

March 10, 2020

Coronavirus: Employment Law Considerations and Practical Guidance for Employers

On January 30, 2020, in response to the increasing global spread of the novel coronavirus (COVID-19), the World Health Organization declared a “Public Health Emergency of International Concern.” Within a day, the United States and Italy followed suit. Since then, numerous other countries, states, and local governments have also declared public health emergencies. On March 7, 2020, Governor Andrew M. Cuomo declared a state of emergency in New York, as the number of confirmed cases in the state continues to rise.

With each day that COVID-19 remains a growing threat to communities across the country, employers face unprecedented challenges and concerns. To provide guidance on how to plan, prepare, and respond to the coronavirus outbreak, the Centers for Disease Control and Prevention (the “CDC”) issued an interim guidance for businesses and employers (the “CDC Interim Guidance”).¹ The New York City Health Department also issued guidance for NYC businesses and employers.² Several companies, such as Amazon, Facebook, Google, Apple and Microsoft, have advised or encouraged their employees in particularly affected areas, such as Seattle, New York and New Jersey, to work remotely as the outbreak in those regions grows. A number of other companies have instituted strict international travel policies by, for example, suspending non-essential business travel and requiring any business travel outside the United States to be approved by a senior manager. Companies are also either facing or preparing for potential coronavirus-related claims. Among many proposals put forward by federal and state lawmakers to alleviate the economic impact of coronavirus on businesses and employees, President Trump announced on March 9, 2020 that he would ask Congress to cut payroll taxes and provide relief to hourly workers.

In this Client Memorandum, we provide a brief overview of the legal obligations relevant to employers during this public health crisis, followed by recommended strategies for employers to ensure business

¹ Centers for Disease Control and Prevention, “Interim Guidance for Businesses and Employers,” (last visited Mar. 10, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.

² See NYC Health, “2019 Novel Coronavirus (2019-nCoV) FAQ for Businesses and Employers,” (Feb. 14, 2020), <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/novel-coronavirus-faq-for-businesses.pdf>; “Novel Coronavirus (COVID-19) Update for NYC Businesses” (Mar. 5, 2020), <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/update-for-nyc-businesses.pdf>.

continuity and a safe workplace.³ As the public health situation is rapidly changing, it is recommended that employers seek legal advice to stay abreast of additional developments. We will continue to monitor developments and keep clients apprised of pertinent information.⁴

Employers' Legal Considerations

Employers must balance multiple, at times competing, legal considerations when determining their response plans to the coronavirus outbreak. Relevant employment laws, discussed below, may include the Americans with Disabilities Act (“ADA”), the Occupational Safety and Health Act (“OSHA”), Title VII and state and local anti-discrimination laws, wage and hour laws, the Family and Medical Leave Act (“FMLA”), worker’s compensation laws, the privacy safeguards set forth in the Health Insurance Portability and Accountability Act (“HIPAA”), and whistleblower protection laws. Employers should keep in mind that the bedrock legal obligations that they owe their employees at all times remain in force during an infectious disease outbreak: the duty to provide a safe and healthy work environment, the duty not to discriminate based on disability, national origin, or other protected characteristics, the duty to comply with laws regarding compensation and absence from work, and the duty to protect the privacy of employees.

Laws Applicable to a Safe and Healthy Work Environment

- Under the ADA, an employer cannot make disability-related inquiries or require employees to undergo medical examinations unless the employee’s condition could pose a “direct threat” to the workforce, defined as a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”⁵
- According to pandemic guidance recently reissued by the Equal Employment Opportunity Commission (“EEOC”), whether an illness rises to the level of a “direct threat” is determined by the CDC and other public health authorities. Thus, employers should closely monitor the latest CDC and state or local public health assessments before requiring a medical examination or making coronavirus-related inquiries of employees.⁶

³ A more detailed discussion of some of the most relevant federal, state, and local statutes applicable to employers in grappling with issues raised by the coronavirus is attached as an Appendix.

⁴ See Paul Weiss, Coronavirus (COVID-19) Resource Center, <https://www.paulweiss.com/practices/transactional/coronavirus-covid-19-resource-center/videos/business-insights-for-navigating-the-coronavirus-covid-19?id=30823>.

⁵ 29 C.F.R. § 1630.2(r).

⁶ EEOC, “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act,” (Oct. 9, 2009), https://www.eeoc.gov/facts/pandemic_flu.html;

- The Occupational Safety and Health Administration (the “OSH Administration”) has issued guidance setting forth specific requirements to prevent occupational exposure to the virus, depending on the type of employer.⁷
- Because an employee’s expressed concern about work travel or other work-related activities might be interpreted as a protected whistleblower activity under OSHA, an employer whose business involves travel to affected areas should consider offering reasonable alternatives such as teleconferencing or videoconferencing of meetings and/or postponement of travel.

Laws Applicable to Non-Discrimination

- In developing and implementing workplace policies relating to the coronavirus, employers should ensure that policies are facially neutral and enforced in a way that does not discriminate against anyone in a protected class.
- Decisions about quarantine and evaluations of risk should be made on the basis of objective facts, such as a recent trip to a high-risk area, and not on unfounded fears, national origin, or race.

Laws Applicable to Compensation and Leave Issues

- Under the Fair Labor Standards Act (the “FLSA”), whether an employer must continue to pay an employee while they are on leave depends on whether the employee is hourly or salaried.⁸
- Employers should keep in mind, however, that aside from the FLSA, they may be legally obligated to continue to pay employees who are on leave because of employment contracts or policies, collective bargaining agreements, or state or local wage laws.
- While leave under the FMLA is unpaid, employers should be aware of any state or local laws that may require them to provide paid leave.

⁷ Occupational Safety and Health Administration, “COVID-19: Standard,” <https://www.osha.gov/SLTC/covid-19/standards.html>.

⁸ See 29 U.S.C. § 213. See also U.S. Department of Labor, “Opinion Letter FLSA 2005-46,” (Oct. 28, 2005), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2005_10_28_46_FLSA.pdf; U.S. Department of Labor, “Pandemic Flu and the Fair Labor Standards Act: Questions and Answers,” https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/flu_FLSA.pdf.

Laws Applicable to Privacy Considerations

- Pursuant to guidance issued recently by the Department of Health and Human Services, there are limited circumstances under which employers subject to HIPAA's privacy obligations may disclose patient information during an outbreak of infectious disease.⁹
- Importantly, an employer should not publicly disclose the identity or any specific information about the treatment and/or test results of an employee without his or her written authorization.¹⁰

Recommended Strategies for Employers

There are several strategies that businesses may want to take now in order to plan for and mitigate the workplace and business disruptions caused by the spread of coronavirus. The recommendations for employers discussed below are based on currently available information, including recommendations from the CDC Interim Guidance and the New York City Health Department.¹¹

Reassure Employees with Open Lines of Communication

Many employees will be concerned about the impact of coronavirus on their employment, family, and health. Employers should strive to ensure that employees have access to information and feel that their concerns are being heard and addressed. In this regard, employers should consider naming a coronavirus point person to whom employees can confidentially address concerns. It is recommended that this person be a member of the Human Resources Department or a similar department that has already developed relationships with employees. Employees should be told that the point person will sit down with them to discuss any concerns they have, and that all such discussions will be kept confidential. Having a point person in place may also increase the chances that employees will feel comfortable reporting personal travel or other potential incidents of exposure.

Employers should also consider sending regular coronavirus updates to employees, including educating employees on coronavirus symptoms and developments. Keeping employees informed about any steps the employer is taking to protect them will help ease concern. Employers should reassure employees that they

⁹ Office of Civil Rights, "Bulletin: HIPAA Privacy and Novel Coronavirus," (Feb. 2020), <https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf>.

¹⁰ 45 C.F.R. § 164.508; see U.S. Health & Human Services, Office of Civil Rights, "Bulletin: HIPAA Privacy and Novel Coronavirus," (Feb. 2020), <https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf>.

¹¹ CDC, "Interim Guidance for Businesses and Employers: Plan, Prepare and Respond to Coronavirus Disease 2019," (Feb. 2020), <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/guidance-business-response.html>; NYC Health, "2019 Novel Coronavirus (2019-nCoV) FAQ for Business and Employers," (Feb. 14, 2020), <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/novel-coronavirus-faq-for-businesses.pdf>.

are staying abreast of all CDC and local guidelines regarding coronavirus, and share any such guidelines with employees.

Perform Routine Environmental Cleaning

The CDC has recommended that frequently touched surfaces be routinely disinfected to reduce the spread of germs. It is important to regularly disinfect door handles, counters, workstations, and other surfaces. Employers are encouraged to provide employees with disposable disinfectant wipes to clean their personal workstations and ensure access to such wipes in shared spaces such as break rooms and conference rooms.

Encourage and Facilitate Good Hygiene Practices

One of the best ways to prevent the spread of coronavirus is to engage in good hygiene. Employers should place posters throughout the workplace reminding employees to wash their hands with soap and water for at least 20 seconds, avoid touching their faces, and cover their mouth and nose with a tissue when they sneeze or cough. Employees should be provided hand sanitizers for work stations and common areas, and bathrooms should be kept well-stocked with soap. It is advised that employers provide tissues and no-touch trash receptacles, and employees should be reminded to dispose of tissues immediately after use.

Prepare for Employees to Work Remotely

To reduce strain on business, employers may consider preparing for employees to work remotely. The employer should evaluate which roles can feasibly be performed remotely, and ensure that work from home arrangements are in place. Employers should also consider data protection and confidentiality concerns when considering work from home setups. As a precautionary measure, employers may also consider encouraging employees who can easily work remotely to begin doing so even if they are not showing symptoms and have not been exposed to coronavirus. Reducing the number of employees onsite lowers the risk of a workforce-wide outbreak.

Encourage Sick and Exposed Employees to Stay Home

The legal implications of sick leave and quarantine are discussed above. Regardless of the approach an employer chooses to take with respect to sick leave and quarantine, it is important to emphasize that employees who are sick, or who may have been exposed to coronavirus, should stay home. Having a plan for remote work in place will make employees more comfortable about self-reporting and reduce the risk that coronavirus may spread among the workforce. Where it is not possible for an employee to perform their job duties from home, being generous with leave policies can encourage employees to report their illness or potential exposure to coronavirus to the employer.

Review Upcoming Company Travel and Events

Employers may want to consider cancelling or rescheduling upcoming non-essential meetings and events. Employees should also be encouraged to avoid congregating in groups. For example, employers may consider hosting meetings via teleconference or videoconference whenever possible.

Employers should review all upcoming business travel and consider whether they want to reduce, make optional, or prohibit non-essential work travel to affected regions. Where travel to an affected region is imperative, the employer should ensure that the traveling employees are educated on how to protect themselves and are provided as much support as possible. For example, the employer may consider upgrading the employee's flight to limit exposure to other passengers. The employee may also be provided with, or reimbursed for, hand sanitizer and disinfecting wipes.

Assess the Risk of Negligence Claims

Businesses, particularly those that provide services or accommodation to the general public, may find themselves at greater risk of claims alleging that their negligence led to exposure and infection of clients, customers and/or visitors. Accordingly, businesses should identify what new exposures and risks may be present on their premises given the nature of the coronavirus and closely monitor and follow guidance from public health authorities and government officials to ensure that they are exercising reasonable diligence in warning about and protecting against exposure.

What NOT to Do

As discussed above, it is important that employers make determinations about risk of exposure based on reasonable and objective facts, not on actual or perceived race or national origin. An employer should be careful about taking measures such as mandatory temperature checks or medical screenings until and unless such measures are approved by the CDC. In addition, employers should also keep in mind their responsibilities concerning employees' privacy rights. For example, employees should not be surveyed about personal travel or family connections. Employers may, however, encourage employees to report voluntarily any recent travel to infected areas or other incidents of potential exposure.

Creating a Contingency Plan

In addition to the strategies discussed above, companies should consider creating a pandemic contingency plan to reduce the impact of coronavirus on their business continuity. Some of the topics companies may wish to cover in such a contingency plan include:

- Creation of a response team, which would include members of the companies' Human Resources, Safety, Operations, Finance, and Communications departments;

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- Setting up a process for tracking developments related to the coronavirus and for disseminating internal communications;
 - Creation of a reporting process across offices that will identify employees who are working, on leave, or working remotely (while still maintaining confidentiality and privacy);
 - Identification of critical employees without whom the companies cannot function, and identification and training of backup employees;
 - Evaluation of supply chains, determination of whether supplies should be stocked in advance, and identification of backup suppliers;
 - Identification of employee risk management concerns and assignment of certain issue buckets to specific departments. For example, Employee Benefits may be tasked with developing a plan for paid/unpaid quarantine and sick leave, Communications may be tasked with developing internal messaging, and Human Resources may be tasked with distributing company communications and education materials;
 - Development of a plan for external communications, including communications with clients and media;
 - Review of upcoming travel, development of a policy for business-related travel, and development of messaging on personal travel;
 - Review of delivery, visitor, and security protocols and determination as to whether they should be altered;
 - Implementation of cleaning and hygiene policies; and
 - Development of a pandemic budget plan and allocation of resources for employee protection.

The CDC Interim Guidance can be found here: https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fspecific-groups%2Fguidance-business-response.html.

The CDC has also issued a Business Pandemic Influenza Planning Checklist, which can be found here: <https://www.cdc.gov/flu/pandemic-resources/pdf/businesschecklist.pdf>.

The EEOC Pandemic Guidance can be found here: https://www.eeoc.gov/facts/pandemic_flu.html.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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Appendix: Relevant Federal, State and Local Statutes*Americans with Disabilities Act*

Under the ADA, which prohibits discrimination on the basis of disability in employment, as a general rule, an employer with 15 or more employees is prohibited from requiring a medical examination or making a disability-related inquiry.¹² An exception to this general rule is that an employer may make disability-related inquiries or require a medical examination if the employee's condition could pose a "direct threat" to the workforce.¹³ Under the current Equal Employment Opportunity Commission (the "EEOC") regulations, a medical condition can be deemed a "direct threat" if it poses "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."¹⁴ Additionally, the ADA requires that an employer make reasonable accommodations for individuals with disabilities absent a showing that the accommodation would impose an undue hardship on the operation of its business.¹⁵

In its guidance concerning the coronavirus, the EEOC has stated that the ADA, "including the requirement for reasonable accommodation and rules about medical examinations and inquiries," continues to apply in the midst of the coronavirus outbreak, and does not interfere with or prevent employers from following the CDC Interim Guidance.¹⁶ According to the EEOC's pandemic guidance, which was published in response to the 2009 Swine Flu outbreak and recently reissued in light of the coronavirus outbreak (the "EEOC Pandemic Guidance"), whether an illness rises to the level of a "direct threat" depends on the severity of the illness which, in turn, will be determined by the assessment of the CDC or public health authorities. Thus, employers should closely monitor the latest CDC and state or local public health assessments for such determinations before requiring a medical examination or making coronavirus-related inquiries. In addition, as the employer's duty to provide reasonable accommodations under the ADA continues even during a pandemic, employers should be prepared to accommodate individuals who have contracted coronavirus or are recovering from it, to the extent that infection with coronavirus falls within the definition

¹² 42 U.S.C. § 12112(d)(4); EEOC, "Facts About the Americans with Disabilities Act," (Jan. 15, 1997), <https://www.eeoc.gov/eeoc/publications/fs-ada.cfm#:~:text=>.

¹³ 29 C.F.R. § 1630.2(r).

¹⁴ *Id.*

¹⁵ 42 U.S.C. § 12112(b)(5)(A).

¹⁶ See EEOC, "What You Should Know About the ADA, the Rehabilitation Act and the Coronavirus," https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm; EEOC, "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act," (Oct. 9, 2009), https://www.eeoc.gov/facts/pandemic_flu.html

of a “qualified individual with a disability” and the accommodation does not pose an undue hardship on their business.¹⁷

Occupational Safety and Health Act

Under the OSHA’s General Duty Clause, an employer must provide a workplace that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm” and also must comply with the occupational safety and health standards proscribed by the statute.¹⁸ Section 11(c) of OSHA prohibits an employer from retaliating against workers for raising concerns about safety and health conditions.¹⁹ Most private sector employers are subject to OSHA’s General Duty Clause and the anti-retaliation provision. Additionally, the statute requires employers with more than 10 employees to keep a record of serious work-related injuries and illnesses with some minor exceptions.²⁰

The OSH Administration has issued its own guidance regarding the coronavirus, cautioning that while “there is no specific OSHA standard covering” the coronavirus, several requirements may be relevant in preventing occupational exposure to the virus.²¹ According to the OSH Administration, employers with employees “with potential occupational exposure” to coronavirus—defined as including those that engage in healthcare, laboratory, airline, border protection, or international travel to high-risk areas²²—may need to provide personal protective equipment, including gloves and eye and face protection,²³ and implement a comprehensive “respiratory protection program,”²⁴ wherever necessary.²⁵ Employers falling under this category should also promptly identify and isolate individuals suspected of having the coronavirus.²⁶ Further, in light of the OSH Administration’s guidance that “COVID-19 is a recordable illness when a worker

¹⁷ See EEOC, “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act,” (Oct. 9, 2009), https://www.eeoc.gov/facts/pandemic_flu.html; see also 42 U.S.C. § 12112(b)(5); see also § 12111(3); 29 C.F.R. § 1630.2(r).

¹⁸ 29 U.S.C. § 654(a).

¹⁹ 29 U.S.C. § 660(c).

²⁰ See Occupational Safety and Health Administration, “OSHA Injury and Illness Recordkeeping and Reporting Requirements,” <https://www.osha.gov/recordkeeping/>.

²¹ See Occupational Safety and Health Administration, “COVID-19: Standard,” <https://www.osha.gov/SLTC/covid-19/standards.html>.

²² See Occupational Safety and Health Administration, “COVID-19: Control and Prevention,” <https://www.osha.gov/SLTC/covid-19/controlprevention.html>.

²³ See 29 C.F.R. 1910 Subpart I (discussing personal protective equipment standards applicable to general industry).

²⁴ See 29 C.F.R. 1910.134.

²⁵ See Occupational Safety and Health Administration, “COVID-19,” <https://www.osha.gov/SLTC/covid-19/standards.html>.

²⁶ *Id.*

is infected on the job,” employers with more than 10 employees are required to record an employee’s exposure to the coronavirus, if any, on its OSHA log.²⁷

The OSHA standards and directives may apply in other ways as well. For example, because an employee’s expressed concern about work travel or other work-related activities might be interpreted as a protected activity under OSHA, an employer whose business involves travel to areas that are subject to travel restrictions or warnings should consider offering reasonable alternatives such as teleconferencing or videoconferencing of meetings and/or postponement of travel.

Title VII and Relevant State Anti-Discrimination Laws

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of “race, color, religion, sex and national origin.”²⁸ Title VII applies to employers who have 15 or more employees for each working day in each of 20 or more calendar weeks a year.²⁹ In addition, there may be state and local anti-discrimination laws that provide broader protections than Title VII, such as the New York State and New York City Human Rights Laws which include protection over more protected classes.³⁰ In developing and implementing workplace policies relating to the coronavirus, employers should ensure that such policies are facially neutral and enforced in a way that does not discriminate against anyone in a protected class. Decisions about quarantine and evaluations of risk should be made on the basis of objective facts, such as a recent trip to a high-risk area, and not on unfounded fears, national origin, or race. Any workplace policies relating to the coronavirus should also make clear that national origin discrimination and harassment will not be tolerated and that disparate treatment among employees in the workplace, such as singling out certain employees because of their national origin, is strictly prohibited.

Wage and Hour Laws

Under the Fair Labor Standards Act (the “FLSA”), whether an employer must continue to pay an employee while they are on leave depends on whether the employee is hourly or salaried.³¹ Where an employee is

²⁷ *Id.*

²⁸ 42 U.S.C. § 2000e-2.

²⁹ *Id.*

³⁰ See New York State Division of Human Rights, “Important Updates to the New York State Human Rights Law,” <https://dhr.ny.gov/sites/default/files/pdf/nysdhr-legal-updates-10112019.pdf>; New York City Human Rights Code (Administrative Code of the City of NY, tit. 8, ch. 1) § 8-107.

³¹ See 29 U.S.C. § 213. See also U.S. Department of Labor, “Opinion Letter FLSA 2005-46,” (Oct. 28, 2005), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2005_10_28_46_FLSA.pdf; U.S. Department of Labor, “Pandemic Flu and the Fair Labor Standards Act: Questions and Answers,” https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/flu_FLSA.pdf.

hourly, the employer has no obligation under the FLSA to continue paying the employee while he or she is on leave. Hourly employees need only be paid for the hours they actually work. However, where an employee is salaried, that employee must be paid their entire salary for the designated week where the employee performs at least some work during that week, even if work is performed remotely.³²

Employers should keep in mind, however, that aside from the FLSA, they may be legally obligated to continue to pay employees who are on leave because of employment contracts or policies,³³ collective bargaining agreements, or state or local wage laws. For example, on March 3, Governor Cuomo announced that he would amend his New York Paid Sick Leave budget proposal to cover individuals with coronavirus.³⁴ If passed by the legislature, the budget proposal would require businesses with five to 99 employees to offer at least five days of job-protected paid sick leave each year, employers with over 100 employees would be required to offer at least seven days of paid sick leave, and employers with four or fewer employees must offer at least four days of unpaid sick leave.³⁵ In New York City, the Earned Safe and Sick Time Act, which went into effect on April 1, 2014, already requires employers with five or more employees to provide each covered employee who works more than 80 hours per calendar year with up to 40 hours of paid sick leave per calendar year.³⁶ Employers with four or fewer employees must provide eligible employees with up to 40 hours of unpaid leave.³⁷ Under the New York City law, employees may use their sick time for, among other reasons, their own mental or physical illness, injury, or health condition, procurement of preventative care, caring for a family member, or when the employer's business or the employee's child's school or day care is closed due to a public health emergency.³⁸ Under this law, employers may only require medical documentation from employees who are absent for more than three days.³⁹ At this time, it is unclear how the proposed New York Paid Sick Leave budget would interact with the New York City Earned Safe and Sick Time Act if passed. When making determinations about an employee's pay during leave, employers should be sure to consult all relevant state and local laws.

³² *Id.*

³³ Any time-off policies that the employer already has in place should be followed.

³⁴ See New York State, "During Coronavirus Briefing, Governor Cuomo Signs \$40 Million Emergency Management Authorization for Coronavirus Response" (Mar. 3, 2020), <https://www.governor.ny.gov/news/during-coronavirus-briefing-governor-cuomo-signs-40-million-emergency-management-authorization>.

³⁵ *Id.*

³⁶ See NYC Consumer Affairs, "Paid Safe and Sick Leave: What Employees Need to Know," <https://www1.nyc.gov/site/dca/about/paid-sick-leave-what-employees-need-to-know.page>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ See NYC Consumer Affairs, "Paid Safe and Sick Leave Law FAQs," <https://www1.nyc.gov/site/dca/about/paid-sick-leave-faqs.page#4>.

Family and Medical Leave Act

Under the FMLA, eligible employees are entitled to 12 weeks of unpaid leave during a one year period to care for their own “serious health condition” or that of a family member.⁴⁰ A serious health condition is defined as “an illness, injury, impairment or physical or mental condition that involves inpatient care . . . or continuing treatment by a health care provider.”⁴¹ Although the flu or common cold does not ordinarily meet the threshold for a serious health condition according to the Department of Labor regulation,⁴² there is a possibility that the coronavirus may qualify as a serious health condition under the FMLA depending on the factual circumstances if it otherwise satisfies the definition of a “serious health condition.”⁴³

In the normal course, the FMLA allows an employer to require an employee coming back from leave to get a “fit-for-duty certification” from a health care provider before coming back to work subject to certain requirements.⁴⁴ If the coronavirus were to qualify as a serious health condition under the FMLA, employers should consider forgoing this request in light of the CDC Interim Guidance that urges employers not to require a doctor’s note because healthcare provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely fashion.⁴⁵

Additionally, even though leave under the FMLA is unpaid, employers should be aware of any state or local laws that may require them to provide paid leave. For example, the New York Paid Family Leave Act (the “PFLA”), which became effective on January 1, 2018, requires employers to provide eligible employees job-protected paid leave for, among other reasons, the care of a family member with a serious health condition.⁴⁶ The PFLA applies to most private employers with one or more employees.⁴⁷ Employees become eligible for leave under the PFLA when they have worked 20 hours or more per week for 26 consecutive weeks, or after

⁴⁰ 29 U.S.C. §§ 2612(a)(1)(C); 2612(a)(1)(D).

⁴¹ 29 C.F.R. § 825.113(a).

⁴² *Id.* at § 825.113(d) (“Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave.”).

⁴³ See 29 C.F.R. § 825.113; U.S. Department of Labor Opinion Letter, “FMLA-87,” (Dec. 12, 1996), <https://www.dol.gov/agencies/whd/opinion-letters/fmla/fmla-87#:~:text=>

⁴⁴ 29 U.S.C. § 2614; 29 C.F.R. § 825.312.

⁴⁵ Centers for Disease Control and Prevention, “Interim Guidance for Businesses and Employers,” (last visited Mar. 7, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.

⁴⁶ See 12 NYCRR part 380. See also New York State, “How are Paid Family Leave (PFL) and the Federal Family and Medical Leave Act (FMLA) different?,” <https://paidfamilyleave.ny.gov/paid-family-leave-and-other-benefits>.

⁴⁷ *Id.*

they have worked for 175 days if working less than 20 hours per week.⁴⁸ While the PFLA does not cover an employee's own serious health condition,⁴⁹ eligible employees could receive up to ten weeks of paid leave to care for a family member with a serious health condition.⁵⁰ Employers need to be aware of the application of the PFLA and any other state or local laws that affect their legal obligation to provide paid leave related to the coronavirus.

Worker's Compensation Laws

Worker's compensation laws, which vary by state, generally extend insurance benefits for paid leave and medical expenses to employees for injuries "arising out of or in the course of employment."⁵¹ Virtually all employers in New York must provide worker's compensation coverage for their employees.⁵² Employers should be prepared to handle worker's compensation claims related to coronavirus. In the event that an employee contracts coronavirus as a "direct result" of their job, the employee may be entitled to temporary disability benefits if coronavirus is determined to be an "occupational disease."⁵³ A disease is occupational where it arises from the conditions to which a specific type of worker is exposed, meaning that the disease must be particular to the employment.⁵⁴ A worker who does not work in healthcare or a related field who contracts coronavirus in the workplace likely would not be eligible for worker's compensation. However, employers who require employees to travel to high-risk areas should consider the risk that coronavirus may be considered an "occupational disease" should any of their employees contract it. Employers should review their worker's compensation policies and insurance coverage and limits in preparation for potential worker's compensation claims related to coronavirus. Employers are encouraged to carefully document all worker's compensation determinations relating to coronavirus and maintain detailed records about possible incidents of exposure.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See e.g., New York State Worker's Compensation Board, "Introduction to the Worker's Compensation Law," <http://www.wcb.ny.gov/content/main/onthejob/WCLawIntro.jsp>.

⁵² See New York State Worker's Compensation Board, "Who is Covered by the Worker's Compensation Law?," http://www.wcb.ny.gov/content/main/Workers/Coverage_wc/workerWhoCovered.jsp.

⁵³ See New York State Worker's Compensation Board, "Occupational Disease," <http://www.wcb.ny.gov/content/main/onthejob/OccDisease.jsp>.

⁵⁴ *Id.*

HIPAA and Privacy Considerations

The HIPAA Privacy Rule requires appropriate safeguards to protect the privacy of protected health information (“PHI”), and sets limits and conditions on the uses and disclosures that may be made of such information without patient authorization.⁵⁵ An employer who is a covered entity or performs certain activities that involve the use or disclosure of PHI on behalf of a covered entity is subject to the privacy and security responsibilities under the HIPAA Privacy Rule. A covered entity (*i.e.*, health care provider, health plan, and health care clearinghouse)⁵⁶ or companies that handle PHI on behalf of a covered entity may not disclose, without a patient’s authorization, a patient’s PHI unless it is permitted or required by the HIPAA Privacy Rule.

Last month, the Office for Civil Rights (the “OCR”) at the Department of Health and Human Services issued a bulletin to provide guidance to HIPAA-covered entities and associated parties regarding the permissible ways in which patient information may be shared in an outbreak of infectious disease such as the coronavirus.⁵⁷ The circumstances under which a patient’s PHI may be released without individual authorization include the following:

- Covered entities may disclose PHI about the patient as necessary to treat the patient or to treat a different patient.
- Covered entities may disclose requested PHI to a public health authority or to a foreign government agency that is collaborating with the public health authority (at the direction of a public health authority), and persons at risk of contracting or spreading a disease or condition if authorized by law.
- Covered entities may share PHI with a patient’s family, friends, relatives, or other persons identified by the patient as being involved in the patient’s care.
- Healthcare providers may share PHI with anyone in order to prevent or lessen a serious and imminent threat to the public health and safety.⁵⁸

⁵⁵ See U.S. Health and Human Services, “The HIPAA Privacy Rule,” <https://www.hhs.gov/hipaa/for-professionals/privacy/index.html#:~:text=>.

⁵⁶ See U.S. Health and Human Services, “Covered Entities and Business Associates,” <https://www.hhs.gov/hipaa/for-professionals/covered-entities/index.html>.

⁵⁷ See U.S. Health and Human Services, Office of Civil Rights, “Bulletin: HIPAA Privacy and Novel Coronavirus,” (Feb. 2020), <https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf>.

⁵⁸ *Id.*

Importantly, an employer should not disclose to the media or the public at large the identity or any specific information about the treatment and/or test results of an employee without their written authorization.⁵⁹ Also, the OCR noted that covered entities are under an ongoing obligation to implement reasonable safeguards to protect PHI against intentional or unintentional impermissible uses and disclosures.⁶⁰

Whistleblower Protections

Several statutes protect employees who engage in whistleblower activities. The Whistleblower Protection Act (the “WPA”) protects federal employees and job applicants who lawfully disclose information they reasonably believe evidences “a substantial and specific danger to public health or safety,” among other things.⁶¹ The National Defense Authorization Act (the “NDAA”) makes it unlawful for a federal contractor, subcontractor, grantee, or sub-grantee to discriminate against an employee for making a protected whistleblower disclosure.⁶² Section § 740 of the New York Labor Law also prohibits employers from retaliating against a whistleblower who discloses or threatens to disclose an employer’s practices that present “a substantial and specific danger to the public health or safety.”⁶³

As discussed above, Section 11(c) of the OSHA also prohibits an employer from retaliating against workers for raising concerns about workplace safety and health conditions.⁶⁴ The OSH Administration instructs employees to inform their employer about perceived unsafe or unhealthful working conditions as an employee may have a legal right to refuse to work under certain circumstances.⁶⁵ The National Labor Relations Act (the “NLRA”) prohibits an employer from discharging or disciplining an employee for engaging in a protected “concerted activity,” which may encompass participating in a concerted refusal to work in unsafe conditions.⁶⁶

In light of the growing concern about the spread of the coronavirus, it is possible that an employee may raise concerns about potentially contracting the coronavirus at the workplace or refuse to engage in employment-related travel or other activities. In addition to taking reasonable measures to minimize the

⁵⁹ *Id.*; 45 C.F.R. § 164.508.

⁶⁰ *Id.*

⁶¹ 5 U.S.C. § 2302(b)(8).

⁶² 41 U.S.C. § 4712.

⁶³ N.Y. Lab. Law § 740(2).

⁶⁴ 29 U.S.C. §660(c).

⁶⁵ See Department of Labor, Occupational Safety and Health Administration, “Workers’ Right to Refuse Dangerous Work,” <https://www.osha.gov/right-to-refuse.html>.

⁶⁶ See National Labor Relations Board, “Concerted Activity,” <https://www.nlrb.gov/rights-we-protect/whats-law/employees/i-am-represented-union/concerted-activity>.

risks at the worksite, an employer should not retaliate against employees who, in good faith and reasonable belief, voice their concerns relating to the coronavirus.

Warn Act

The federal Worker Adjustment and Retraining Notification Act (the “WARN Act”) requires employers with 100 or more full-time employees to provide notice in certain situations if they are forced to close a plant or institute mass layoffs.⁶⁷ The WARN Act specifies the information that must be included in each notice, but does provide for an exception to some of the notice requirements when layoffs are a result of unforeseen business circumstances.⁶⁸ It remains to be seen whether the notice exemption would apply if the contemplated layoffs are a result of the effects of the coronavirus. In addition, employers may also be subject to state “mini-WARN” laws with different employee thresholds and notice obligations.⁶⁹ It is recommended that employers seek the advice of counsel if they anticipate suspension of business or layoffs due to the coronavirus as soon as practicable.

⁶⁷ 29 U.S.C. § 2100 et. seq.

⁶⁸ 20 C.F.R. § 639.9(b).

⁶⁹ See U.S. Department of Labor, “Plant Closing and Layoffs,” <https://www.dol.gov/general/topic/termination/plantclosings> (discussing possibility that different state obligations may apply).