

ANDERSON KILL EMPLOYMENT LAW INSIDER

ALERT

COVID-19: What All Employers Need To Know

By Bennett Pine and John P. Lacey Jr.

The coronavirus outbreak has had significant impacts on virtually every sector. To date, the United States has reported at least 4,226 presumptive and confirmed cases of COVID-19, and that number is expected to dramatically increase in the coming weeks as testing ramps up.

Employers are also now facing numerous and novel legal issues in the wake of COVID-19, and there are several considerations all employers should take into account before implementing strategies to combat the outbreak of the coronavirus.¹

Employers Should Keep Abreast of CDC Guidelines and Implement Uniform Workplace Policies

Every employer should be aware of Centers for Disease Control and Prevention (CDC) guidelines before implementing workplace strategies to prevent the spread of COVID-19. Presently, the CDC has issued interim guidance for businesses and employers to prevent stigma and discrimination in the workplace. First and foremost, the CDC recommends that employers actively encourage sick employees to stay home. Consistent with this general guideline, the CDC specifically recommends that:

1. Employers ensure their sick leave policies are flexible and consistent with public health guidelines.
2. All employees are aware of these policies.
3. Employers maintain flexible policies permitting employees to stay home and care for a sick family member.

Employers Should Be Aware of the FFCRA

On March 14, 2020, the U.S. House of Representatives passed the Families First Coronavirus Response Act (FFCRA). The new law was quickly approved by the U.S. Senate on March 18, 2020, and signed into law by President Donald Trump.

The FFCRA is significant in at least three respects. First, the act requires employers with fewer than 500 employees to provide employees with up to 12 weeks medical leave and pay at least two-thirds of their regular income to care for an ill family member. Employees are eligible

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for leave based on a "qualifying need related to a public health emergency," where:

the employee is unable to work due to a need for leave to care for a son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.

Second, the act implements a new paid sick leave requirement. Most employers would be required to provide 14 days of paid sick leave to employees who test positive for the coronavirus, demonstrate symptoms of the coronavirus, or are subject to quarantine, as in New Rochelle, New York, or Teaneck, New Jersey.

Third, the act provides a quarterly tax credit to employers to balance the increased costs of paid sick leave and paid family leave.

Accordingly, all employers should be aware of the FFCRA. Companies with fewer than 50 employees can seek hardship exemptions from the U.S. Department of Labor. Companies with more than 500 employees are exempt.

Employers Are Afforded Greater Latitude to Ensure the Workplace Is Safe

In the event a sick employee does come to work, the CDC recommends the employer send the employee home. Under the circumstances, employers are afforded greater latitude in combating the spread of the coronavirus. For example, although otherwise prohibited, the Equal Employment Opportunity Commission (EEOC) has concluded an employer may take an employee's temperature during the pandemic. But employers should always err on the side of caution to avoid infringing on employees' rights.

Employers Must Continue to Provide Employees With a Hazard-Free Workplace

The Occupational Safety and Health Act already provides employers with legal authority to send sick employees home, given an employer's responsibility to provide each employee with a workplace free of recognized hazards that are either causing or are likely to cause death or serious physical harm. Such measures, though, should be exercised uniformly to prevent allegations of harassment or discrimination.

Furloughs and Other Responses in the Wake of the Coronavirus

In the wake of the coronavirus outbreak, many employers have been forced to consider the possibility of furloughs, temporary



office closings, and even short-term layoffs. When preparing for any of these possibilities, it is important that employers are aware of applicable laws on both the state and federal levels. For example, employers may otherwise have a duty to provide notice to employees under the Federal Worker Adjustment and Retraining Notification (WARN) Act. Thus, although employers are otherwise free to furlough or lay off employees, they must be cognizant of any individual employment agreement that may restrict that right.

Changes in Compensation

Many employers have inquired about whether they can reduce an employee's level of compensation during the coronavirus outbreak. The answer is generally yes, unless an individual has an employment agreement that fixes a set compensation. In no event, however, can compensation fall below the statutory minimum wage, e.g., \$15 an hour in New York City.

Federal WARN Requirements Prior to Any Closing or Layoffs

WARN generally requires employers to provide 60 days advance notice to covered employees, unions or government officials prior to any closing or significant layoff at a single employment location. Not all layoffs, however, trigger the WARN requirements for an employer. For example, temporary layoffs of less than six months are not subject to WARN. In the present circumstances, it is our opinion that the advance notice requirements of WARN will likely not apply because layoffs may not last six months, and the "unforeseeable business circumstances" exception of WARN will likely apply. In addition, the notice requirements under WARN will depend on the size or duration of the layoffs.

New Jersey WARN Requirements Prior to Any Closing or Layoffs

The state of New Jersey recently made changes to its WARN requirements that will take effect later this year. One of the most significant changes is a requirement that employers that trigger notice under the New Jersey law, NJ WARN, provide severance pay automatically and give notice 90 days in advance of any layoffs. Again, the coronavirus may provide for an exception to these WARN requirements.

It is critical that employers are aware of both state and federal WARN requirements when planning for potential furloughs, office closings, or layoffs. And, in the event of a furlough or short-term layoffs, all employers should advise their employees to apply for unemployment benefits.

In Sum

Despite these unprecedented times, Americans have one common goal – to prevent the spread of COVID-19 and in particular, to protect those the CDC have deemed most vulnerable to the virus. Employers play a unique role in furthering that common goal. However, employers are now facing numerous and novel legal issues. While the situation remains fluid, all employers should keep abreast of any developments in the coming days and continue to comply with applicable law. Employer preparedness cannot be overstated.

Should any issues arise in connection with COVID-19, employers can reach out and consult with counsel to address any of these numerous and novel legal issues. Counsel will continue to monitor all developments in this arena and circulate those developments as they occur. ▲

ENDNOTES

1 <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited March 17, 2020)

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