



interactive dialogue

Coronavirus and Employment Law

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a brave new format (with a little more text than usual)



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**For most employers, this may be an even bigger
economic crisis than health crisis**



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Top 5 things you can do to better prepare your company

- 1. Come up with a scheduling/remote work/cross-training plan NOW.**
- 2. Tell your employees the plan. It will reduce panic and uncertainty.**
- 3. Monitor school closings/other things affecting your employees so you can respond.**
- 4. Inform/reassure employees of their options for sick leave for themselves and family members.**
- 5. Have a plan for if an employee develops symptoms or is diagnosed with COVID-19.**

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Operations planning and trade secret protection

- **IMMEDIATELY** train your employees on existing remote work resources.
- **Identify additional low cost remote work resources and train employees on them as well.**
 - Video chat on cell phones
 - Consider investing in additional remote work infrastructure, especially for key employees.
 - Repurpose old laptops.
 - Reimburse employees who can work from home but don't have a home computer.
 - Cheap laptop or tablet with keyboard, headset (\$300)
- **Advise employees to prepare their own remote work resources.**
- **BUT beware of trade secret/data security issues. Prepare clear guidance for the kinds of data/hard copies employees may take with them home.**
- **Identify key/essential personnel and begin cross-training backups (and maybe tertiary backups).**
- **Consider staggered shifts to limit number of employees interacting.**



Hourly employees may be hesitant to use sick leave if they are not seriously ill

- **Reports are that many COVID-19 cases are mild, especially among young, healthy people.**
- **Employees may need to make rent and will be afraid to stay away from work if they run out of sick leave/PTO**
- **These employees may have parents or children they will need to care for and for which they want to save their sick leave.**
- **Consider a temporary program of unlimited sick leave, or at the very least, allowing employees to accrue a negative sick leave balance.**



What rights to employer's have regarding suspected cases?

- You can require employees who exhibit COVID-19 symptoms to go home.
- You can require employees with symptoms to be tested or wait 14 days before returning to work. Beware of wage/hour implications for exempt workers.
- Employees generally cannot refuse to come to work.
 - However, they may be able to refuse to travel to affected areas such as China, or to work with or near people who are or are likely to be infected (such as patients) without personal protective gear.
 - Fear of getting sick from public transportation is insufficient.
- Employers may refuse to allow employees to wear facemasks. Though they might not want to refuse.



Wage and Hour Issues: Hourly workers and “Secure Scheduling”

- Hourly employees generally do not have to be paid for canceled shifts.
- **Unless** state or local law provides otherwise. For example, Seattle’s Secure Scheduling Ordinance and similar local laws.
 - Must post work schedule at least 14 days in advance and respect employees’ right to decline hours not originally posted.
 - Pay one hour of pay for hours added to a shift or when a shift date or time is changed.
 - Pay half of the hours not worked when an employee is sent home early from a shift.
 - Pay half the hours not worked when an employee is scheduled for an on-call shift and not called in.
 - BUT see exceptions:
 - Operations cannot begin or continue due to threats to employees or property, or due to the recommendation of a public official ... ;
 - Operations cannot begin or continue due to natural disaster or other cause not within the employer’s control



Wage and Hour Issues: Overtime Exempt Workers

- **Exempt employees must be paid if they work any part of a week.**
 - Unless the absence is FMLA covered.
- **First- and last-weeks of furlough should be in full workweeks for exempt employees**
- **Beware the “just a quick email” issue.**



Prepare for mass school closures

- **If the COVID-19 becomes widespread, officials may start closing schools and those closures could become widespread.**
- **Japan decided to close all schools until their school year ends in late March. Italy may be following suit.**
- **Employees will have problems getting child care.**
- **Consider the following:**
 - **Alternative shifts (outside 9:00 to 5:00 and weekends)—allows one caregiver to be at home**
 - **Temporary liberal work from home policies**
 - **Temporarily allow liberal shift swapping**
 - **Ask your employees what would help**



Washington (and other states') Paid Family and Medical Leave

- Reports that the Employment Security Department is already up 10 weeks behind on processing requests.
- A COVID-19 outbreak will overwhelm the system further. Applicants may not get benefits for several months.
 - Flu is generally not a covered condition
 - But bad cases of COVID 19 will qualify
 - Especially for cases that turn into pneumonia
- Educate employees that they can use PTO and other benefits to “top off” their WA PFML benefits.
- However, they might not receive their WA PFML benefits for some time given existing delays.



Plant closings and the WARN Act

- Employers are only required to provide notice if a “plant closing” would last six months.
- Even then, the WARN Act provides exceptions where a plant closing is caused by unforeseen circumstances.
- Economic or supply conditions may make a temporary plant closing permanent.
- It is critical to provide notice of a plant closing as soon as possible and to ensure that notice complies with the WARN Act.
- Remember the 90 day look back rule for aggregating layoffs.



Workers' comp

- Obviously someone who works in the healthcare industry could claim an industrial exposure.
- However, employees who have to work with the public might also make such a claim.
- In cases involving Valley Fever, the Workers Compensation Board of California held that industrial causation was established if the employee's risk of contracting Valley Fever from employment was medically probable or materially greater than from the general public.



OSHA General Duty

- "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."
 - The employer fails to keep the workplace free of a hazard to which its employees were exposed.
 - The hazard was recognized.
 - The hazard was causing, or was likely to cause, death or serious physical harm,
 - There was a feasible and useful method to correct the hazard.
- "OSHA has the ability to cite employers under the general duty clause if there was a case of blatant exposure of employees to SARS,"
Melody Sands, director of the Office of Health Enforcement. 7/27/2007
<https://www.ehstoday.com/standards/osha/article/21907997/sars-what-employers-need-to-know>



OSHA General Duty

- “A formal complaint alleging 2009 H1N1 influenza exposure in healthcare settings where employees are expected to perform only medium or lower exposure risk tasks will not normally result in an onsite inspection.” OSHA Instruction Enforcement Procedures for High to Very High Occupational Exposure Risk to 2009 H1N1 Influenza
https://www.osha.gov/OshDoc/Directive_pdf/CPL_02_02-075.pdf
- “A fatality/catastrophe inspection will be conducted when related to a death or multiple hospitalizations due to reported occupational exposure to pandemic influenza virus.” *Id.*

OSHA General Duty

- **Allow high risk individuals to preemptively begin working from home if the COVID-19 virus starts spreading widely.**
- **Provide hand sanitizer and encourage employees to wash hands frequently and to use hand sanitizer throughout work areas.**
- **If someone in the office reports becoming ill, close the office for a day for disinfection and require those who work closely with the ill worker to stay home for 14 days.**

Personal travel cancellation

- Can employers cancel pre-approved vacations?
- Can employers quarantine employees when they return?
- Can employers terminate employees who go anyway? What are the implications of “lawful outside work activities” statutes?
- Can/should employers reimburse for cancellation fees?
 - If so, is that taxable income to employees?



Work travel cancellation

- Administer without discrimination (especially race, national origin)
- Address how it could affect variable pay, such as commission and bonus potential
- Address incoming customer travel
- Prepare for return flights



Immigration and Naturalization

- Travel restrictions imposed on foreign nationals who have visited China and Iran within 14 days of seeking admission to the United States.
- Heightened travel advisory for certain regions of Italy and South Korea.
- The U.S. Embassy and Consulates in China have cancelled immigrant and nonimmigrant visa appointments.
- Expect processing delays and longer appointment wait times for visa applications at other U.S. consular posts abroad.
- USCIS Field Office in Seattle closed for 14 days over coronavirus fears.

Contact Ieva Aubin, Partner, for more information at aubin.ieva@dorsey.com



Discrimination

- Beware of harassment or discrimination on protected classes
 - Race
 - National origin
 - CDC warning: “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.”
- Foreign nationals (IRCA)
 - IRCA protects individuals from employment discrimination based on immigration or citizenship status



Discrimination (cont.)

- **Employees disabled or “perceived as” disabled (ADA)**
 - ADA prohibits employers from requiring medical examinations unless employee poses “direct threat”
 - During the H1N1 flu pandemic, EEOC released guidance clarifying that workplace discrimination can violate the ADA, even if based on an honest fear of H1N1
- **To prevent discrimination, do not make determinations of risks of infections based on race or national origin and maintain confidentiality of those with confirmed infection**
 - Response programs should apply equally to all employees

Disability Laws

- **Can employers require employees to undergo fitness for duty tests?**
- **Pre-employment procedures/recruiting?**
- **What are the implications of temporarily allowing work from home during this crisis on future leave requests?**
- **Can you require people to come in to work once the crisis is over?**

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Dorsey Speakers:



Shevon Rockett
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Dan Brown
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Thursday, March 26

Coronavirus and Cross-Border Legal Issues in China

Dorsey Speakers:



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Thank you and follow up questions



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