

Employer Planning for Coronavirus

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Troutman Sanders and Pepper Hamilton Announce Plans to Combine

Troutman Sanders and Pepper Hamilton LLP have agreed to merge effective April 1, 2020. Troutman Pepper will offer expanded capabilities and practice strengths, with a hallmark focus on client care.



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Pepper Hamilton LLP has developed a dedicated Resource Center to guide clients through this unprecedented global health challenge. We will regularly update this page with COVID-19 news and developments, recommendations from leading health organizations, and tools that businesses can use free of charge.

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As the novel coronavirus (COVID-19) continues to spread, Pepper Hamilton LLP has developed a dedicated Resource Center to guide clients through this unprecedented global health challenge. We will regularly update this page with COVID-19 news and developments, recommendations from leading health organizations, and tools that businesses can use free of charge.

We have assembled a COVID-19 Task Force of Pepper attorneys who are available to help companies navigate this evolving public health crisis. They represent diverse practice areas and industries, across multiple geographies. If you have any questions, don't hesitate to contact an attorney on our Response Team, or an attorney with whom you work.

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Introduction

- ▶ On March 11, 2020, the World Health Organization characterized COVID-19 as a pandemic.
- ▶ According to Johns Hopkins University, as of 3:30PM EST on March 27, there were 97,028 confirmed and presumptive positive cases of coronavirus in the United States in all 50 states and DC, Puerto Rico, Guam and the U.S. Virgin Islands. Globally, there were 585,040 confirmed cases in 176 countries, areas and territories. The five countries with the highest number of cases are the United States, Italy, China, Spain, and Germany.
 - 26,819 deaths and 129,812 recoveries reported worldwide.

Introduction

- ▶ Schools have closed, conferences have been canceled, and many companies have directed their employees to work from home.
- ▶ Many Governors and Mayors have issued orders requiring non-essential businesses to close and employees to work from home. As a result, employers that are not able to operate at full capacity are suffering financially and are faced with having to make difficult employment decisions – reducing salaries/hours, furloughs, and layoffs.
- ▶ There is fear and uncertainty in the public, financial markets, and in the workplace.

Discrimination Issues

Americans with Disabilities Act (ADA)

- ▶ Regulates disability-related questions that can be asked of applicants/employees.
- ▶ Governs types of medical examinations that can be imposed upon applicants/employees.
- ▶ Cannot exclude individuals with disabilities from the workplace unless individual presents a direct threat.
- ▶ Provide accommodations to employees with disabilities unless the accommodation causes an undue hardship.

Is coronavirus a disability?

- ▶ Not necessarily.
- ▶ Under the ADA, “disability” means:
 - A physical or mental impairment that substantially limits one or more major life activities; or
 - Record of such impairment; or
 - Being regarded as having an impairment.
- ▶ Almost certainly a perceived disability.
- ▶ Unlikely to be a disability unless a very serious case of COVID-19.
- ▶ Low bar to demonstrate “disability” and employers should simply treat it as such.

Can an employer terminate an employee with coronavirus?

- ▶ No — unless you enjoy defending disability discrimination lawsuits.
- ▶ No justifiable reason for employers to terminate employees with coronavirus (or those regarded as having coronavirus) solely because of their diagnosis or perceived diagnosis.

What should an employer do when an employee comes to work with coronavirus symptoms?

- ▶ Require sick employees to stay home.
- ▶ If employees comes to work sick (symptoms include fever, cough, difficulty breathing), separate the employee from other employees and send the employee home immediately.
- ▶ Employee should remain home until they are free of all symptoms (without the help of medication).
 - Follow the latest guidance from the CDC

What should employers do if an employee wants to wear a mask in the workplace?

- ▶ Generally a decision for the employer.
- ▶ CDC/WHO advises that masks are generally ineffective for healthy people.
- ▶ Mask only needed if an employee is infected and needs to leave their house — but in such an instance, the employee should not be at work.
- ▶ Mask may be required if employee has another disability that requires use of mask (or employee works in health care field).

Can we take employees' temperatures?

- ▶ Yes. On March 18, the EEOC issued guidance stating that employers may measure employees' body temperature due to the COVID-19 pandemic.
- ▶ General Rule is no medical examinations unless:
 - An employee's ability to perform essential job functions will be impaired by a medical condition; or
 - An employee will pose a direct threat due to a medical condition.
- ▶ If there is objective evidence that an employee is sick or may have a fever, don't bother taking their temperature — just send them home.

National Origin Concerns

- ▶ COVID-19 originated in China
- ▶ Title VII of the Civil Rights Act prohibits discrimination against individuals based on national origin.
- ▶ Be alert for co-workers who make inappropriate or harassing comments to Asian Americans and strictly enforce your nondiscrimination and anti-harassment policies.
- ▶ If an employee returns from vacation, you can ask them if they traveled to one of the countries where the CDC is recommending people avoid travel.
 - If answer is yes, require the employee to stay home or work remotely.

Wage Considerations

Employee Pay

- ▶ Whether an employer must pay workers who are out of the office because they are sick or exposed to the virus depends on whether the worker is exempt or non-exempt.
 - Non-Exempt Workers:
 - Pay only for time worked

 - Exempt Workers:
 - If business is closed, pay in full-week increments
 - If business is open, leave may be unpaid where:
 - Employee is away from work for a full day due to illness after employee has exhausted all sick leave under a *bona fide* plan or policy
 - Employee is away from work for a full day due to personal reasons
 - Employee is out of work on FMLA

Business Reductions - Furlough

- ▶ What is the difference between a furlough and a lay off?
 - Short-term furloughs: Laying off employees for a period of time with an expectation that they will be recalled when there is an uptick in business
 - Non-exempt employees can be furloughed for full or partial weeks and need only be compensated for hours worked.
 - Exempt employees must be paid in full-week increments.
 - Furlough may impact the employee's eligibility for continued benefits.
 - Furlough may trigger a right to severance under a severance plan or agreement.
 - If the workforce is unionized, the employer will need to follow CBA or may need to bargain over furlough.
 - A furloughed worker generally would be entitled to unemployment compensation benefits.

Business Reductions - Lay-off

- ▶ Termination may occur mid-week
- ▶ Employees may be eligible for COBRA
- ▶ Lay-off may trigger a right to severance under a severance plan or agreement.
- ▶ If the workforce is unionized, the employer will need to follow CBA or may need to bargain over lay-off
- ▶ A laid off worker generally would be entitled to unemployment compensation benefits.
- ▶ When choosing who to lay off, ensure that the methods for selecting employees for the reduction are neutral and do not have a disparate impact on a protected category.
- ▶ In certain jurisdictions, such as CA, immediate payment may be required by state law in the event of a lay off.
- ▶ Federal and state WARN Act obligations - exception for natural disasters or unforeseeable business circumstances.

Pay Reductions

- ▶ An employer may decide to reduce the pay of all or a group of employees in an effort to avoid furloughs or layoffs.
- ▶ Employers generally may reduce the salaries of at-will employees (exempt and non-exempt) prospectively.
 - Exempt employees will not lose exempt status so long as the pay reduction is for a *bona fide* long-term business reason and is not done on a day-to-day or week-to-week basis.
- ▶ Pay changes must be prospective
- ▶ Employer may be required to bargain for pay reduction if workforce is unionized
- ▶ Pay cut may not reduce an employee's pay below minimum wage
- ▶ Pay cut may not reduce an exempt employee's pay below salary threshold required to maintain exemption - currently \$35,568 or \$684 per week.
- ▶ Pay reduction may trigger the right to severance under a severance plan or employment agreement.
- ▶ Pay reduction should be implemented in a non-discriminatory way.
- ▶ A substantial reduction in an employee's compensation may be interpreted as a constructive termination and may also affect an employee's right to unemployment compensation benefits.

WARN Act Notice Requirements

- ▶ Employers with 100 or more employees
 - Not counting those who have worked less than 6 months in the last 12 months
 - Not counting those who work an average of less than 20 hours/week
- ▶ 60 days advance notice may be required if:
 - Plant closing
 - Affecting 50 or more employees during any 30-day period
 - Mass layoff
 - 500 or more employees, or
 - 50 or more employees which is 33% or more of workforce at a single site of employment

WARN Act Notice Requirements

- ▶ Exceptions
 - Unforeseeable business circumstances
 - Natural disaster
 - Faltering company fails to obtain capital or business necessary to maintain operations
- ▶ Only applies if lay-offs are expected to exceed 6 months
 - However, does apply if layoff is later extended
- ▶ State mini-WARN Acts
 - Some states have relaxed standards in response to pandemic
 - Examples: California, New York

Unemployment Compensation Benefits

- ▶ For layoffs
- ▶ For pay and hours reduction
 - State workshare programs
- ▶ CARES Act:
 - Additional 13 weeks of benefits
 - \$600 per week topper for 4 months, through July 31
 - Retroactive to January 27, 2020
 - States are incentivized to waive waiting period

Volunteering

- ▶ The FLSA has strict requirements with respect to volunteers.
- ▶ Employees may not waive their right to be paid for time worked.
- ▶ Exception when the employee is volunteering to do something that is other than his or her normal work, such as at an outside community service event, volunteer day or pro bono work.
 - The work must be purely voluntary, take place outside of regular work hours, and participation may not bring direct economic benefit to the business.

Leave of Absence Issues

Leaves of Absence

- ▶ General Duty Clause, Section 5(a)(1) of the Occupational Safety and Health Act, 29 U.S.C. 654(a)(1), requires employers to furnish to each worker “employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.”
 - If employees are sick with or have been exposed to the coronavirus, employers should tell them to stay home.
- ▶ If an employee stays home and cannot work remotely, is the employee’s job protected?
- ▶ Is the employee entitled to paid leave?

The Families First Coronavirus Response Act

- ▶ On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act (FFCRA), which will become effective on April 1. The FFCRA includes the Emergency Family and Medical Leave Expansion Act (EFMLA) and the Emergency Paid Sick Leave Act (EPSLA).
- ▶ Both Acts apply only to employers with fewer than 500 employees and some government employers.
- ▶ Neither Act provides leave to an employee who is unable to work because of a state or local shelter-in-place order.
- ▶ Under both the EFMLA and the EPSLA, employers qualify for dollar-for-dollar reimbursement through tax credits for all qualifying wages. Qualifying wages are those paid to an employee who takes leave for a qualifying reason, up to the appropriate per diem and aggregate payment caps. Applicable tax credits also extend to amounts paid or incurred to maintain health insurance coverage.

Emergency Family and Medical Leave Expansion Act

- ▶ Under the EFMLA, covered employers are required to provide to employees who have been employed for at least 30 days the right to take up to 12 weeks of job protected leave for the following reason:
 - The employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.
- ▶ The first ten days of leave under the EFMLA are unpaid (but are likely paid under the EPSLA).

Emergency Family and Medical Leave Expansion Act

After the first ten days, the leave is paid at 2/3 of the employee's regular rate of pay based on the hours that the employee is normally scheduled to work, up to a maximum of \$200/day and \$10,000 in the aggregate.

How is a part-time employee's leave pay calculated?

According to the Department of Labor FAQs, a part-time employee is entitled to leave for his or her average number of work hours in a two-week period. If the normal hours scheduled are unknown, or if the part-time employee's schedule varies, employers may use a six-month average to calculate the average daily hours. Such a part-time employee may take paid sick leave for this number of hours per day for up to a two-week period, and may take expanded family and medical leave for the same number of hours per day up to ten weeks after that.

EFMLA Documentation Requirements

- ▶ Employer must require and maintain documentation of need for leave to care for child whose school or place of care has closed or whose childcare provider is unavailable, such as notice on school website or email from childcare provider.
 - Documentation is needed to claim payroll tax credit
- ▶ The same documentation requirement applies to leave under the EPSLA that is taken for this reason.

Emergency Paid Sick Leave Act

- ▶ Requires covered employers to pay up to 10 days of sick leave to employees who are unable to work or telework due to a need for leave for one of the following reasons:
 - (1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
 - (2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
 - (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
 - (4) The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).

Emergency Paid Sick Leave Act

- (5) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID–19 precautions.
 - (6) The employee 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 Secretary of Labor.
- ▶ Employees taking leave for reasons 1, 2 or 3 are entitled to their regular rate of pay (or the applicable minimum wage, whichever is greater), capped at \$511/day or \$5,110 in the aggregate.

Emergency Paid Sick Leave Act

- ▶ Employees taking leave for reasons 4, 5 or 6 are entitled to 2/3 of their regular rate of pay (or the applicable minimum wage, whichever is greater), capped at \$200/day or \$2,000 in the aggregate.
- ▶ The number of hours worked by part-time employees is calculated the same as under the EFMLA.

Emergency Paid Sick Leave Act

- ▶ Under both the EPSLA and the EFMLA, leave may be taken intermittently as follows:
 - If employee teleworks and is unable to work his/her normal schedule of hours, the employee can take leave intermittently if the employer allows it.
 - If employee works at the employer's location, the employee cannot take leave intermittently unless the leave is to care for the employee's child whose school or place of care has closed or whose childcare provider is unavailable, due to COVID-19, and the employer agrees.
- ▶ If the employee no longer has a qualifying reason to take leave before exhausting it, the employee can take any remaining leave at a later time.

Documentation Requirements under EPSLA

- ▶ Employers must require and maintain documentation of need for leave:
 - Employee's name
 - Qualifying reason for leave (source of quarantine order, name of healthcare provider that directed quarantine, etc.)
 - Statement that employee is unable to work or telework for that reason
 - Dates for which leave is requested

Other Federal and State Leave Laws

- ▶ If the Families First Coronavirus Response Act does not apply because an employer has more than 500 employees, employers should determine whether leave under the existing FMLA, 29 U.S.C. 2601 et seq., is available.
 - are the employer and employee covered under the FMLA?
 - does the employer employ at least 50 employees?
 - has the employee worked for the employer for at least 12 months and for at least 1,250 hours over the past 12 months?
 - If the employee or an immediate family member is sick with coronavirus, there is likely a “serious health condition” covered by the FMLA.
 - If the employee or immediate family member is not sick with coronavirus, but the employee stays home because his/her child’s school is closed, FMLA does not cover the leave.

Other Federal and State Laws

- ▶ Is there an applicable State family/medical leave law?
- ▶ Is there an applicable State or local sick leave law?
 - Many states/localities have laws that allow employees to accrue paid sick time based on hours worked.
 - In addition to covering absences for the employee's illness, those laws also may cover absences for an ill family member or because school is closed or childcare is unavailable.
 - New York passed the New York Sick Leave Law on March 18, which provides benefits to employees who are subject to a mandatory or precautionary order of quarantine or isolation due to COVID-19. The law covers all employers. Depending on the number of employees, employers are required to provide 1 to 14 paid sick leave days followed by unpaid leave for the duration of the order.

Other Leaves of Absence

- ▶ Does the employee have unused vacation or sick days?
 - Employers might consider waiving a requirement to provide doctor's note, but are not required to do so.
 - Employers might consider allowing vacation days to be used for sick leave.
- ▶ Some employers are providing additional paid days to be used for time out due to the coronavirus.

Other Leaves of Absence

- ▶ Is an employee absent because of the coronavirus entitled to leave under the Americans with Disabilities Act (42 U.S.C. 12101 et seq.) as a reasonable accommodation for a disability?
 - Probably not. Coronavirus is likely not a disability, and a reasonable accommodation is not required for a perceived disability.
 - However, if the employee has an underlying health condition that qualifies as a disability and that is aggravated when the employee becomes sick with coronavirus, the employee may be entitled to reasonable accommodation leave.
- ▶ Employers may decide to provide unpaid job-protected leave if legally required leave and employee's accrued leave are not sufficient.

Confidentiality

What should an employer do if an employee has COVID-19 or a presumptive diagnosis of COVID-19?

- ▶ Notify all potentially impacted employees (i.e., all employees who worked closely with the employee during the prior 14 days) of the potential exposure.
- ▶ Send the potentially impacted employees home for 14 days.
- ▶ Do not reveal the identity of the infected employee (unless you have permission from the infected employee).
- ▶ If an employee is working from home due to illness/quarantine, take steps to protect the reason an employee is out of the office from co-workers.
- ▶ Contact local health department and, if necessary, vendors/customers.

Handling Confidential Information

- ▶ Take all reasonable steps to protect the privacy and medical information of an employee with COVID-19.
- ▶ In general, employers are required to maintain all information about employee illness as a confidential medical record.
 - Medical documents kept separate from personnel file.
 - Stored in locked filing cabinet or protected electronic file.

Telecommuting Considerations

Telecommuting as an Accommodation

- ▶ Coronavirus likely not a disability, but if it were...
- ▶ Allowing a sick employee to work remotely in lieu of time off may be considered a reasonable accommodation for a disability if the employee can perform the essential functions of his or her job while telecommuting.
- ▶ The ADA does not require employers to lower quality or productivity standards as a reasonable accommodation.

Telecommuting - Pay Considerations

- ▶ The same rules about pay that we discussed earlier would apply to a teleworking situation.
 - Non-exempt employees must be paid at least minimum wage for time worked and overtime for hours worked over 40 in a workweek (or as otherwise required by state law).
 - Important to track all time worked by a non-exempt employee working remotely so that can ensure that accurate wages.
 - Need to monitor for rest and meal breaks where required by state law.
- ▶ Exempt employees generally must receive their full salary in any week in which they perform any work.

Telecommuting Planning Considerations

- ▶ Consider what equipment an employee will need to get the job done-laptops, phones, printers, chargers, supplies, etc.
- ▶ Move relevant physical materials to digital form
- ▶ Set reasonable expectations regarding work schedules, communication, productivity, etc.
- ▶ Ensure appropriate protections for confidentiality and data security.
- ▶ Discuss with employee whether he or she has the appropriate set up for a work from home arrangement, especially if the need arises on short notice.
- ▶ In some states, such as CA, employee may be eligible for reimbursement of business expenses, such as internet charges, supplies, etc.

Telecommuting - OSHA Concerns

- ▶ The Department of Labor's Occupational Safety and Health Administration (OSHA) does not have any regulations regarding telework in home offices.
- ▶ The agency issued a directive in February 2000 stating that the agency will not conduct inspections of employees' home offices, will not hold employers liable for employees' home offices, and does not expect employers to inspect the home offices of their employees.
- ▶ Employers who are required to keep records of work-related injuries and illnesses will continue to be responsible for keeping such records for injuries and illnesses occurring in a home office.

Telecommuting - Written Agreement

- ▶ Consider putting in place a written policy or agreement with the following provisions:
 - At-will language
 - Temporary nature of accommodation
 - Performance expectations
 - Equipment
 - Confidentiality
 - Injuries
 - Recording time worked

Changes to Working Conditions

What if an employee is scared to come to work?

- ▶ Under the Occupational Safety and Health Act, employees can refuse to work if imminent danger exists.
 - Difficult threshold to meet as it requires objective evidence of imminent death or physical harm. Unlikely to be the case in most work environments, but examine on a case-by-case basis.
- ▶ Be careful if employees act/protest together in an effort to avoid coming to work due to fear of virus. This activity could be considered engagement in protected concerted activity and protected by the NLRA.
- ▶ Address on a case-by-case basis.
- ▶ Recommendation: Let the employee work from home if they can.

Too Few Employees

- ▶ Plan for employees who are unable to come to work because:
 - They have COVID-19;
 - A family member has COVID-19; or
 - They are otherwise unable to get to work because public transportation or schools have closed.
- ▶ Determine critical positions and functions within your organization.
 - Adjust schedules to ensure essential functions are completed.
 - Give employees different work assignments.
 - Extend hours or require mandatory overtime of healthy employees.
 - Require employees to work at different locations if you have multiple locations.
- ▶ Bargain with union, if applicable collective bargaining agreement.

Conclusion

- ▶ Communication is key.
 - Designate a single point of contact to control the message.
 - Set up an emergency communication system.
 - Educate employees about COVID-19 and its symptoms.
 - Personal hygiene
 - Social distancing
 - Importance of staying home when sick
 - Importance of avoiding close contact with sick people
- ▶ Sanitize offices and equipment.
- ▶ Encourage social distancing.
 - Use of video conferencing instead of face-to-face meetings when possible
 - Business travel restrictions
- ▶ Prepare for continuity of operations.
- ▶ Keep apprised of CDC and WHO updates.

Questions & Answers

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