



Labor, Employment & Employee Benefits

CORONAVIRUS: EMPLOYMENT LEGAL ISSUES FOR EMPLOYERS

Syracuse ♦ Ithaca ♦ New York City

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On March 11, 2020, the World Health Organization declared a global pandemic as the Coronavirus rapidly spreads around the world. Employers are becoming increasingly concerned about their rights and obligations with respect to maintaining a safe workplace for their employees and complying with various federal and state labor and employment laws. This alert will provide a short summary of some key workplace safety and labor law issues to help employers prepare for and address some of the legal and practical issues that are arising due to the Coronavirus outbreak.

Workplace Safety

Under the Occupational Safety and Health Act ("OSHA"), workers have a right to working conditions that do not pose a risk of serious harm, to receive information and training about workplace hazards, and to exercise their rights without retaliation. Still, employers should be careful not to implement rules which may trigger complaints of disability or national origin discrimination, among others.

To ensure a work environment free from the recognized hazards of the Coronavirus, employers should consider the following measures, several of which have been recommended by the Centers for Disease Control and Prevention ("CDC"):

- Encourage sick employees to stay home;
- Separate sick employees from your workforce who exhibit recognized symptoms and send them home;
- Educate employees on the importance of staying home if sick;
- Educate employees on workplace etiquette for hygiene;
- Perform regular environmental cleaning of the workplace;
- Provide disposal wipes for wiping down commonly used surfaces;
- Provide hygiene products, such as hand sanitizers, for use by employees (and customers);
- Encourage employees with sick family members to notify their supervisors;

In addition to the foregoing, employers should be proactive in anticipating a worsening outbreak, including outbreaks which may happen in their workplace. Therefore, employers should also:

- Have an appropriate outbreak response plan in place in the event of an outbreak among its employees;
- Implement and/or evaluate existing workplace emergency response protocols;
- Implement travel guidelines for employees who must travel as part of their employment;
- Plan for options to continue business in the event of an outbreak, such as allowing employees to work at home or offsite and limiting direct personal contact among employees and customers.

Common Legal Issues that Will Arise in the Workplace

A. Are employees who contract Coronavirus protected by the Americans with Disabilities Act or New York State Human Rights Law?

In most cases, employees who contract the Coronavirus will only suffer a transitory illness like the flu and, therefore, will not be considered disabled under the Americans with Disabilities Act. However, someone who contracts the Coronavirus may develop serious complications ultimately limiting one or more of their major life activities and therefore qualify them as disabled under the ADA. It is also important to remember that the ADA also protects employees who may not actually be disabled but who are "regarded as" disabled. Therefore, employers should be careful not to presume that an employee who contracts the Coronavirus is not protected by the ADA.

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New York Human Rights law provides a definition of disability that is broader than that contained in the ADA. Generally speaking, any medical condition which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques will be regarded as a protected disability. Consequently, it is most likely that employees covered by New York law will be deemed disabled under the New York Human Rights law even though they may not be protected by the ADA.

B. Common Situations Faced by Employers

Question 1. May an employer require an employee to stay at home if they have Coronavirus symptoms?

Answer: Yes; employers may send employees home if they exhibit Coronavirus-like symptoms. Not only may an employee's work performance be affected by their illness, but the action may be permitted where the illness is serious enough to pose a direct threat to other employees or customers of the employer. Employers, however, must ensure that they follow any policies or protocols for sending sick employees home in a consistent and non-discriminatory manner.

Question 2: May an employer demand a doctor's note certifying the employee's fitness for duty after a medical leave due to a Coronavirus illness?

Answer: Yes, employers are permitted to ensure that an employee who has already taken time off from work due to a medical impairment is able to return to work with or without restriction. Employers, however, should have policies in place to ensure that such a rule is applied consistently and in a non-discriminatory manner.

Question 3: Is an employee entitled to job protected leave and accommodations for a Coronavirus illness?

Answer: Yes, a leave of absence may be required as a reasonable accommodation under NY Human Rights law, even if the ADA may not apply to the employee's condition.

Question 4: Is an employee's job protected if they need time off to care for a family member who has contracted the Coronavirus?

Answer: The Coronavirus may be a serious health condition under the Family Medical Leave Act and New York State's Paid Family Leave Act. These laws, however, have many limitations which may exempt an employee or an employer from coverage. Employers should consult with their counsel to determine their specific obligations.

C. Wage and Hour Issues

Hourly ("non-exempt") employees are generally not entitled to be paid if they do not work, unless they have defined rights under contract or under an employer's vacation, sick or paid time off policies. However, employees must be paid for work performed regardless of where the work is performed. Therefore, employees who are permitted to work at home are still entitled to compensation for time worked, including overtime compensation if they work more than 40 hours per week. Employers should ensure that employees working offsite complete timesheets or use of other methods of recording their hours of employment and ensure that they comply with other workplace requirements, such as time off for meal breaks.



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Generally speaking, salaried ("exempt") employees are compensated with a flat salary that does not change depending on their hours worked or location of work performed. After exhausting their rights to paid time off, vacation, or sick leave, employers may deduct from an exempt person's salary in allotments of not less than one day. However, such deductions should only be made pursuant to an adopted employer policy applied consistently and in a non-discriminatory manner.

Conclusions

The issues facing employers to control and comply with employment law issues are variable and myriad. This alert samples a few of the issues that employers are facing now and will likely face in the coming weeks and months. To avoid running afoul of any federal or state labor laws, employers are encouraged to review their employment policies and ensure that they have appropriate policies in place to address many of the issues that may arise due to the Coronavirus. They must also ensure that their policies and practices are consistently applied to all their employees. Where questions arise, or uncertainty exists about the application of certain employment law requirements, we encourage employers to consult with their legal counsel.

If we can provide you with additional insight and information regarding changing employment laws related to the current coronavirus pandemic and how to address internal issues at your business, please contact :

John L. Valentino ♦ 315.701.6308 ♦ JValentino@bhlawpllc.com





BOUSQUET HOLSTEIN PLLC

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Bousquet Holstein PLLC provides representation to employers, large and small, and to employees. Our attorneys make it a priority to become familiar with our clients' businesses. We emphasize addressing employment, discrimination, and labor issues before they become problems and we advise our clients in all areas of human relations and human resource practices to satisfy our clients' business objectives.

Our attorneys are also fully versed in the complex set of rules that regulate the employee benefits area as set forth under ERISA (Employee Retirement Income Security Act of 1974, as amended) and the Internal Revenue Code. We routinely advise clients with regard to the design, implementation, and administration of employee retirement, welfare, and fringe benefit plans.



John L. Valentino
jvalentino@bhlawpllc.com
315.701.6308



Sharon A. McAuliffe
smcauliffe@bhlawpllc.com
315.701.6315



L. Micha Ordway
lordway@bhlawpllc.com
315.701.6441



Joshua S. Werbeck
jwerbeck@bhlawpllc.com
315.701.6447



Kavitha Janardhan
kjanardhan@bhlawpllc.com
315.701.6468



Joseph J. Porcello
jporcello@bhlawpllc.com
315.701.6440



Rebecca R. Cohen
rcohen@bhlawpllc.com
315.701.6347



Cameron T. Bernard
cbernard@bhlawpllc.com
315.701.6446