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Employer's Guide to COVID-19

Timothy A. Davis (816.329.5910/913.205.8647)
tadavis@constangy.com

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A wider lens on workplace law



Tim Davis, Kansas City



Agenda

- COVID-19 Basics
- Practical Workplace Guidance
- Families First Coronavirus Response Act
- Workplace Law and Best Practices Q&A
- OSHA Deeper Dive



The Fine Print

- We probably won't be able to answer all your questions today, but we'll do our best.
- Existing laws do not adequately address this situation.
- The most important thing about these slides? **The date.** Applicable laws and guidance will change rapidly.



COVID-19

- The CDC says the virus is thought to spread mainly from person-to-person contact
 - Between people who are in close contact with one another (within about 6 feet)
 - Through respiratory droplets produced when an infected person coughs or sneezes
- Current guidance: virus remains alive on surfaces for up to 72 hours, depending on surface and environment
- No vaccines or specific treatment at this time

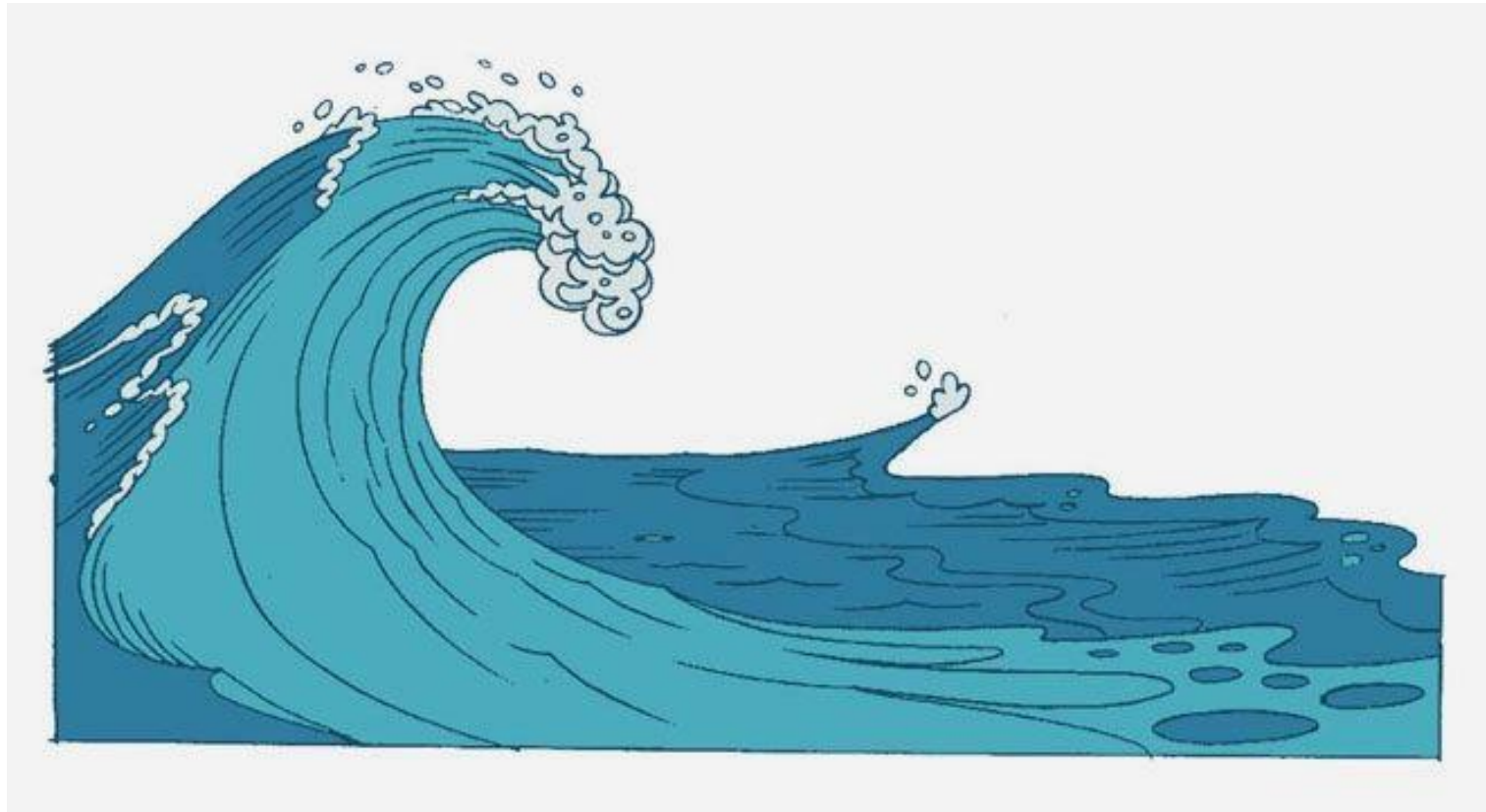


Symptoms

- Mild to severe illness
- The CDC advises that the following symptoms may appear 2-14 days after exposure:
 - Fever
 - Cough
 - Shortness of breath
- 98% of people who acquire will survive and many will experience only mild symptoms.
- Efforts primarily geared toward protecting elderly and at-risk.



Expect Long-term Business Impact (12 months): Flattening the Curve Means Spreading the Illness Into Smaller Waves, Not Totally Stopping the Tide

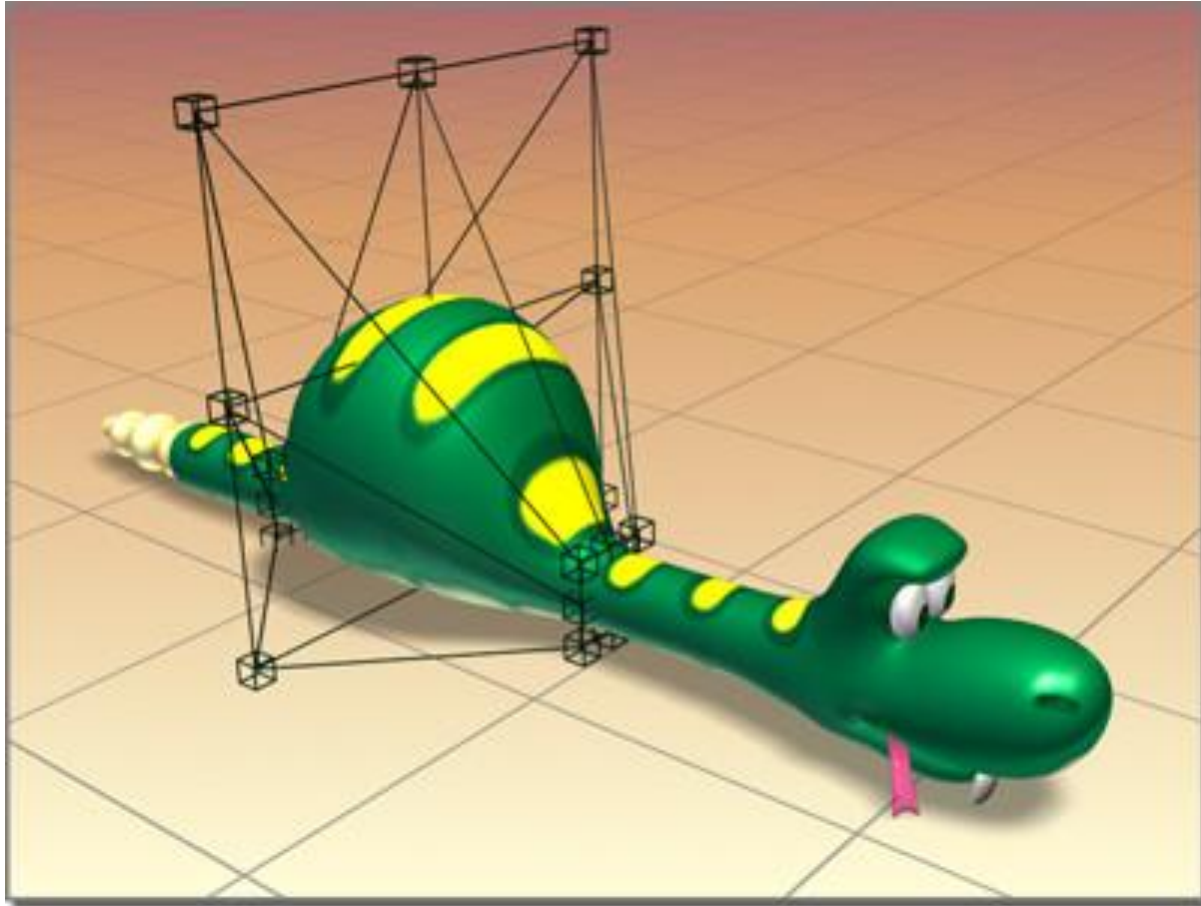


Planning Your Business

- COVID-19 will be around until:
 - Vaccine
 - Herd Resistance (numerous illnesses – hopefully spread out)
 - Unexpected natural decline
- Current projection: 50-70% of population will contract COVID-19 absent vaccine
- Current actions are about saving lives by not overwhelming healthcare



Gophers in a Snake (they will pass)



Gophers in Your Snake

- Your Game Plan: **ADAPT AND SURVIVE**
- Information and Advice Changing Daily
- First Wave/Gopher is mitigating health crisis
- Subsequent Waves/Gophers will be localized outbreaks (think Wack-a-Mole) and short and long-term economic impacts



Monitor Trusted Websites

- www.CDC.gov
- www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm
- www.dol.gov
- <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>
- www.osha.gov
- <https://www.nga.org/coronavirus/#states>
- <https://labor.mo.gov/coronavirus>
- www.shrm.com/workplacesafety
- www.nationwidegroup.org
- www.constangy.com



First Wave/Gopher: Where We Are Now?

- Social Distancing/Hygiene/72-Hour Guidelines
- No gatherings of more than ten (10) people
- Voluntary efforts to minimize social activities
- Shelter At Home/Quarantines in Some Locales
- Bans or Limits on Operations (bars and restaurants)
- Travel Restrictions Business/Personal
- Get Supplies, But Don't Overstock



First Wave/Gopher: If You Are Operating

- Educate/Inform/Re-Assure Employees of Efforts and Plan
- Take Steps To Make Workplace as Safe as Possible
 - Separation of Employees
 - Cleaning/Sanitation/PPE
 - Work From Home if Possible (Evaluate Technology Needs Now)
 - Communication Plans
 - Attendance/Time Off/Leave



First Wave/Gopher: “Day One” Plan After Exposure

- Legal Compliance
 - If employees has symptoms or tests positive
 - If employee has contact with someone
- Sanitizing
- Notifying/addressing issues with others exposed to employees
- Dealing With At-Risk Employees
- Recent Travelers
- Remote Work
- Paid Leave (to follow)



First Wave: Where We Are Now

- “Shelter from Home” Orders
 - Will be “essential” exceptions, so watch closely
 - Your Plan if Workplace/Region Closes for Two to Four Weeks
 - Layoffs/Furloughs
 - Customer Coverage
 - Essential Business/Staff
 - Controlling Access
 - Mail/Orders/Deliveries
 - Security



Subsequent Waves/Gophers: Upcoming Decisions

- Staffing During Crisis (absences will spike)
- Layoffs (already underway in many industries) – Monitor and Utilize Government Funding Opportunities (e.g. unemployment benefits and grants)
- Do what you can, but remember going out of business will not help your staff long-term
 - CARES Act
 - Reduced Hours
 - Compensation Practices
 - Vacation/Sick/PTO/Flextime Practices



Families First Coronavirus Response Act

- New Paid Leave Law is the Floor: Employers Can Do More, But Not Reimbursed
- ***Does Not Make All Aspects of FMLA Apply to All Employers***
- DOL Regulations Will Clarify
 - First DOL guidance published March 24, 2020
 - Q&A and Employer Fact Sheet
 - More to follow
- Effective April 1, 2020
- Expires December 31, 2020
- Applies to leave taken between April 1, 2020 and December 31, 2020



Families First Coronavirus Response Act

- Members with Fewer than 500 Employees
 - Single/Joint Employer Issue
 - Secretary of Labor can exempt businesses with 50 or fewer if can demonstrate required leave would jeopardize business. (Wait for it ...)
- Paid FMLA Leave
- Paid Sick Days
- Prohibitions Against Termination
- Required Job Restoration
- 100% Tax Credits for Employers
- Posting Requirement
- Free Testing
- Enhanced Unemployment Grants to States



Some Welcome News From DOL

For the first 30 days after the law takes effect, the DOL is taking a **non-enforcement position** (provided that employers are making good-faith efforts to comply) and will focus on providing **compliance assistance** instead.



Small Employer Exemption: How to Apply?

Q: If providing child care-related paid sick leave and expanded family and medical leave at my business with fewer than 50 employees would jeopardize the viability of my business as a going concern, how do I take advantage of the small business exemption?

- To elect this small business exemption, you should document why your business with fewer than 50 employees meets the criteria set forth by the Department, which will be addressed in more detail in forthcoming regulations.
- You should not send any materials to the Department of Labor when seeking a small business exemption for paid sick leave and expanded family and medical leave.

-- USDOL Q&A (3/24/20)



Emergency Paid FMLA Leave

- **Eligible:** On payroll for thirty (30) days
- **Amount:** Twelve (12) weeks job protected leave
- **UNCERTAIN BUT LIKELY:** Total of 12 weeks for Covid-19 qualifying events or in addition to all other FMLA events?
- **Waiting Period:** Ten (10) days unpaid then ten (10) weeks paid but likely coordinated with paid sick days
- **Pay Rate:** No less than 2/3 usual pay for normally scheduled hours full-time/part-time
- **Pay Cap:** \$200 per day and \$10,000
- **Accrual Usage:** Cannot Require Employees to Substitute Other Paid Leave But Can Allow if Employee Elects



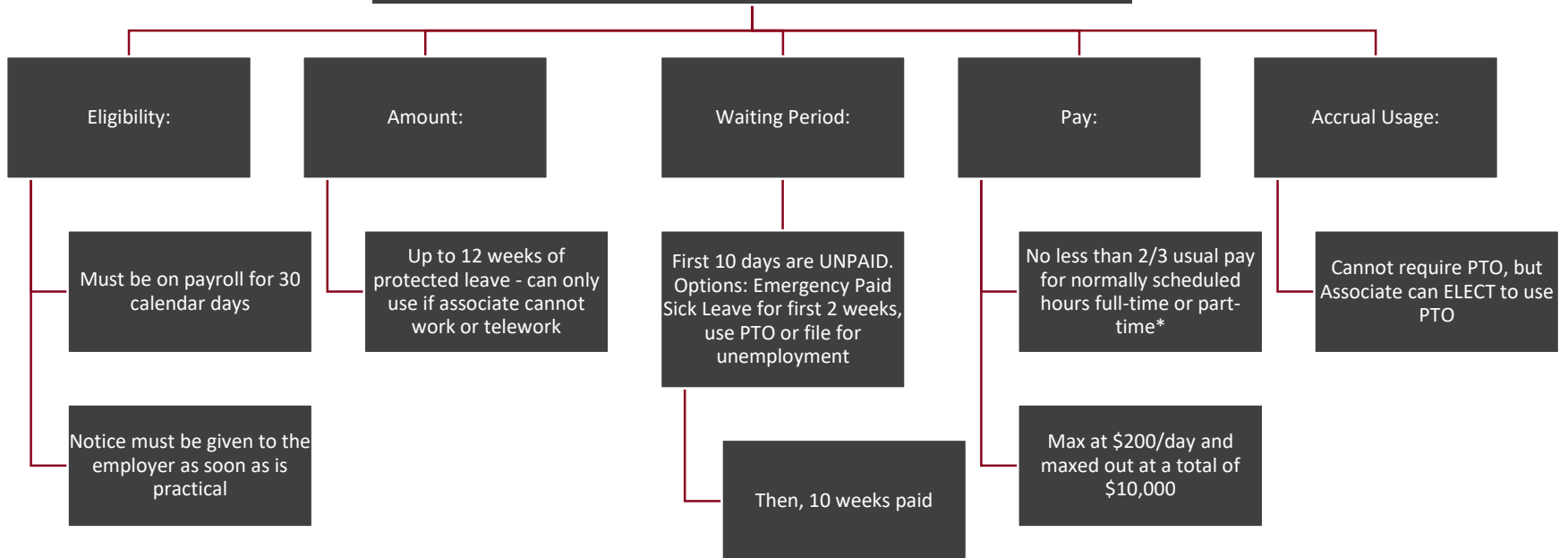
Emergency Paid FMLA Leave

- Expanded FMLA Qualifying Event:
 - if the employee is unable to work (or telework) because the employee's son or daughter under age 18 is home due to a school or child care center closure, or due to unavailability of a child care provider, because of a COVID-19 emergency
 - Takes effect April 1st, and applies to leave taken after that date



Families First Coronavirus Response Act - Stipulations

Emergency FMLA Expansion Act (leave due to childcare if school or daycare closes)



Emergency Paid Sick Leave

- Emergency Paid Sick Leave (Same Employer)
 - **Effective:** April 1, 2020; applies to leave taken after that date
 - **Employers:** Fewer than 500 employees
 - **Eligible:** All employees on payroll
 - **Amount:** Eighty (80) Hours Paid Sick Time
 - **Pay:**
 - Regular rate of pay for own illness up to \$511 per day/\$5110
 - 2/3 rate of pay to care for others up to \$200 per day/\$2000
 - **Prohibitions:** CANNOT Reduce Paid Time Off Benefits If You Have Them and CANNOT Require to Use Existing Benefits First
 - No Carryover into 2021



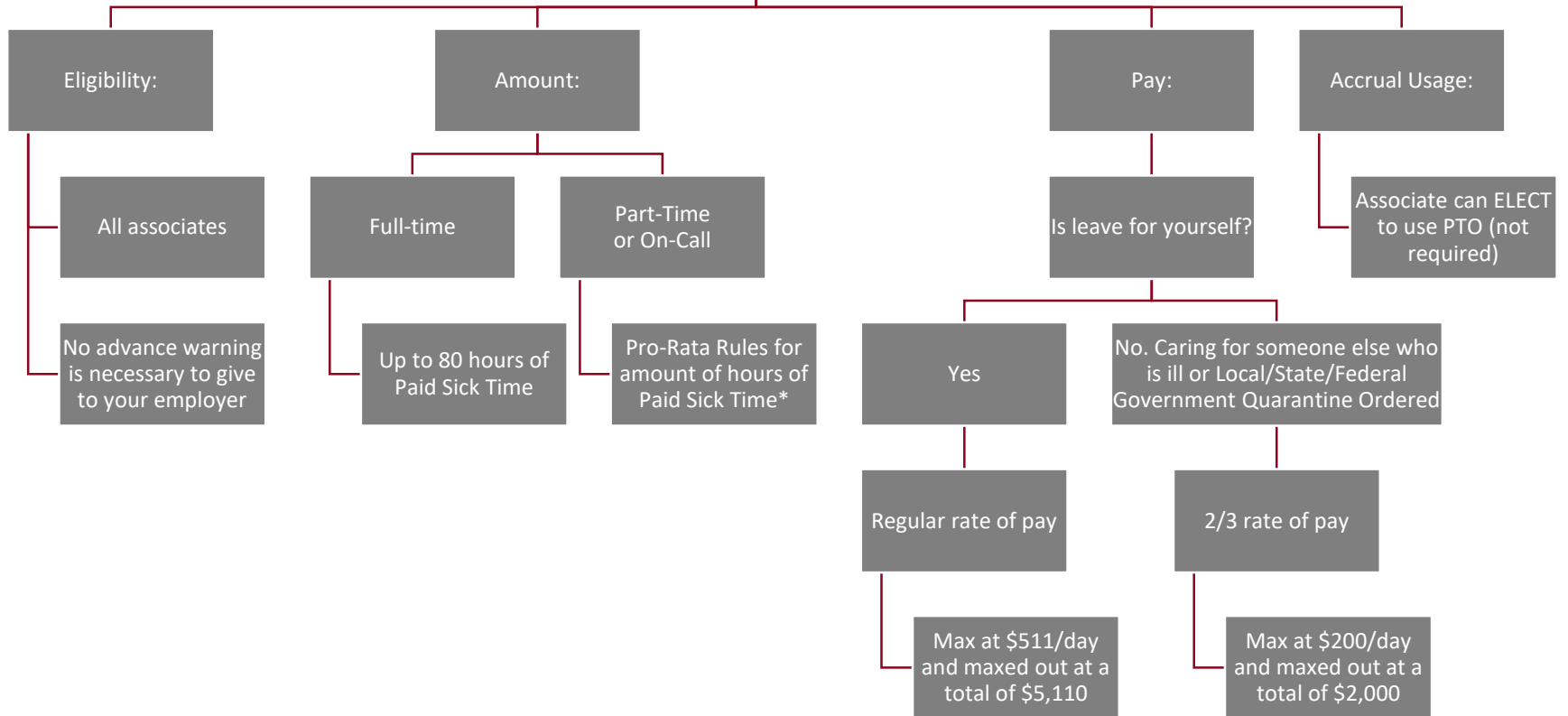
Emergency Paid Sick Leave

- Qualifying Events:
 - Employee subject to a federal, state or local quarantine or isolation order related to COVID-19;
 - Employee advised by a health care provider to self-quarantine due to COVID-19 concerns;
 - Employee experiencing COVID-19 symptoms and seeking medical diagnosis;
 - Employee caring for an individual subject to a federal, state or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns;
 - Employee caring for the employee's child if the child's school or place of care is closed or the child's care provider is unavailable due to public health emergency; or
 - Employee experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.



Families First Coronavirus Response Act - Stipulations

Emergency Paid Sick Leave (2 weeks)



Employer Financial Assistance

- Employers reimbursed for costs of leave via tax refunds and credits process
- 100% refundable tax credits if **required** to offer leave/sick days
- Per guidance issued by DOL, IRS and Dept. of Treasury:
 - Employers will be allowed to subtract from payroll taxes the amounts they paid for leave.
 - E.g., if the employer owes a total of \$8,000 in payroll taxes but paid \$5,000 to provide paid leave for employees, it will have to remit to the IRS only \$3,000.
 - If the amount of leave exceeds the amount of payroll tax owed, the employer will not have to remit any payroll tax, and it can file for an expedited refund of the difference. The expedited refund is to be issued in two weeks.



CARES ACT

- PASSED SENATE LAST NIGHT (CHECK WITH SBA)
- Provides for forgivable loans up to \$10M to cover costs of payroll, rent, mortgage for two months
- All employers with fewer than 500 employees likely eligible.



Main Areas of Employment Law Concern

- State and Local Laws Also Apply
- COBRA
- FMLA
- ADA
- FLSA
- WARN
- NLRA
- OSHA



Common Question: WARN

- If we close or lay off employees due to decline in business will WARN apply?
 - First – consider state mini-WARN laws
 - Second – Federal WARN involves closure or layoff exceeding six months or reduced hours below 50% for six months.
 - Federal WARN will (hopefully) not be implicated with layoffs if this turns around quickly but you must stay on top of this.
 - WARN may be implicated if business will be permanently closed
 - Third – WARN has an exception for “natural disasters” which may also apply to this situation and limit/reduce notice requirements.
 - Fourth – Law may change (e.g. California)
 - **MONITOR YOUR UNIQUE BUSINESS CONCERNS AND SEEK COUNSEL IF CLOSING OR LAYING OFF BECOMES NECESSARY**



Common Question: WARN

- What if we need to lay off employees or have to close or suspend portions of our business?
 - COBRA
 - Collective bargaining agreements if you are unionized
 - Union may demand “effects” bargaining
 - State Mini-WARN laws
 - Discrimination laws apply when selecting individuals
 - Unemployment benefits coordination (one-week waiting periods being relaxed all over the country)



Common Question: FLSA

- Do we have to pay employees who are sent home due to business decline?
- Review FLSA and State Wage/Hour Laws
 - Non-exempt employees are only paid for hours worked. Consider how you would dovetail existing time off with unemployment benefits.
 - Exempt salaried employees generally must receive their full salary in any week in which they perform any work, subject to certain limited exceptions.
 - Exempt salaried employees are not required to be paid their salary in weeks in which they perform no work.
 - Where an employer offers a bona fide benefits plan or vacation time, there is no prohibition on an employer requiring that accrued leave or vacation time be taken on a specific days (note new paid days). This will not affect the salary basis of payment so long as the employee still receives an amount equal to the employee's guaranteed salary. But an employee will not be considered paid "on a salary basis" if deductions from the predetermined compensation are made for absences occasioned by business closure during a week in which the employee performs any work.



Consider Alternatives

- Furlough/Reduced Schedule Option: temporary period out-of-work or prospective change in salary amount and reduced expectation for work.
- E.g.: New salary at 80% of current along with expectation that only work four days per week in general.
- Again – check state laws.
- CHECK CARES ACT



Common Question: FMLA

- Will FMLA apply to Covid-19 related conditions?
 - See above re Coronavirus Response Act for Qualifying Event for Paid Leave or Paid Sick Days
 - If not a qualifying event under new law for paid time off, “traditional” FMLA rules apply (e.g., if employee has mental health issue such as severe anxiety and cannot come to work, may have to provide unpaid FMLA leave)
 - Employers should carefully consider any FMLA requests and seek guidance.
 - Again - state family leave and other leave laws apply.



Common Question: FMLA

- Can an employee stay home under FMLA leave to avoid getting Covid-19?
 - Time off taken by an employee for the purpose of avoiding exposure would GENERALLY not be protected under the FMLA unless an existing medical issue is present or one of the new qualifying events for paid leave applies.
 - Employers should encourage employees who are ill or are exposed to ill family members to stay home and should consider flexible leave policies for their employees in these circumstances.



Common Questions: ADA

- Is positive test for Covid-19 a disability under the ADA?
 - Probably not, standing alone
 - Will depend on an individual's particular health situation and any complications or exacerbations (e.g. COPD, pneumonia, asthma, mental illness).
- Is fear of exposure a disability under the ADA?
 - Probably not, standing alone, but will again depend on an individual's particular health situation and any complications or exacerbations.
 - E.g., if an individual has severe anxiety that is exacerbated by coronavirus fears, this must be evaluated as a potential ADA situation.



Common Question: ADA

- An employee comes to work with symptoms of COVID-19, and has been exposed or has travelled to a high risk location. May the employer send the employee home?
 - Yes. Employers may ask employees not to return to work for 14 days or until negative test.
 - In some cases, employers may also ask for a doctor's note to return to work. (State laws might play a role here.)
 - If you believe the employee may have COVID-19, you may also send home employees with whom this employee has had contact.
 - Avoid a panic -- remember to tell the other employees that there has not been a positive diagnosis of COVID-19 if that is the case. Avoid disclosing confidential information, such as the employee's identity.
 - Be mindful of discrimination laws.



New EEOC Guidance (see link above)

- 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?
 - 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.
- When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic?
 - 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. **(TAKE PRIVACY STEPS)**



Updated EEOC Website

- Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19?
 - 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.
- When employees return to work, does the ADA allow employers to require doctors' notes certifying their fitness for duty?
 - 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.



Common Question: General

- Are there discrimination issues employers should be thinking about as well?
 - This is not the “Chinese Virus” as some are calling it.
 - The CDC has advised the following: “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.”
 - The DOL has also raised discrimination concerns.
 - Ensure that all policies and decisions regarding sending employees home are being taken in a non-discriminatory manner.



Common Question: Workers Comp

- Are there workers compensation concerns?
 - Potentially. If an employee contracts COVID-19 while traveling for work, or works in a position with heightened risk of exposure (healthcare, TSA screeners), they may file a workers' compensation claim.
 - There may be an issue related to the origin of where they contracted COVID-19 and whether, even if exposed while working, the disease is covered by the system when the general public is also broadly exposed.
 - State workers' compensation laws vary.



Common Question: What Does OSHA Require?

- There is no OSHA Standard addressing airborne viruses or diseases.
- OSHA relies on Section 5(a)(1) of the OSH Act, the General Duty Clause.

Section 5(a) Each employer –

- (1) 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.



OSHA's New Guidance on Preparing Workplaces for COVID-19

- Developed by OSHA and the CDC
- Guidelines to:
 - 1) Identify risk level
 - 2) Determine appropriate control measures
- Advisory and Informational
 - Does not create any new legal obligations



Feasible Means of Abatement: Basic Steps to Reduce Risk

- Promote frequent hand washing
- Encourage employees to stay home if sick
- Encourage respiratory etiquette
- Discourage employees from using other employees' phones, desks, offices, work tools
- Maintain regular housekeeping
 - Cleaning and disinfecting surfaces
- Develop Policies and Procedures for prompt identification and isolation of sick people



What Are Feasible Means of Protection?

- Establish work rules or practices
- Communicate the rules through training and signage
- Develop process for reporting cases and isolating employees



Injury and Illness OSHA Recordability

- If an employee is exposed to the coronavirus in the work environment, and
- Is diagnosed with COVID-19 by a licensed health care professional, and
- The case results in “medical treatment,” restricted work activities, days away from work, loss of consciousness or death,
- The case is recordable in Column (M)(3).
- But it has to be “more likely than not” that the work environment either caused or contributed to the illness.
- It is probably not work related if an employee either lives with someone or has come into close contact away from work with someone who is infectious.



Whistleblower Protection

- Section 11(c) of the OSH Act prohibits employers from retaliating against employees who exercise rights protected under the Act.
- Refusing to perform hazardous work is considered to be a right protected by the Act.
- A plan to reasonably protect the employee from exposure to the disease is your defense.



An Employee's Burden of Proof

- 1) The employee has asked the employer to eliminate the danger and the employer failed to do so.
- 2) The employee refused in good faith to work.
- 3) A reasonable person would agree that there is a real danger of death or serious injury.
- 4) There is not enough time, due to the urgency of the hazard, to get it corrected through regular OSHA enforcement.

§ 1977.12(b)(2)



