Thursday, March 12, 2020

The spread of the coronavirus COVID-19—recently declared a pandemic by the World Health Organization—has created a myriad of practical and legal issues for employers seeking to prioritize employee health and wellness while continuing to meet business and customer needs. The situation remains extremely fluid, with new developments and issues emerging by the minute.

In this post, we share answers to some of the more frequently asked questions from employers. As the questions and answers make clear, these issues are extraordinarily fact-, employer-, and circumstance-specific. Please contact any member of the Schiff Hardin Labor & Employment team to discuss the particular challenges your organization is facing.

Q: Should I restrict all business and personal travel?

A: At a minimum, international travel to CDC Level 3 (China, Iran, South Korea, and Italy) and Level 2 (Japan) countries should be prohibited. In addition, when assessing international travel plans and needs, U.S. businesses should consider that President Trump just announced a 30-day ban on travel from Europe (excluding the U.K.) into the U.S., beginning March 13 at 11:59 p.m. Many U.S. employers, however, have
already begun restricting all international travel, regardless of location.

Some employers have also made the difficult decision to restrict domestic travel. If that is not the case for your organization, this decision should be reevaluated over the coming weeks. In the meantime, employers should consider adopting a policy that allows employees to opt-out of domestic work-related travel.

Although it is unlikely employers can restrict employees from taking personal vacations, employers can require employees to self-quarantine upon their return. In addition, if any employees are prohibited from reentering the country or placed in a government-imposed quarantine, there may be no obligation to pay those employees (see below). If the employees are not covered by any applicable leave laws, and have exhausted all available time off under your policies, they may not be entitled to future employment.

Q: Do I have to pay employees who are not at work due to closure, quarantine, or sickness?

A: There are multiple situations in which COVID-19 may result in employees, individually or an entire workforce, not being able to report to work. Whether employees are entitled to be paid for time they are not at work depends on the specifics of each situation.

There is one clear rule, however, that applies in all cases: employees should be paid for all time actually worked, even if the work is not physically done at the normal workplace. So, if telework is an option, employees who telework should be considered on the clock and paid for the time they spend working from home. This is required regardless of whether the employee is exempt or non-exempt. As a consequence, it is critically important for employers to have reliable processes for employees to track and record their work time while at home. In addition, employers should consider any applicable state laws (e.g., California and Illinois) that require reimbursement of business-related expenses and that may apply with respect to their employees’ telework activities.

Somewhat less clear are the various circumstances in which employees are not working from home because, for example, there is no work for them to do, they are sick and unable to work, or their job duties are not capable of being performed remotely. These situations require further legal and practical consideration, but again, a few clear rules emerge:

First, if the employees are salaried exempt under the Fair Labor Standards Act, it is highly likely their compensation will not be affected by the closure or absence from work. The FLSA generally requires that salaried exempt employees continue to be paid as normal unless their business is closed and they perform no work whatsoever for at least a full work week.

Nonexempt employees, on the other hand, present a different scenario. Employers need to consider whether nonexempt employees—who are absent from work and not working from home—are nevertheless entitled to compensation under the business’ sick, vacation, or other paid-time-off policy, short-term disability policy, or under applicable state or local paid sick leave laws. Any or all of these policies or
state/local laws may require compensation for at least a portion of an employees’ absence from work.

Further, even with respect to employees who are not entitled to paid time off, or have exhausted their paid time off allotments under company policy or state or local law, many employers are considering whether to provide some additional compensation for practical or business reasons. To that end, a number of employers have decided to provide at least some level of compensation to encourage people not to report to work if they are sick, or to lessen the burden on employees who find themselves suddenly and unexpectedly out of work due to circumstances beyond their control. Employers who decide to implement changes in their normal compensation or time-off polices should be clear to describe any such changes as limited to address unique exigencies caused by COVID-19.

**Q:** If an employee reports that he is sick, what questions can I ask? What information can/should I share with others in the workplace who may have been in contact with the employee?

**A:** Employers covered by the Americans with Disabilities Act can ask employees if they are experiencing symptoms of acute respiratory illness. Care should be taken, however, not to make “disability-related inquiries,” which the EEOC defines as those that are “likely to elicit information about a disability.” For example, asking an employee whether his immune system is compromised is a disability-related inquiry. As such, the inquiry is generally out of bounds except in limited circumstances—namely, the inquiry is job-related and consistent with business necessity, meaning the employer reasonably believes based on objective evidence that (1) the employee’s ability to perform essential job functions will be impaired by a medical condition, or (2) the employee will pose a direct threat to himself or others due to a medical condition. Further, employers should treat any information they learn about an employee’s illness as a confidential medical record.

If an employer discovers that an employee (or anyone) who has recently been in the workplace is now exhibiting symptoms of acute respiratory illness, it may (and should strongly consider whether to) share non-identifying information with employees who work at the same location. Further, if an employer discovers that an individual with a confirmed diagnosis or exposure to COVID-19 has been in the workplace (e.g., through a positive test result or recent return from a CDC Level 3 area), the employer should consider sharing non-identifying information and closing the location for a period of time to permit deep cleaning before employees reenter the space.

**Q:** If we need to close or lay off employees, does my company need to provide WARN notices?

**A:** It is likely that businesses will need to close plants, offices, and other facilities as a result of the coronavirus. In lieu of closing, an employer may need to lay off employees for a period of time until the outbreak subsides. If that occurs, employers will need to evaluate whether the business is obligated to provide a Worker Adjustment and Retraining Notification Act (WARN) notice under federal or state law.
The federal WARN Act requires employers with 100 or more employees to provide written notice at least 60 calendar days before a plant shutdown or covered mass layoff. The law does have an exception to the notice provision for “unforeseeable business circumstances,” which are the result of “sudden, dramatic and unexpected action or conditions outside of the employer’s control.” Because the coronavirus is a public health crisis and pandemic, employers will have a strong argument that this exception may apply. Even when relying upon the exception, employers must still provide notice as soon as it is practicable, and must provide a statement of the reason for reducing the notice requirement period.

Employers should also be aware that many states have mini-WARN laws that may also apply. This includes Illinois, California, and New York. It is important to carefully review these laws in each jurisdiction in which your business operates to determine whether a WARN notice may be appropriate.

Q: When do I tell employees to stay home?

A: The decision of whether to shut down all or parts of a business and tell employees to stay home and potentially self-quarantine is not an easy one. The correct answer will vary based on the nature of the business and the needs of the workforce. Because employers have an obligation under the Occupational Safety and Health Administration (OSHA) general duty clause to provide a working environment free from known hazards, there may come a point where closure is the only means to achieve compliance.

If an employee has tested positive for the virus and has been in the workplace within the last fourteen days, it may be appropriate to close the business until the 14-day incubation period has expired. During this time, employers should consider having the workplace professionally cleaned.

If an employee has not tested positive for the virus, but has been in contact with someone who has tested positive, closure may not be necessary. At a minimum, the employee should be asked to self-quarantine for fourteen days. If the employee is exhibiting symptoms consistent with the virus, and has not yet been tested, it may be prudent to close the business, ask employees to work from home, or initiate a social distancing plan, if at all possible.

Finally, many employers have taken proactive measures to reduce the potential spread of the virus. Even though no employees are sick and no employees have been in contact with the sick, they are requiring employees to work from home. Other employers are staggering work schedules to reduce the number of employees in the workplace at a given time. If that is the path that your business decides to take, employees should be advised that these requirements are necessary due the unique circumstances that this coronavirus has created and should not be considered as precedent for how the business will handle future situations.

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