

IMPORTANT COVID-19 UPDATE

COVID-19: REGULATORY CONSIDERATIONS FOR EMPLOYERS

To assist employers navigate the regulatory complexities presented by the coronavirus situation, we compiled a series of updates below for many of the common issues:

Family and Medical Leave Act (FMLA)

Employees who are diagnosed with the coronavirus or are medically quarantined for suspicion of having it may be eligible for FMLA since coronavirus may be a serious health condition. Those who are self-quarantined without having seen a doctor or getting treatment may not satisfy the serious health condition requirement under FMLA. Similarly, to qualify for FMLA leave to care for a family member, the family member would have to be unable to care for themselves and need help being transported to the doctor or require psychological comfort. It is entirely possible for an employee to have a family member who is quarantined or diagnosed with coronavirus, but the leave may not be covered by FMLA because the employee may not be able to provide transportation support or psychological comfort directly to the family member if the family member is quarantined or isolated.

Confidentiality Requirements Under ADA, FMLA, Workers' Compensation and HIPAA

If an employer learns of an employee's coronavirus diagnosis (or any medical information), the employer may not share this information. Under the confidentiality provisions of ADA, FMLA and workers' compensation, only those who "need to know" may be notified of the diagnosis. It's important to note that the "need to know" standard is very narrow and strict. Employers

cannot share the medical diagnosis or other medical information unless it is facing a true medical emergency where knowledge of the employee's diagnosis becomes imperative for health and safety reasons.

Occupational Health and Safety Act (OSHA)

Under the OSHA general duty clause, employers must provide a place of employment free from recognized hazards that are causing or likely to cause death or serious physical harm. One of the ways to protect employees is through personal protective equipment (PPE) such as gloves, eye and face protection and respiratory protection, which are regulated by OSHA. It's important for employers to be sure that they do not expose employees to risks associated with contracting the coronavirus. For example, if an employee exhibits symptoms of the coronavirus, the employer should send the employee home. Likewise, if an employee is diagnosed with coronavirus and had previously been in the office, the employer should have the office deep-cleaned and disinfected.

American with Disabilities Act (ADA)

ADA generally prohibits employers from medical inquiries or requiring medical examinations of employees, unless the examinations are job-related or there is an objective reasonable belief that the employee poses a direct threat to the health and safety of themselves or others that can't be dealt with under another accommodation. Generally, those medical inquiry/examination rules change only if certain criteria are met:

- If influenza symptoms become more severe than seasonal flu or H1N1; or
- A pandemic becomes widespread in the community as assessed by state or local health officials or the Centers for Disease Control and Prevention (CDC).

ADA considerations for employers now that the coronavirus has been declared a pandemic include:

- Employees who are exposed to the coronavirus and are quarantined as a consequence may not necessarily be disabled as defined by ADA.
- Employees who are actually diagnosed with coronavirus will likely qualify for the rights and protection of ADA.
- EEOC has stated that in some circumstances a leave of absence may be a reasonable accommodation under ADA. Employers should consider prior practice for consistency and compliance.
- Assessment of whether an employee poses a direct threat in the workplace must be based on objective factual information. Employers should rely on state or local health officials to determine the severity of the pandemic in their community.
- Telecommuting may be a reasonable accommodation and employees can be asked to work remotely. Employers will have to contemplate what their telecommuting policy will look like regarding access to technology and cybersecurity.

Title VII of the Civil Rights Act

This law prohibits discrimination on the basis of sex, race, color, religion and national origin. Employers should not assume that because employees are of a particular race or national origin that they should be treated differently. However, it may be reasonable to ask a worker if he or she has traveled to countries or locations that have been infected by the virus to refrain from coming to the office for 14 days.

Fair Labor Standards Act (FLSA)

Except under certain conditions, employers cannot reduce the salaries of exempt employees. If they do, they might subject themselves to rules for nonexempt employees and owe them overtime pay. Exempt employees who are not infected and can work may find that they must fill in for absent, infected co-workers or those who have been laid off because of a decline in business. Job descriptions may be significantly altered and may potentially compromise an employees' exempt status. Employees who are able to remain working may be faced with increased overtime hours and the employer may grapple with possible overtime abuse. Employers should be sure that their time and attendance policies are up-to-date and distributed throughout the workforce.

Affordable Care Act (ACA)

Employers should look at whether employees who have reduced hours remain eligible for employer-sponsored health coverage or should be switched to coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA). Employers that rely on the W-2 safe harbor for calculating affordability of their health insurance premiums under ACA may need to revisit their calculations as employees are paid less compensation during business interruptions due to coronavirus. A plan that is not affordable may trigger a penalty if an employee buys a plan on the health insurance marketplace and receives a subsidy.

This information is not a substitute for legal advice from your counsel but should be useful for practical guidance. We will continue to collect information we believe to be useful and distribute it accordingly.

Source: International Foundation of Employee Benefit Plans, 3/20/2020

Please visit our [COVID-19 Resource Center](#) for more information.

