HIRSCH & WESTHEIMER
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MEMORANDUM

To: Firm Clients & Friends

From: Eric Lipper, Lee Herman, Bradley Rauch, Melissa Sternfels and Derek Flynn

Date: March 27, 2020

Re: COVID-19 Legal Update

Given the deluge of information, laws, regulations and guidelines employers are being inundated with every day, we here at Hirsch & Westheimer, P.C. have put together the following memorandum to touch on each of the issues that will directly impact employers and our clients. We will continue to monitor everything that is going on and send updates as new information becomes available. Contact for our COVID-19 Response Team is provided at the end of the memorandum. Thank you and we hope you find this helpful.

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The Families First Coronavirus Response Act (FFCRA) provides new benefits to employees through two new laws: The Emergency Family and Medical Leave Expansion Act (EFMLEA) and the Emergency Paid Sick Leave Act (EPSLA). The requirements of FFCRA are set to take effect April 1 and expire Dec. 31. The elements of FFCRA that touch most directly on the employer-employee relationship are examined below.

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

EFMLEA amends the Family and Medical Leave Act (FMLA) to require covered employers to provide up to 12 weeks of protected paid leave to eligible employees for a qualifying reason.

- ***Eligible Employees***: Those who have been employed for 30 days.
- ***Covered Employers***: Private employers with fewer than 500 employees and all public sector employers, but carve-outs exist regarding certain provisions for smaller businesses, and EFMLEA gives the Secretary of Labor (DOL) the authority to exempt even more small businesses and certain healthcare and emergency personnel. How the DOL will exercise this authority remains unclear.
- ***Qualifying Reason***: The employee is unable to work (or telework) due to being diagnosed with COVID-19, exposure to COVID-19 and/or the

need to care for the employee's child, because the child's school or place of care has been closed, or is unavailable, due to a public emergency.

- ***Compensation***: The initial 10 days of leave may be unpaid, except that an employee may substitute any available paid leave for this unpaid leave. After the initial 10 days, the employer must provide paid leave equal to two-thirds of the employee's regular rate of pay for the remainder of the leave. For employees with varying schedules and pay, the paid leave must be equal to the average number of hours the employee was scheduled to work per day over the prior six-month period. In no event shall the total value of paid leave taken by an employee exceed $200/day or $10,000 in the aggregate.

EMERGENCY PAID SICK LEAVE ACT

EPSLA requires covered employers to provide eligible employees with paid leave when a qualifying reason exists or has been triggered.

- ***Covered Employers***: Private employers with fewer than 500 employees and all public sector employers. Health care provider and emergency responder employers may be entitled to exclude their employees from this provision.
- ***Eligible Employees***: All employees, regardless of their length of employment.
- ***Paid Leave:*** Employers must provide full-time employees with 80 hours of paid sick leave and part-time employees with two weeks of paid sick leave based on the average number of hours the employee worked during the prior six-month period.
    - For paid leave taken for self-care (reasons 1–3, below), the employee is entitled to paid leave at the employee's regular rate, capped at $511/day and $5,110 in the aggregate.
    - For paid leave taken to care of another individual (reasons 4–6 below), the employee is entitled paid leave at two-thirds of the employee's regular rate, capped at $200/day and $2,000 in the aggregate.
- ***Qualifying Reasons***: An employee qualifies for EPSLA if the employee,
    - is subject to a federal, state or local quarantine related to COVID-19;
    - has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;

- is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
- is caring for an individual (not limited to family member) who is subject to qualifying reasons (1) or (2) above;
- is caring for a child while the child's school or place of care is closed, or the employee's child care provider is unavailable, due to COVID-19 precautions; or
- is 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 DOL.

HOW WILL EMPLOYERS PAY FOR THESE BENEFITS?

Employers are responsible for all payments owed to qualifying and covered employees under both EFMLEA and EPSLA. However, the act provides a quarterly tax credit to employers (and certain self-employed individuals) to offset the cost of paid family and sick leave. Specifically, employers are eligible for a refundable tax credit of 100% of qualified family leave wages paid and sick leave wages paid against their employer-side payroll tax liability. If the credit value exceeds the employer's quarterly tax liability, the act provides that the excess will be treated as an overpayment and refunded.

NEW DOL GUIDELINES

On March 26th, the U.S. Department of Labor (DOL) released additional FAQs that further explain employer and employee rights and responsibilities under the federal Families First Coronavirus Response Act (FFCRA). Effective April 1, 2020, the FFCRA will require private employers with 499 or fewer employees, and certain public employers, to provide covered employees emergency paid sick leave and emergency unpaid and paid family leave.

Requesting and Documenting Leave: The DOL explains that employees must support leave requests with appropriate information, including the employee's name, qualifying reason for leave, a statement that the employee is unable to work or telework for that reason, and leave date(s).

Employees must provide documentation supporting the absence, *e.g.*, a copy of the quarantine or isolation order, or written documentation from a health care provider advising self-quarantine. For employees using leave to care for a child, examples of supporting documentation include a notice posted on a government, school, or day care website, or published in a newspaper, or an email from an employee or official of the school, place of care, or child care provider.

The DOL recommends that employers keep this documentation if they will seek tax credits for providing paid leave. The DOL points employers to consult Internal Revenue Service (IRS) applicable forms, instructions, and information for the process they will need to follow to claim this tax credit, including any necessary supporting documentation.

What it Means to be "Unable" to Work or Telework: The DOL explains that being "unable" to work or telework means that an employer has work available, but one of the specified paid reasons for leave under the FFCRA prevents the employee from being able to do so. If an employer offers the ability to work the same number of hours per day but different hours, the employee is able to work and leave is unnecessary unless: 1) the reason for leave prevents the employee from working that schedule; 2) the employee has a qualifying paid sick leave absence; or 3) the employee cannot telework due to the need to care for a child. Note, however, that if an employee can telework while caring for the child, leave is unavailable.

Intermittent and Incremental Use at Employer's Discretion: The DOL provides generally that employees and employers may agree to intermittent and incremental use of emergency paid sick leave (EPSL) and emergency paid Family and Medical Leave benefits (FMLA+), but then seems to divide the remaining guidance into two situations—whether the employee is teleworking, or working onsite.

For employees who are teleworking, whether taking time off under EPSL or FMLA+, employer and employee may agree to intermittent leave for any of the covered reasons. But for employees who are working *on the employer's premises*, *intermittent EPSL is only permitted for employees who are taking leave for school closures or childcare unavailability* (again, only if the employer agrees). Employees taking EPSL for one of the other five reasons under the Act must take such leave in full-day increments (because the intent of the FFCRA is to prevent employees who may be ill or caring for those who are ill from possibly spreading the virus to other individuals in the workplace).

Worksite Closing Forecloses Leave Availability: Per the DOL, if the worksite closes, employees do not receive, or continue to receive, FFCRA leave. It does not matter whether: 1) the closure occurs before or after the law takes effect; 2) an employee is on leave when closure occurs; 3) an employer furloughs an employee; 4) the worksite temporarily closes and the employer says it will reopen in the future. This is true whether the worksite closes for lack of business or per a federal, state, or local directive. If this occurs, an employee's only recourse is to seek unemployment benefits.

Shelter-in-Place and Business Closure Orders do Not Likely Support the Need for EPSL: Although it did not carve out a specific question for these types of

orders, the DOL appears ready to deny EPSL to those covered by these sweeping orders. In FAQ #27, the DOL notes:

If, prior to the FFCRA's effective date, your employer sent you home and stops paying you because it does not have work for you to do, you will not get paid sick leave or expanded family and medical leave but you may be eligible for unemployment insurance benefits. This is true whether your employer closes your worksite for lack of business or because it is required to close pursuant to a Federal, State, or local directive.

Similarly, in FAQ #28, the DOL states:

If your employer reduces your work hours because it does not have work for you to perform, you may not use paid sick leave or expanded family and medical leave for the hours that you are no longer scheduled to work. This language seems to indicate that EPSL is not available to those covered by shelter-in-place and business closure orders at the state and local level (though employees whose child's school or childcare is unavailable would still be eligible for FMLA+ for that reason alone).

Employees Can Use Leave for Scheduled Hours Only: The DOL clarifies leave is available only for an employee's scheduled hours. If an employer reduces an employee's hours, the employee can use leave for remaining scheduled hours only.

Health Coverage Continues During Leave: Per the DOL, existing FMLA standards apply to emergency family leave: employees can continue group health coverage on the same terms; if an employee has family coverage, an employer must maintain such coverage, and employees must generally continue to make regular contributions for their own portion of premiums. For paid sick leave, the DOL says that, per the federal Health Insurance Portability and Accountability Act (HIPAA), employers cannot establish an eligibility rule or set an individual's premium or contribution rate based on whether the employee is actively at work, "unless absence from work due to any health factor (such as being absent from work on sick leave) is treated, for purposes of the plan or health insurance coverage, as being actively at work."

Employees Cannot Use Existing Benefits During FFCRA Leave without Employer Consent and Employers Cannot Require Employees to Use Existing Benefits: According to the DOL, employers and employees must agree in order to use FFCRA paid leave and existing employer-provided leave benefits simultaneously and use the latter to "top up" the deficit that may result when FFCRA leave pays out at two-thirds an employee's regular rate (and that employers cannot require this without the employee's consent). While this supplementation may be allowed if

employees and employers agree, the DOL reminds employers that the law limits the employer tax credit to the amount of FFCRA leave an employer must provide, so tax relief is unavailable for the "top up."

CORONAVIRUS AID, RELIEF AND ECONOMIC SECUTIRY ACT

On March 27th, Congress passed and the President signed the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"). The bill provides various tax relief and loan provisions to assist businesses impacted by COVID-19, as well as additional unemployment benefits for individuals affected by the pandemic.

The 800+ page bill is designed to inject $2.2 trillion into the economy, and includes a number of provisions designed to aid both employers and workers facing the dramatic challenges of the COVID-19 public health crisis. Agencies like the Small Business Administration and the Department of the Treasury will be charged with establishing mechanisms for participation and the "fine print" of these programs.

Some key provisions of the bill include:

Loan Provisions

The CARES Act contains provisions that offer loan support to small businesses. Some key provisions would:

- Increase the government guarantee of loans made for the Payment Protection Program under section 7(a) of the Small Business Act to 100% through December 31, 2020.
- Define eligible businesses to include non-profits, sole proprietorships, self-employed individuals and firms with fewer than 500 employees per location.
- Include franchise businesses as eligible for relief.
- Specify allowable uses of the loan to include payroll support, such as employee salaries, paid sick or medical leave, insurance premiums, and mortgage, rent, and utility payments.
- Set a maximum interest rate of 4% and waive various requirements (personal guarantees, etc.).
- Allow for six-month loan deferments.

The CARES Act also provides for loan forgiveness. The key features of loan forgiveness include:

- Borrower shall be eligible for loan forgiveness equal to the amount spent by the borrower during an 8-week period after the origination

date of the loan on payroll costs, interest payment on any mortgage incurred prior to February 15, 2020, payment of rent on any lease in force prior to February 15, 2020, and payment on any utility for which service began before February 15, 2020.
- Amounts forgiven may not exceed the principal amount of the loan.
- Eligible payroll costs do not include compensation above $100,000 in wages.
- Forgiveness on a covered loan is equal to the sum of the following payroll costs incurred during the covered 8-week period compared to the previous year or time period, proportionate to maintaining employees and wages: Payroll costs **plus** any payment of interest on any covered mortgage obligation (which shall not include any prepayment of or payment of principal on a covered mortgage obligation) **plus** any payment on any covered rent obligation and any covered utility payment.

Other changes include amendments to Chapter 11 of the Bankruptcy Code to address coronavirus-related issues, including excluding from income coronavirus-related payments from the federal government to the debtor.

Unemployment Assistance

The CARES Act creates a temporary Pandemic Unemployment Assistance program through December 31, 2020 to provide payment to those not traditionally eligible for unemployment benefits (self-employed, independent contractors, those with limited work history, and others) who are unable to work as a direct result of the coronavirus public health emergency. Specifically, the CARES Act provides that a "covered individual" includes anyone who self-certifies that they are able and available to work but is unemployed or partially unemployed due to any of the following:

- Has been diagnosed with COVID-19 or is experiencing symptoms and seeking a medical diagnosis;
- A member of the individual's household has been diagnosed with COVID-19;
- The individual is providing care for a family member or household member who has been diagnosed with COVID-19;
- The individual is the primary caregiver for a child or other person in the household who is unable to attend school or another facility as a direct result of COVID-19;
- The individual is unable to reach the place of employment because of a quarantine imposed as a direct result of COVID-19;
- The individual is unable to work because a health care provider has advised the individual to self-quarantine due to COVID-19 concerns;

- The individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of COVID-19;
- The individual has become the breadwinner or major support for a household because the head of household has died as a direct result of COVID-19;
- The individual has to quit their job as a direct result of COVID-19; or
- The individual's place of employment is closed as a direct result of COVID-19.

The Secretary of Labor may establish additional eligibility criteria as well. Importantly, the law not only applies to employees, but also to those who are self-employed (independent contractors). Individuals are not eligible for benefits if they have the ability to telework with pay or are receiving paid sick leave or other paid leave benefits.

Other key features of the new unemployment benefits include:

- Benefits extended from 26 weeks (in most states) to 39 weeks.
- Benefits are payable for the period beginning on January 27, 2020, and end on December 31, 2020.
- The amount of benefits includes the amount that would be calculated under state law plus $600 per week for up to four months.
- Waiver of the usual one-week waiting period.

Additional benefits may also be available to those who exhaust their benefits. The CARES Act also provides funding to states for work share programs.

Payroll Tax Credit and Deferral

The CARES Act provides a refundable payroll tax credit for 50% of wages paid by employers to employees during the COVID-19 crisis. The credit is available to employers whose (1) operations were fully or partially suspended due to a COVID-19-related shut-down order, or (2) gross receipts declined by more than 50% when compared to the same quarter in the prior year.

The credit is based on qualified wages paid to the employee. For employers with greater than 100 full-time employees, qualified wages are wages paid to employees when they are not providing services due to the COVID-19-related circumstances described above. For eligible employers with 100 or fewer full-time employees, all employee wages qualify for the credit, whether the employer is open for business or subject to a shut-down order. The credit is provided for the first $10,000 of compensation, including health benefits, paid to an eligible employee. The credit is provided for wages paid or incurred from March 13, 2020, through December 31, 2020.

Employers and self-employed individuals may also defer payment of the employer share of the Social Security tax on employee wages. Deferred employment tax must be paid over the following two years, with half of the amount required to be paid by December 31, 2021, and the other half by December 31, 2022.

Individual Rebates and Retirement Accounts

All U.S. residents with adjusted gross income up to $75,000 ($150,000 married), who are not a dependent of another taxpayer and have a work-eligible social security number, are eligible for the full $1,200 ($2,400 married) rebate. In addition, they are eligible for an additional $500 per child. This is true even for those who have no income, as well as those whose income comes entirely from non-taxable, means-tested benefit programs, such as SSI benefits.

For the vast majority of Americans, no action on their part will be required in order to receive a rebate check as the IRS will use a taxpayer's 2019 tax return if filed, or in the alternative, their 2018 return. This includes many low-income individuals who file a tax return in order to take advantage of the refundable Earned Income Tax Credit and Child Tax Credit. The rebate amount is reduced by $5 for each $100 that a taxpayer's income exceeds the phase-out threshold. The amount is completely phased out for single filers with incomes exceeding $99,000, $146,500 for head-of-household filers with one child, and $198,000 for joint filers with no children.

Individuals may also be able to tap into retirement accounts. The provision waives the 10% early withdrawal penalty for distributions up to $100,000 from qualified retirement accounts for coronavirus-related purposes made on or after January 1, 2020. In addition, income attributable to such distributions would be subject to tax over three years, and the taxpayer may recontribute the funds to an eligible retirement plan within three years without regard to that year's cap on contributions. Further, the provision provides flexibility for loans from certain retirement plans for coronavirus-related relief.

There are many other aspects to the CARES Act, including numerous provisions relating to health care and other issues. For employers, the CARES Act offers both opportunities and potential pitfalls, as the new unemployment benefits are likely to be broadly applied, potentially causing disruptions to existing workforces that believe they fall within one of the enumerated categories. Because there is no clear precedent for these benefits, it remains to be seen how state unemployment agencies will process new claims under these expanded benefit provisions.

EMPLOYER FAQ FROM EEOC

1. Can employers take the temperature of employees who are coming to work?

Temperature checks normally constitute an overly broad medical exam under the Americans with Disabilities Act (ADA) (because the exam is not "job-related and consistent with business necessity") as well as various state non-discrimination laws, which carry separate penalties. However, as of March 19, 2020, the EEOC issued updated guidance specifically concerning COVID-19, the ADA and the Rehabilitation Act. With regard to temperature checks, the EEOC indicates: "If pandemic influenza symptoms become more severe than the seasonal flu or the H1N1 virus in the spring/summer of 2009, or if pandemic influenza becomes widespread in the community as assessed by state or local health authorities or the CDC, then employers may measure employees' body temperature."

Temperature screening should not be an employer's only response to the COVID-19 outbreak; the EEOC guidance notes, "some people with influenza, including the 2009 H1N1 virus or COVID-19, do not have a fever." Rather, a temperature check is only one element of a comprehensive program, including employee education about COVID-19 symptoms, employee and visitor screening questionnaires or interviews related to other risk factors, limitations on non-essential travel, encouragement to work from home, emphasis on good hygiene (*e.g.*, handwashing), social distancing, and assessment of paid and unpaid leave programs.

In implementing a temperature screening program, it is necessary to 1) establish a consistent process for conducting such checks; 2) mitigate the risk that someone excluded by a temperature check will bring a claim; and 3) assess any other considerations that should weigh into the decision, such as public health.

The following are prudent measures that an employer may want to consider to help mitigate risk: implementing a safe and consistent procedure designed to reduce the risk of coronavirus exposure (*i.e.*, with respect to the individual administering the screening, as well as among those being screened); ensuring that the screen applies to all those entering the workplace, not just employees; giving employees and others prior notice about the screen and encouraging them to self-monitor for symptoms and stay away from the workplace if they are experiencing symptoms; keeping any documented results confidential in a file separate from the employee's personnel file; and sharing the screening results on a purely need-to-know basis as necessary to protect against the threat of exposure to coronavirus.

Additional risk mitigation measures could include paying non-exempt employees for the time spent waiting and being screened, which is

compensable in many states, as well as making paid or unpaid leave available for employees who are sent home and are unable to work remotely. Multinational employers should seek advice with regard to locally applicable privacy laws, including the General Data Protection Regulation (GDPR).

2. Does contracting COVID-19 constitute having a disability under the Americans with Disabilities Act (ADA)?

For exposed employees who experience no symptoms, or only mild, temporary symptoms, COVID-19 standing alone likely would not qualify as a "disability" under the ADA, as temporary, non-chronic impairments with little or no long-term impact, such as broken limbs, sprained joints, concussions, appendicitis, pneumonia, and influenza usually are not viewed as disabilities. However, an employee who contracts COVID-19 may be entitled to reasonable accommodation and protection under the ADA if the employee's reaction to COVID-19 is severe or if it complicates or exacerbates one or more of an employee's other health condition(s)/disabilities. The ADA requires employers to assess whether a particular employee is "disabled" under the ADA on an individualized basis, taking into account the employee's particular reaction to the illness, their symptoms and any other relevant considerations. In addition, COVID-19 may qualify as a disability under applicable state disability laws with definitions of "disability" that are less stringent than the ADA's definition.

3. When should we require a fitness-for-duty test and/or return-to-work clearance?

The ADA generally prohibits medical examinations and inquiries of current employees unless such examinations or inquiries are job-related and consistent with business necessity. An examination or inquiry is job-related and consistent with business necessity if the employer has reason to believe that the employee may have a medical impairment that restricts the employee's ability to perform essential job functions and/or may pose a "direct threat" of harm to the employee or others in the workplace. A **"**direct threat**"** is defined as a significant risk of substantial harm to the health or safety of the employee or others that cannot be eliminated or sufficiently reduced by reasonable accommodation.

An employee likely would not be deemed to pose a "direct threat" due to COVID-19 unless the employee is known to have contracted the virus, has come into close contact with someone known or likely to have the virus, or is exhibiting symptoms that may be associated with the virus. Employers may request a fitness-for-duty or return-to-work certification if an employee has been quarantined by a treating medical provider or public health official or the employer has placed the employee off work based upon reasonable,

objective evidence that the employee may pose a direct threat of harm in the workplace. However, the certification should be narrowly tailored to seek information that is job-related and consistent with business necessity. Therefore, where the basis for seeking the medical information is rooted only in a belief that the employee may pose a "direct threat" of harm to others by spreading the virus but there is no indication that the employee has medical restrictions on performing essential job functions, the fitness-for-duty certification should be focused on whether or not the employee poses a direct threat in the workplace.

Please note that the CDC's guidance discourages requiring a healthcare provider's note for employees who are sick with acute respiratory illness to validate their illness or to return to work, in order to reduce the burden on busy healthcare providers. Further, certain state and local agencies have issued either limitations on seeking some type of healthcare provider's note or certification or guidance similar to the CDC's guidance, due to the burdens created on healthcare providers during this time.

4. How should employers disinfect the workplace if they have reason to be believe (or actual knowledge) that an employee has COVID-19?

Based on OSHA's guidance, it is recommended that so long as employers are routinely cleaning high-touch areas, there is no need to perform special cleaning upon learning that an asymptomatic employee has tested positive for COVID-19. Employers should only undertake the below cleaning if a symptomatic employee was present at the job site within 48 hours of testing positive.

The CDC has issued Environmental Cleaning and Disinfection Recommendations. It is important to note the following:

- These guidelines are focused on community, non-healthcare facilities (*e.g.*, schools, institutions of higher education, offices, daycare centers, businesses, community centers) that do not house persons overnight and are not meant for cleaning staff in healthcare facilities, repatriation sites or households.

- The Personal Protective Equipment (PPE) required does NOT include respirators (which makes it so much easier for employers) but includes disposable gloves and gowns ***for all tasks, including handling trash***.

    - Gloves and gowns should be compatible with the disinfectant products being used.

  - Additional PPE might be required based on the cleaning/disinfectant products being used and whether there is a risk of splash.
  - Gloves and gowns should be removed carefully to avoid contamination of the wearer and the surrounding area. Be sure to clean hands after removing gloves.
  - Gloves should be removed after cleaning a room or area occupied by ill persons and hands must be cleaned immediately after gloves are removed.
  - Cleaning staff should immediately report breaches in PPE (*e.g.*, tear in gloves) or any potential exposures to their supervisor.

- The guidelines state that employers should: (1) develop policies for worker protection; and (2) ***provide training to all cleaning staff on site prior to providing cleaning tasks.*** Training should include when to use PPE, what PPE is necessary, how to properly don (put on), use, and doff (take off) PPE, and how to properly dispose of PPE.

Regarding timing/scope of cleaning:

- It is recommended to close off areas used by ill person(s) and wait as long as practicable before cleaning and disinfecting to minimize potential for exposure to respiratory droplets.
- Open outside doors and windows to increase air circulation in the area. If possible, wait up to 24 hours before beginning cleaning and disinfection.
- Cleaning staff should clean and disinfect all areas (*e.g.*, offices, bathrooms, and common areas) used by the ill person(s) focusing especially on frequently touched surfaces.

5. What if an employee requests to wear a mask as an accommodation?

The CDC does not recommend that people who are well wear a face mask to protect themselves from respiratory disease, including COVID-19. The CDC does recommend that face masks should be used by people who show symptoms of COVID-19. However, if an employee shows symptoms or has been diagnosed with COVID-19, the CDC recommends that the employee be separated from other employees and be sent home immediately, thus negating the need for a mask.

If an employee asks to wear a face mask as an accommodation of another condition (such as an autoimmune condition that, the employee reports, may cause a "direct threat" of harm to the employee if they contract the virus), the ADA requires the employer to, at the very least, engage the employee in the

interactive accommodation process to determine whether the employee's request may be granted or not. The ADA also requires that, pending the conclusion of the interactive process, such an employee should not be required to remain in the workplace. If, through the interactive process, the employer determines that the employee does, indeed, have a disability and that wearing a face mask is the only accommodation that will sufficiently reduce or eliminate any threat to the employee or others, the ADA requires the employer to allow the employee to wear a face mask unless it would interfere with the employee's ability to perform the essential job functions or it would pose an "undue hardship."

6. If nonexempt worker is allowed to telecommute, what issues should the employer be aware of?

Employers should consider how to address situations where employees work from home due to quarantine, whether as a long-term or short-term solution. Non-exempt employees must be compensated for all time spent working, and so it is imperative to train employees to track all compensable time, and avoid "off the clock" work. Generally, federal and state law requires employers to pay non-exempt employees for performing any work remotely, even if the employee did not have express permission to work from home. Implementing, communicating and strictly enforcing a time and attendance policy that clearly explains what constitutes compensable time and requires employees to accurately record all time worked, and also tracks and records meal and rest periods where required, will help minimize the risk of wage and hour violations for employees working from home. Employers should require that non-exempt employees certify the accuracy of their recorded work time each week, and further certify that they did not perform any work "off the clock" during the timekeeping or pay period. Paying non-exempt employees for all recorded working time, regardless of whether such working time was approved in advance also helps minimize the risk of violations. As with on-site work, employers can require employees to request approval before working overtime. However, any such policy should make clear that compensable time will be paid, regardless of whether it was approved in advance.

7. If one of our employees is quarantined, what information can we share with our employees?

If an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace. Employers should not, however, disclose to co-workers the identity of the quarantined employee because confidentiality requirements under federal law, such as the Americans with Disabilities Act (ADA), or state law.

8. My employee alleges that the employee contracted the coronavirus while at work. Will this result in a compensable workers' compensation claim?

It depends. If the employee is a health care worker or first responder, the answer is likely yes (subject to variations in state law). For other categories of employees, a compensable workers' compensation claim is possible, but the analysis would be very fact-specific.

Workers' compensation system is a no-fault system, meaning that an employee claiming a work-related injury does not need to prove negligence on the part of the employer.

Employee' only NEED TO prove that the injury occurred at work and was proximately caused by their employment.

Additionally, the virus is not an "injury" but is instead analyzed under state law to determine if it is an "occupational disease." To be an occupational disease, in Texas an employee must generally show two things:

- The illness or disease arose out of and was in the course of employment; and
- The illness or disease must arise out of or be caused by conditions peculiar to the work and creates a risk of contracting the disease in a greater degree and in a different manner than in the public generally.

The general test in determining whether an injury "arises out of and in the course of employment" is whether the employee was involved in some activity where they were benefitting the employer and was exposed to the virus.

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