e.g., older age; presence of chronic medical conditions, including immunocompromising conditions; pregnancy).
- Controls necessary to address those risks.
OSHA Guidance: Steps All Employers Can Take to Reduce Risk of Exposure

- Follow federal and state, local, tribal, and/or territorial (SLTT) recommendations regarding development of contingency plans for situations that may arise as a result of outbreaks, such as:
  - Increased rates of worker absenteeism.
  - The need for social distancing, staggered work shifts, downsizing operations, delivering services remotely, and other exposure-reducing measures.
  - Options for conducting essential operations with a reduced workforce, including cross-training workers across different jobs in order to continue operations or deliver surge services.
  - Interrupted supply chains or delayed deliveries.
OSHA Guidance: Steps All Employers Can Take to Reduce Risk of Exposure

2. Prepare to Implement Basic Infection Prevention Measures
3. Develop Policies and Procedures for Prompt Identification and Isolation of Sick People, if Appropriate
4. Develop, Implement, and Communicate about Workplace Flexibilities and Protections
5. Implement Workplace Controls
OSHA Guidance: Workplace Controls

During a COVID-19 outbreak, when it may not be possible to eliminate the hazard, the most effective protection measures are (listed from most effective to least effective): engineering controls, administrative controls, safe work practices (a type of administrative control), and PPE. There are advantages and disadvantages to each type of control measure when considering the ease of implementation, effectiveness, and cost.
OSHA Guidance: Steps All Employers Can Take to Reduce Risk of Exposure

6. Follow Existing OSHA Standards
   ● PPE (29 CFR 1910 Subpart I)
     ■ Specific requirements for respirators whether voluntary or mandatory
   ● Bloodborne Pathogens (29 CFR 1910.1030)
   ● General Duty Clause...see following slide

■ Determine where your organization falls on the risk pyramid
OSHA – General Duty Clause

- OSH Act of 1970, Section 5(a)(1)
- “Each employer shall furnish to each of his employees 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 to his employees.”
- Examples: heat stress, workplace violence, work zone safety (internal traffic control plans)
- COVID-19 Global Pandemic?
- What about specific workplaces or types of workplaces?
OSHA Guidance: Classifying Worker Exposure to SARS-CoV-2

Occupational Risk Pyramid for COVID-19

- Very High
- High
- Medium
- Lower Risk (Caution)
How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic?

- **EEOC**: During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

- **OSHA**: See General Duty clause
When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic?

**EEOC:** Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.
Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19?

- **EEOC**: Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.
- **OSHA**: See General Duty Clause
When employees return to work, does the ADA allow employers to require doctors' notes certifying their fitness for duty?

EEOC: Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.
May an employee refuse to come to work due to a general fear of becoming infected with COVID-19?

No. But a specific safety hazard may be the basis for an 11(c) retaliation claim under OSHA law, or potentially an unfair labor practice charge if employees are engaged in protected concerted activity under the National Labor Relations Act.
May an employer require an employee who is not exhibiting COVID-19 symptoms but who has been in contact with an individual with COVID-19 or is in a potential incubation period (e.g., after returning from travel to an area of risk, as noted by the CDC) stay away from work?

- Yes, and see the paid leave provisions below.
Safety & Health – Travel Issues

- Can employers forbid business-related travel to affected areas? Yes.
- Can employers require employees to go on business trips to affected areas, despite employees expressing concern over contracting the virus? Not a good idea.
- Can an employer ask employees about their personal travel or future travel plans? Yes.
- Can employers ban employees from personal travel to affected areas? Yes by using leverage.
Other OSHA Legal Issues

- Is a workplace exposure to COVID-19 recordable?
  - Is the exposure work-related?

- Would it be reportable?
  - What else happened?
New Emergency Paid Leave Requirements

“Families First Coronavirus Response Act”

Signed by President Trump: March 18, 2020
Effective Date: April 2, 2020
Families First Coronavirus Response Act

- **Coverage**: Require employers with fewer than 500 employees to provide emergency paid sick leave and family leave to certain employees directly impacted by COVID-19.

- **Tax Credits**: Each quarter, employers are entitled to a fully refundable tax credit equal to 100% of the wages paid under either leave provision.

- Put political and popular pressure on “large” employers to provide paid leave voluntarily (with no reimbursement from the federal government).
Emergency Paid FMLA Leave

- **What it does?** Requires 12 weeks of job-protected FMLA leave for employees to care for children if schools/daycares closed because of a public health emergency and they are unable to work or telework

- **Who is eligible?** Employees working for at least 30 calendar days

- **Rate of Pay**
  - First 10 days are unpaid
  - Employees may use accrued paid personal or sick leave during the first 10 days, but employers may not require them to do so
  - After 10 days, employees are paid at 2/3 of their regular rate
  - Capped at $200 per day and $10,000 in the aggregate
“Emergency Paid Sick Leave Act”

Requires employers to provide paid sick time to the extent the employee is unable to work (or telework) due to a need for leave because:

1. Employee is under government-ordered quarantine or isolation
2. Employee’s “Health Care Provider” advises self-quarantine (HCP is same as FMLA definition and includes nurse practitioners and others)
3. Employee is experiencing COVID-19 symptoms and seeking medical diagnosis
4. Employee is caring for an individual subject to quarantine order or self-quarantine HCP advice (1 or 2, above)
5. Employee is caring for own child if the school or place of care of the child has been closed or the child care provider is unavailable
6. Employee is experiencing substantially similar conditions as specified by the Secretaries of Health and Human Services, Treasury, and Labor
Emergency Paid Sick Leave

- **Eligibility.** All employees, regardless of length of employment
- **Amount of Paid Sick Time**
  - Full-time Employees = 80 hours
  - Part-time Employees = equal to the number of hours that such employee works, on average, over a 2-week period
- **Rates of Pay / Caps**
  a. For reasons 1-3 on prior slide (employee’s condition)
     - The higher of the employee’s regular rate or applicable minimum wage
     - Capped at $511 per day and $5,110 in the aggregate
  b. For reasons 4-6 (employee caring for another)
     - 2/3 of regular rate or applicable minimum wage
     - Capped at $200 per day and $2,000 in the aggregate
Emergency Paid Sick Leave

- **Employers with Existing Leave Policies.** This paid sick time is in addition to whatever sick leave is already offered by the employer (including state or local requirements).
  - Employers may not require an employee to use other paid leave provided by the employer before the employee uses the paid sick time under the Act.
  - But nothing prohibits employers from changing their leave programs after the bill is enacted.
Exemptions – for Both

- **Exemptions**
  - Employers of employees who are health care providers or emergency responders may elect to exclude such employees from the paid leave (these terms aren’t defined).
  
  - DOL is empowered to exempt small businesses with less than 50 employees if complying would “jeopardize the viability of the business as a going concern.” The DOL will have to provide regulatory guidance on this possible exemption.
What’s Next from Congress?

Phase 3 could seek to expand the emergency leave mandate, include:

- Ensuring workers who are sick can access longer term leave if short- and medium-term leave is exhausted;
- Increasing scope of allowable uses of family and medical leave;
- Expanding refundable tax credits to provide support for self-employed workers, workers in the gig economy or other workers with non- traditional employment; and
- Ensuring that first responders and health care workers have access to the paid leave that they need.
Leave Law Questions

- Does the FFCRA prevent layoffs before the law’s effective date?
- What about **after** the effective date?
- What are the best practices for a defensible decision?
Leave Law Questions

- Does the FMLA leave cover an employee who is unable to work due to a need to care for an adult child or other family member?
  - **No.** It is only available for employees who need to care for a child under 18 years of age.
Leave Law Questions

- Does the FMLA leave apply if an employee’s nanny or other child care provider is unavailable?
  - Yes. It applies when a “child care provider” is unavailable and defines that term as “a provider who receives compensation for providing child care services on a regular basis.” There is no indication this is limited to just child care facilities.
FAQ’s on the New Paid Leave Law

- Can employees sue for alleged violations?
  - Yes.

- What are the remedies available to employees?
  - FMLA Coronavirus Leave: same as FMLA remedies
  - Paid Sick Leave: uses FLSA remedies
Are these two new paid leave requirements permanent?

- No. Both expire on December 31, 2020, unless renewed by a new law.
Other Leave Issues
What are your normal policies?

- Follow policies, if deviate make sure for a consistent legitimate business reason
- Be mindful of state and local laws
- Follow policy of call-in procedures
- Continue to require doctor notes?
- You can create temporary pandemic policies.
Current Laws That May Apply

- FMLA: 12 weeks of unpaid leave
  - Own Serious Health Condition
  - Family Serious Health Condition
- ADAAA: leave as possible reasonable accommodation
- Workers’ Compensation
- Retaliation under all three of the above laws
May an employer advance any vacation time and/or paid time off to employees to cover COVID-19 absences? Yes.

May an employer set up a plan to excuse or otherwise not count absences related to COVID-19, whether for an actual illness or a quarantine period? Yes.
- Is a COVID-19 diagnosis an FMLA-covered serious health condition? Probably; follow the Act’s definition.

- Is a COVID-19 diagnosis considered a “disability” under the ADA? Probably not, but related conditions may be.
Pay Issues
When employees are not working

Non-exempt (Hourly)
Exempt (Salaried)
Fair Labor Standards Act (FLSA)

- Classification: exempt or non-exempt
- Method of compensation: salary or hourly
- Workweek - defined
- PTO policy or paid sick leave/vacation policy
- State and Local Laws (see map on next slide)
Non-Exempt Employees

- Federal law requires pay for all hours worked
  - Regardless of reason that a non-exempt employee does not work, federal law does not require employee to be paid

- Strategies
  - Substitution of paid PTO/vacation/sick leave for missed work
  - Compensating employee at reduced rates for missed work
Exempt Employees: Salary Basis and Amount Tests

- Exempt employee must receive guaranteed salary of at least $684 per week that represents all or part of their compensation
  - Salary can be paid bi-weekly, semi-monthly, or monthly
- Deductions from salary for variations in quantity or quality of work are not allowed
- Employee must receive salary for any workweek in which any work is performed subject to 7 exceptions
- 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
Exempt Employee: Salary Basis Requirement

- Permissible deductions limited to 7 exceptions that include:
  - Full-day absences for personal reasons other than sickness and disability;
  - Full day absences due to sickness or disability where the deduction is in accordance with bona fide plan, policy, or practice to provide compensation for loss salary due to sickness or disability;
  - When employee takes unpaid leave under Family and Medical Leave Act, employer required to pay proportionate amount of salary to time actually worked;
  - Penalty amount assessed for violations of major workplace safety rules;
  - Unpaid disciplinary suspensions in full-day increments for violating workplace conduct rules where suspensions are imposed in good faith and pursuant to written policy;
  - Other permissible deductions are offsets for jury duty or military leave pay and proportionate deduction in beginning and last weeks of employment if partial week worked.
Wage or Hour Reductions/Shift Changes/Eliminations

- Wage Reductions or Reductions in Force
- Moving to fewer shifts
- Hours changes/reduced schedules
  - Employment Agreements and Contracts/CBA
  - Results in Reduction in Wages/Change in Hours – state law notices
  - Business Reasons/Disparate Impact Analysis
  - WARN- 50% reduction of hours for 6 months or more= employment loss – could require 60 days notice
RIF’s Layoffs Shutting Down
Reduction In Force

- Analyze and Base Upon a Business Need
- Analyze ERISA Plan
- Follow Severance Policies
  - Utilize a release
  - Follow OWBPA
- Disparate Impact Analysis
- Be Mindful of CBA
Voluntary Separation Programs

- Assist with Company goodwill vs. a RIF
- Use a standard formula of who is eligible
- Utilize a release as a condition of the severance
- Analyze utilizing an ERISA plan
- Comply with OWBPA in Release
Determine Whether WARN or State WARN May Be Triggered
WARN – Preliminary Questions

- Is your organization a covered employer?
- Is this a covered employment action?
- Does an exception apply?
- Then, does a state or local WARN law apply?
- What are the potential consequences for non-compliance?
Federal WARN Act - notice

- The Worker Adjustment and Retraining Notification Act ("WARN Act") requires that qualifying employers provide 60 days' advance notice of a "plant closing" or "mass layoff"

- A qualifying employer under WARN is a business enterprise that employs either:
  1. 100 or more employees, excluding part-time employees or
  2. 100 or more employees, including part-time employees, who in the aggregate work at least 4,000 hours per week, exclusive of overtime
Federal WARN Act – notice

- **Plant Closing**
  - The WARN Act and its notification requirements are triggered by either a plant closing or mass layoff
  
  - A plant closing is defined as:
    - The permanent or temporary shutdown of a "single site of employment" or
    - one or more "facilities or operating units" within a single site of employment, if the shutdown results in an "employment loss" during any 30-day period at the single site of employment for 50 or more full-time employees
Federal WARN Act - notice
Federal WARN Act - Exceptions to Notice

- Faltering Company Exception
- Natural disaster
- Unforeseeable business circumstances
- Practicable Notice
WARN

- WARN is very **inexpensive** to comply with
  - Provide notice 60 days ahead of covered event
  - Cost is limited to the letters you draft and send
- But WARN is very **expensive** to violate
  - Provide lost pay and benefits to each employee who should have received notice
  - For the full period that notice should have been provided but wasn’t, up to 60 days
Wrap-up… For Now
Recommendations

- Monitor the latest guidance.
- Communicate regularly with your employees.
- Be flexible, but consistent.
- Communicate and analyze individual issues with HR and Legal.
Resources
# State Resources

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Coronavirus (COVID-19) Resource Center for Employers.

The Ogletree Deakins Coronavirus (COVID-19) Resource Center delivers the information and resources that employers need to minimize risk and remain informed about the many workplace issues related to the virus. During the outbreak—and the international response to it—employers must make critical decisions to ensure the safety and well-being of their workforces while accomplishing their goals.

SIGN UP FOR DAILY UPDATES

Please provide your contact information if you wish to receive daily COVID-19 updates.

First Name *

Last Name *

Company *

Job Title

Business Email *
The firm’s Coronavirus Rapid Response Team has developed numerous resources to assist employers in responding to the COVID-19 pandemic. For additional information, please reach out to the Ogletree attorney with whom you work.
Client Resources

Complimentary:

- [Coronavirus Resource Center](#) (includes numerous blog posts, podcasts, etc.)
- Detailed [FAQs](#) on federal labor and employment laws implicated by COVID-19
- Your [Daily COVID-19 Update](#) email (attorney-client privileged communication featuring the latest developments and recommendations). Available only to Ogletree Deakins clients.
- [Chart of Closure Orders for All States and Major Municipalities in the United States](#)
Additional Resources:

- **Template Documents** ($250 each or $1,750 for all)
  - Pandemic response plan for employers
  - Manager communication guide
  - Sample employee and manager communications addressing common situations
  - Questionnaire/disclosure form for employees
  - Questionnaire/disclosure form for visitors to a company’s facility
  - Travel risk acknowledgment
  - COVID-19 leave of absence policy
  - COVID-19 remote work policy
  - Sample remote I-9 guidelines

- **Legal Research Surveys** ($750 each or $1,000 for both)
  - 50-State Survey of Notice Requirements for Changing Pay or Hours
  - 50-State Survey of Predictive Scheduling Laws

- **Legal Review and/or Customization of Client’s Documents** (hourly)

- **Advice and Consultation** (hourly)
Thank You

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