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WHITE PAPER

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Labor and Employment Issues Amid COVID-19

What Employers Need to Know

INTRODUCTION

As the novel coronavirus (COVID-19) continues to spread, employers and employees alike are concerned about how the virus may impact their rights. Employers are also concerned about what duties are owed to employees under federal or state law. These concerns may include notifying employees of preventative measures or leave requirements resulting from the spread of the virus. Issues such as Occupational Safety and Health Administration (OSHA) requirements, Family Medical Leave Act (FMLA) leave, Workers' Compensation, and antidiscrimination and/or disability laws may affect how employers operate during the continued spread of the virus. Riess LeMieux provides an overview of the pressing labor and employment law issues facing employers in these uncertain times.

I. OSHA REQUIREMENTS

Employers are required to abide by OSHA standards. Generally, no OSHA-specified standard addresses COVID-19, but some OSHA requirements may apply to prevent occupational exposure to the virus. See COVID-19, Occupational Safety and Health Administration (2020). Depending on the work environment, employers may have a duty to furnish each worker "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." This establishes a duty to prevent occupational exposure to the virus.

OSHA also imposes a duty to keep records of certain work-related injuries and illnesses on the employer's OSHA log. COVID-19 may be a recordable illness if a worker is infected as a result of performing work-related duties. Employers may be required to report if (1) there is a confirmed case of the virus; (2) the case is work-related; (3) the case involves one or more the general recording criteria (i.e., medical treatment beyond first aid or days away from work). The Associated General Contractors of America (AGC) is currently working with OSHA to revise some of the reporting requirements. While AGC is requesting that OSHA consider the virus a non-reportable incident, AGC still suggests continued compliance with OSHA regulations until formal revision. For these reasons, employers should review OSHA policies and other employment-related standards to ensure compliance.

II. FAMILY MEDICAL LEAVE ACT

COVID-19 has already started to affect employer-designated leave under the Family Medical Leave Act (FMLA). The FMLA provides job-protected leave for specific medical and family leave. Jeff Kowak, When are Employees Entitled to FMLA Leave Related to Coronavirus?, FMLA Insights (Feb. 5, 2020). More specifically, leave is provided when the employee is incapacitated from working due to a serious health condition or needs to care for a family member with a serious health condition.

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act. This Act amended the FMLA on a temporary basis to combat the effects of COVID-19 and is effective until December 31, 2020. The amendment, inter alia, requires certain employers to provide employees with paid sick leave or expanded family and medical leave for specified reasons related to COVID-19 (termed emergency paid sick leave). See Families First Coronavirus Response Act: Employee Paid Leave Rights, U.S. Department of Labor.

Prior to this amendment, FMLA only provided 12 weeks of protected, partial pay to an employee who is unable to work if his or her minor child's school or place of care has been closed, or if a child-care provider is unavailable due to public health emergency. The emergency paid sick leave now provides 80 hours of paid sick leave for

full-time employees, and part-time employees are entitled to the number of hours equal to the number of hours the employee worked on average over a two-week period. An employee may be entitled to this benefit if the employee:

1. Is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2. Has been advised by a health-care provider to self-quarantine related to COVID-19;
3. Is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
4. Is caring for an individual subject to an order described above or self-quarantined;
5. Is caring for a child whose school or place of care is closed for reasons related to COVID-19; or
6. Is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretary of Labor and Treasury.

For reasons 1 through 3, employees are entitled to either the regular rate or the applicable minimum wage, whichever is higher, up to $511 per day and $5,110 in the aggregate over the two-week period. Under reasons 4 or 6, employees are entitled to 2/3 of their regular rate or 2/3 of the applicable minimum wage, whichever is higher, for a maximum of $200 per day and $2,000 in the aggregate over a two-week period. For reason 5, employees taking leave are entitled to 2/3 of their regular rate or 2/3 of applicable minimum wage, up to $200 per day and $12,000 in the aggregate over a twelve-week period. The compensation under this Act is slightly higher than when employees seek leave under FMLA.

Importantly, the amended FMLA applies to private employers with 500 or fewer employees and certain public employers. Furthermore, the new standard does not provide a statutory exemption for employers with fewer than 50 employees as the original FMLA did. The Act instead provides two reprieves for struggling small businesses: (1) an employer with fewer than 25 employees does not have to restore the employee to the same or equivalent position upon return if the position does not exist due to economic conditions or other changes that affect employment resulting from the virus; or (2) the Secretary of Labor may also issue regulations exempting employers with fewer than 50 employees from the need to provide emergency paid sick leave for an employee to care for a child if the child's school or child-care provider is closed, where the imposition of such requirements would jeopardize the viability of the business.

Most notably, employers gain a strong benefit from this Act. Employers will receive tax payroll credits for compliance. Therefore, this amendment to the FMLA provides not only further coverage to employees, but also reprieve and benefits to small businesses. It is clear that when an employee or a close family member actually has coronavirus, the employee is entitled to, or at the very least eligible for, FMLA benefits. What does an employer do if the employee doesn't have any symptoms? The employee may be asked to work from home, but the employer should not count the leave against the employee's FMLA allotment. If symptoms are not present, then a serious health concern rendering the employee unable to work is not present.

III. WORKERS' COMPENSATION

There is uncertainty as to whether the COVID-19 is compensable as an "occupational disease" arising from employment that would qualify for workers' compensation benefits. See COVID-19 and Workers Compensation: What You Need to Know, NCCI (March 10, 2020). There is also uncertainty as to whether this will qualify as a temporary disability or just normal sick time. Generally, the Louisiana Workforce Commission states that covered claims include medical care for injury, indemnity wage benefits, vocational rehabilitation services, and/or death benefits when the injuries are a result of or related to employment. See Frequently Asked Question about Rights and Responsibilities of Workers' Compensation, Louisiana Workforce Commission. Such injures may include mental, physical, or occupational diseases. Occupational diseases are defined as a "disease or illness which is due to causes and conditions characteristic of and particular to a particular trade, occupation, process, or employment

in which the employee is exposed to such disease." This raises the question as to whether COVID-19 is an illness or disease related to a particular field of work?

An occupational disease or illness is usually one that is particular to a field of work. COVID-19 is not particular to any field, with the possible exception of health care, and can spread easily once a person is exposed. Generally, an employee seeking workers' compensation benefits would also have to prove that he or she was exposed to COVID-19 at work and that exposure caused the employee to contract the disease. Proving exposure at work is a heavy burden since employees may be exposed to the virus at any point in time either at work or outside work. Furthermore, this is not a typical occupational disease. Most cases arise from an employee being exposed to something continuously and later developing a disease. For example, a coal miner developing black-lung disease or a construction worker (exposed to asbestos) later developing cancer. In order to trigger workers' compensation benefits, the virus would have to qualify as an occupational disease or illness that resulted from or was related to employment and due to causes/conditions characteristic of and particular to a particular trade, occupation, process, or employment in which the employee is exposed to such disease.

Although Louisiana has not provided guidance as to whether COVID-19 is a covered illness, the Workforce Commission recently issued an emergency rule expanding medical coverage. During the State of Emergency expected to continue until at least April 13, 2020, the Workforce Commission has waived certain time restrictions to refill medications and extended the time insurers should accept an approved LWC-WC 1010. Medications can be refilled even if they were recently filled. The revision may help those who have qualified for or already have workers' compensation benefits, but no clear determination has been given to the qualification of COVID-19 as an occupational disease.

IV. AMERICANS WITH DISABILITIES ACT

Employers should take notice of the Americans with Disabilities Act (ADA), including the ADA Amendments Act of 2008, and comply with its requirements. Under the ADA, employers are prohibited from discriminating against employees who are disabled as defined by the statute. Darlene Clabault, May Employees Take FMLA Leave for the Coronavirus?, J.J. Keller & Associates (Feb. 10, 2020). The ADA (1) regulates employers' disability-related inquiries and medical examinations for all applicants and employees, including those who do not have ADA disabilities; (2) prohibits covered employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a "direct threat" (significant risk of substantial harm even with reasonable accommodation); and (3) requires reasonable accommodations for individuals with disabilities, absent undue hardship, during a pandemic. See Pandemic Preparedness in the Workplace and the Americans with Disabilities Act, Equal Employment Opportunity Commission (March 21, 2020). It is important to note that the Equal Employment Opportunity Commission (EEOC) follows the CDC and World Health Organization (WHO) for its determination of an epidemic as a "direct threat" to health.

The EEOC in its most recent update stated that "employers and employees should follow guidance from the CDC as well as state/local public health authorities on how best to slow the spread of this disease and protect workers, customers, clients, and the general public." The EEOC declared COVID-19 meets the "direct threat" standard. By classifying the virus as a "direct threat," employees are not protected by the nondiscrimination provisions of the ADA if they have COVID-19. Importantly, the EEOC's update informs employers how to handle reasonable accommodations, hiring, and vaccination during the outbreak of COVID-19.

The ADA protects against required medical examinations by an employer unless (1) the inquiry or exam is job-related and consistent with business necessity; or (2) the employer has a reasonable belief that the employee poses a direct threat to the health or safety of the individual or others that cannot otherwise be eliminated or

reduced by reasonable accommodation. If one of the two exceptions applies, inquiry by the employer regarding medical treatment/conditions is allowed and requiring medical examinations of an employee is permitted.

Although an employer cannot discriminate because an individual is exhibiting symptoms or belonging to a certain race or nationality where the virus is prevalent, the employer may potentially enact certain preventative measures to prevent the spread of the virus. The employer may send the employee home who is exhibiting symptoms and may inquire as to the employee's symptoms to determine if he or she has COVID-19. The EEOC also determined that employers may measure employees' body temperatures, while recognizing that an employee's medical records and medical history are still confidential and cannot be disclosed. Even though an employer may feel it necessary to highlight an underlying medical condition of an employee, it is not legal or recommended. Instead, inform your employees on how to avoid the coronavirus and what precautions should be made to avoid contact.

Employers should stay up to date with current information released by the EEOC and CDC about recommendations to further protect employees. As the virus progresses, the EEOC and CDC may provide further updates on the handling of employees.

CONCLUSION

The circumstances surrounding COVID-19 are consistently changing and regulators are fighting to combat the affects it may have on employers and employees. It is important for employers to stay up to date with all aspects of employment-related concerns. If you have any questions or concerns regarding the issues addressed in this article, we are available to assist in navigating the process.