Contagion: Practical Advice for NC Employers in the Face of Coronavirus Disease

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The world seems to have shifted beneath our feet - to have become alien and dangerous.

That's no doubt true, but we've been here before. More than 100 years ago, soon after the end of World War I, we encountered the deadliest strain of influenza in modern history. It infected as much as 40% of the global population over the next 18 months. President Wilson got it in 1919 while negotiating the Treaty of Versailles. The disease was called the "Spanish flu," but that turns out to have been unfair to Spain, and wrong: The name stems from the fact that media outlets in Spain were some of the few reliable sources of news about the pandemic because wartime censors in many other countries had concealed information about it - no kidding - for the sake of citizens' morale. The information thus yielded to disinformation.

Employers face the same risk today. Data (some of it helpful, some not) abounds in the chaotic world of cyberspace, but practical insights can be hard to find. We have therefore provided some below that we hope will help all employers of at least 15 employees (many workplace-related laws use that number as a cut-off) understand and deal with their obligations to employees and operate their businesses as
What is my company REQUIRED to do?

1. You must provide a safe workplace for your employees in accordance with the **Occupational Safety and Health Act of 1970**. (This law, despite the numerical limitation set forth above, applies to all employers, including non-profit) The federal Occupational Safety and Health Administration has already published an extensive guide for employers entitled "Guidance on Preparing Workplaces for COVID-19." It's a wealth of information about such subjects as "How a COVID-19 Outbreak Could Affect Workplaces", "Steps All Employers Can Take to Reduce Workers' Risk of Exposure to SARS-CoV-2", and "What to Do to Protect Workers" who occupy jobs of varying risk of exposure. While you're at it, see the Coronavirus Resources page. Both are a goldmine and free.

2. You must comply with the **Americans with Disabilities Act of 1990** ("ADA") and **North Carolina Persons with Disabilities Protection Act** by refraining from employment-related discrimination based on uninformed perceptions of "disability". Anxiety in this odd time is understandable, but fear alone will be no defense against a claim that an employer took adverse action against an employee, or for that matter an applicant, because of an unsubstantiated perception that he or she posed a risk to others in the workplace. Under the ADA, simply "regarding" an employee or applicant as "disabled" and taking adverse employment-action based on that perception can land an employer in hot water. So avoid reactive "Ready, fire, aim" personnel-decisions about hiring, firing, and providing workplace-related accommodations to ill – or apparently ill – employees.

3. You must comply with **Title VII of the Civil Rights Act of 1964** and **Age Discrimination in Employment Act of 1967**, which, generally speaking, prohibit employers from making employment-related decisions based on employees' and job-applicants' race, color, religion, sex, national origin and age (the last if age 40 or older). It's therefore important when deciding how to handle employees' absences from work, whether by necessity or your choice, to do so in a way that avoids the appearance of distinctions based on any of those criteria.

4. If you employ **50** or more employees counted in the specific way required by law, then you must comply with the **Family and Medical Leave Act of 1993** ("FMLA"). The FMLA is too complicated to address in this article in detail, but this U.S. Department of Labor Fact Sheet will give you the gist. Most important, bear in mind that the FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave of as much as (but not more than) 12 workweeks in a 12-month period for various family and medical reasons (and to the continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave). Those reasons include the need to care for the employee's spouse, child, or parent who has a serious health condition, and the employee's need to care for him/herself when the employee has a serious health condition that makes him/her unable to perform the essential functions of the job. But don't assume that "testing
positive" for a pandemic virus is necessarily a "serious health condition" under the FMLA: It probably won't be in the absence of medical complications and, if it isn't, you may not count an employee's absence from work against his or her 12 weeks of FMLA leave.

**Related law may change soon.** The U.S. House of Representatives passed a bill last week called the "Families First Coronavirus Response Act." A summary can be found [here](#). The bill, if enacted into law, will provide paid employee-leave, establish free COVID-19 testing, protect public health workers, and provide important benefits to children and families. It includes a proposed "Emergency Paid Leave Act of 2020," which, if adopted into law, will create a new federal emergency paid-leave benefits program administered by the Social Security Administration that will apply to most employers and permit eligible virus-affected workers to take 14 days of paid leave. You can monitor the status of the bill [here](#).

5. You must comply with the federal **Fair Labor Standards Act of 1938** and the **North Carolina Wage and Hour Act**. Both statutes (which apply to essentially all employers in North Carolina) require employers to pay employees in specified ways, and the latter requires N.C. employers to comply with their own policies and practices when it comes to issues like frequency of pay and use of paid-time-off. If you're considering changing how and when you pay employees and/or permit use of paid vacation time, then keep these laws in mind. And remember that employees who are "exempt" from the FLSA's overtime requirements are generally paid on a "salary" basis and that, with some exceptions, an exempt employee must receive his/her full salary for any week in which the employee works, regardless of the number of hours worked (but need not be paid for any workweek in which no work is performed). Lastly, you may find this [helpful](#).

**What MAY and SHOULD my company do?**

1. **Communicate with your employees about the virus and how it may affect them.** Many are probably very anxious about how the pandemic may affect their jobs and pay. People tend to try to replace fear and ignorance with assumptions, many of which may be wrong. So tell them, as often as makes sense in your workplace, what to expect in terms of working conditions, job security, and compensation. That will be kind and enhance your employees' loyalty and morale. (For example, tell them about disease-prevention measures (e.g., frequent hand washing, coughing techniques, refraining from face-touching) and that employees will be asked to stay home if they exhibit symptoms of the flu or other virus.) Visit the [CDC](#) for more information.

2. **Create or update your "telecommuting" policy.** Many employees can work from home. That can be a great thing, but, to do it right, you'll need a thorough **personnel policy** (and ideally a written "telecommuting agreement" with each "remote" employee) addressing critical issues such as how "non-exempt" employees may "clock" in and out (to keep accurate track of "compensable time"); compliance with personnel policies generally; agreed hours of work; expectations regarding communication with supervisors; security
of confidential information/intellectual property and company IT; ergonomics; compliance with ordinances and property restrictions that may limit an employee's right to conduct business from home; and termination of permission to telecommute.

3. **Review/revise policies regarding sick leave and "PTO".** For example, if you typically require proof of illness from a healthcare provider for an absence of three or more days, then consider waiving that requirement during the outbreak. If an employee is caring for someone with the virus, then consider providing a job-protected leave of absence (whether paid or unpaid) for a stated period of time, even if that's not required by law. Consider revising your leave policies generally to ensure that employees don't feel compelled to work while sick. You may **not** typically ask employees about their health conditions to enable the company to try to anticipate potential absenteeism, but, according to the U.S. EEOC, *during a pandemic*, employers may ask employees whether they have influenza symptoms, such as fever or chills and a cough or sore throat. **But be careful:** Employers may not ask employees who don't appear to be sick to disclose whether they have a medical condition that may make them susceptible to a pandemic.

4. **Ensure that your supervisors are aware of ADA guidance.** Generally, a fleeting illness is not a protected "disability" under the ADA, but an employee may have some other serious health condition that may be a "disability" that's exacerbated by the coronavirus. So be cautious if an employee requests a leave-of-absence or telework as an accommodation under the ADA. The EEOC has issued [ADA guidance in relation to pandemics](https://www.eeoc.gov/coronavirus), which provides employers with some helpful latitude when it comes to asking questions about employees' flu-related symptoms. Wise employers, however, will ensure that all employees' requests for potential ADA-related accommodations are routed to whoever handles "HR" matters in your organization, to ensure that such requests are treated consistently and in a way that complies with applicable law and optimizes productivity in this tumultuous time.

5. **Communicate with your customers/clients, vendors, and other stakeholders.** They will want to know how to continue to do business and work with you despite the current disruptions without exposing themselves and their employees and agents to unwarranted risks. If you haven't told them how to do so, then they may turn to a competitor who has. So tell them that you take the contagion seriously and have identified ways in which you can serve their needs without making them more anxious than they undoubtedly already are. They'll appreciate your honesty and initiative and remember you when this crisis has passed. **As it most certainly will.**

We'll publish further timely alerts as this dynamic situation continues to evolve, regarding the status of the [Families First Coronavirus Response Act](https://www.congress.gov) and otherwise. In the meantime, wash your hands.

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