

## The Coronavirus and Its Impact on the Workplace

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With cases of the novel coronavirus (COVID-19) significantly on the rise, the World Health Organization declaring the coronavirus outbreak a pandemic, and Governor Baker recently declaring a state of emergency in the Commonwealth, employers should be prepared to address a number of potentially complicated employment-related issues that may result. This Client Alert is intended to assist employers in addressing scenarios that are likely to arise as the coronavirus spreads.

As an initial matter, employers are well-advised to review the latest interim guidance for employers and businesses from the Centers for Disease Control (CDC) which can be found [here](#). Among other recommendations, the CDC advises that employers should “actively encourage sick employees to stay home,” separate employees who “appear to have acute respiratory illness symptoms (i.e., cough, shortness of breath) upon arrival to work or become sick during the day” and send them home immediately, and perform “routine environmental cleaning” of the office.

In addition to the CDC’s guidance, we have laid out several FAQs addressing anticipated employment-related scenarios that may result from the coronavirus. This is not an exhaustive list of possible situations and each particular circumstance may differ depending on the facts involved. For these reasons, it is recommended that employers consult

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with counsel if they are unsure about a particular course of action.

## **Q&A**

### **If one of my employees is traveling, may I ask him/her where they are going or where they have been?**

Yes. Employers are permitted to inquire about the travel destinations of their employees, even if travel is personal. To the extent an employer begins this practice of inquiring about employee travel, it should do so uniformly to avoid potential claims of disparate treatment based on membership in a protected class.

### **May I instruct employees who have been to a region where coronavirus is prevalent, or who otherwise believe they may have been exposed, to stay home?**

Yes. Employers may instruct employees who have traveled to a location where coronavirus is prevalent, or who believe they may have been exposed to coronavirus, to stay home. Employers must, however, be sure that they apply this practice uniformly across the workforce.

### **If I instruct an employee not to physically come into the office, do I have to pay him/her when he/she is at home?**

The answer here depends upon the employee's FLSA status (i.e., exempt/non-exempt) and whether the employee is, in fact, working while they are at home.

If a non-exempt employee is not performing any work while home, he/she is not entitled to any wages. If, however, a non-exempt employee is working at home, the employee should be instructed to keep track of, and be paid for, all hours worked. In this situation, the best practice is to have employees email their hours worked each day to their supervisor. In addition, although employees are not physically in the office, they are nonetheless entitled to an uninterrupted thirty (30) minute meal break for every six consecutive hours they work.

An exempt employee must be paid his/her full salary for any workweek in which the employee performs any work. Thus, if the employee works only one day during the week, he/she is nonetheless entitled to his/her full salary for the week, subject to limited exceptions. One exception permits an employer to reduce an exempt employee's pay for "absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness." Finally, if an exempt employee does not perform any work for an entire workweek due to a self-quarantine, he/she is not entitled to his/her salary for that week.

### **What are my wage/salary payment obligations to my employees if I decide to temporarily close my operations?**

As noted above, non-exempt employees are not entitled to wages if they render no services to the employer. Therefore, during a company shutdown, non-exempt employees would not be entitled to wages (assuming they perform no work during the shutdown).

With respect to exempt employees, if a company shutdown lasts a full week, and the exempt employee does not otherwise perform any work during that time, the exempt employee is not entitled to a salary for that week. The analysis differs slightly where an employer shuts down its operations for only part of a week. In that regard, exempt employees must be fully compensated for those days during the week that the Company is shutdown. This means that the employee must receive their full salary – or an amount equal to their full salary (i.e., paid vacation) – for that week. A failure to pay exempt employees' full salaries could lead to the employees losing their "exempt" status and becoming eligible for overtime.

### **If I require an employee to stay home, or the employee voluntarily chooses to self-quarantine, is the employee entitled to use his/her earned sick time?**

The Massachusetts Earned Sick Time Law allows employees to use earned sick time for several reasons including, but not limited to, "car[ing] for the employee's own physical or mental illness, injury, or other medical condition that requires home, preventative, or professional care" and/or

“car[ing] for a child, parent, spouse, or parent of a spouse who is suffering from a physical or mental illness, injury, or other medical condition that requires home, preventative or professional care.”

Thus, if, while at home, the employee is not sick and is not caring for a sick family member, he/she is not entitled to use earned sick time (although employers may decide to relax their policy requirements during this time). Notwithstanding the foregoing, there is an argument that such time away from the office may constitute preventative care and, thus, entitle the employee to use his/her earned sick time. Separate and apart from an analysis under the Earned Sick Time Law, if the employee otherwise has banked sick time, the employer could certainly allow the use of such sick time even if the employee is not symptomatic.

Of course, if the employee and/or a family member are sick with the coronavirus, the employee is entitled to use his/her earned sick time.

### **If an employee calls out sick, can I ask if they are experiencing symptoms of the coronavirus?**

The Americans with Disabilities Act (ADA) permits employers to ask employees if they are experiencing coronavirus-like symptoms, such as fever, cough, and shortness of breath. Employers who keep records of this inquiry must ensure that the information is kept confidential and separate and apart from an employee's personnel file.

Employers should also be aware that, under the Massachusetts Earned Sick Time Law, they may ask for *written* documentation, like a doctor's note, only in limited circumstances, including, but not limited to, when the employee is absent from work for more than 24 consecutively-scheduled work hours and/or the employee is absent for three consecutively-scheduled work days. In requesting written documentation, an employer should not require the employee to disclose the details of the medical condition.

### **If my company is covered by the federal Family and Medical Leave Act (FMLA), are employees entitled to use FMLA leave if they are required to stay home?**

The FMLA allows an employee of a covered employer to take an unpaid leave of absence for up to twelve weeks to care for the employee's own

serious health condition and/or to care for a family member with a serious health condition. Generally, an employee who is forced to stay home or who voluntarily chooses to self-quarantine as a precaution would not be eligible for FMLA leave.

However, because the coronavirus is very likely to qualify as a serious health condition under the FMLA, if an employee and/or the employee's family member contracts the virus, the employee will likely be eligible for FMLA leave (assuming the employee meets the additional statutory criteria).

### **If I force an employee to stay home, or an employee chooses to self-quarantine, can I require the employee to use his/her paid time off?**

Employers must follow their paid time off policies as written. Therefore, an employer may require its employees to use available paid time off if permitted by its policy.

To the extent that an employer has a paid time off policy that lumps vacation and sick time together, and the employee's absence does not qualify as an allowable purpose under the Earned Sick Time Law, the employer must be careful to ensure that its employees are nonetheless able to use up to at least forty (40) hours of the paid time off per year for the purposes allowed under the statute.

### **If an employee shows up to work with coronavirus-like symptoms, can I require them to go home?**

Yes. As noted above, the CDC recommends that employees who arrive at work showing coronavirus-like symptoms be sent home immediately. Moreover, pursuant to the federal Occupational Safety and Health Act, employers have a general duty to furnish each worker with "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." Sending an employee home who is demonstrating coronavirus-like symptoms would almost certainly fall under the umbrella of an employer's duty to furnish a safe workplace.

Similarly, the Equal Employment Opportunity Commission (EEOC) has advised that sending an employee home who is demonstrating

symptoms of an illness would be permissible because the illness, if mild, would not constitute a disability under the ADA (or G.L. c. 151B). However, even if the illness was severe enough, such that it would constitute a disability under the ADA (or G.L. c. 151B), sending an employee home would nonetheless be justified under a direct threat to the workplace analysis.

### **Is there anything I have to do if an employee contracts coronavirus at the office?**

Yes. As many employers are aware, the Occupational Safety and Health Administration (“OSHA”) recordkeeping requirements mandate that covered employers record certain work-related illnesses and injuries on their OSHA 300 log. Although employers are not required to record when an employee is infected with the common cold and flu on the job, OSHA recently issued guidance stating that *if* an employee is infected with coronavirus while on the job, the employer must include this illness in their 300 log.

For additional OSHA related considerations, employers are well advised to review OSHA’s recently published “Guidance on Preparing Workplaces for COVID-19” which can be found [here](#).

Employers should also consider contacting their workers’ compensation insurance carrier in the event an employee contracts coronavirus in the office.

### **Can I require an employee who has been out of the office as a result of the coronavirus to provide a doctor’s note certifying that the employee is fit to return to work?**

Yes, requiring an employee to submit a doctor’s note clearing the employee to return to work would be job-related and consistent with business necessity because having an employee in the workplace not fully recovered from the coronavirus would pose a direct threat to the workplace. As such requiring such a doctor’s note would not run afoul of the ADA or state-law statutory equivalent (G.L. c. 151B).

Employers are always free to go above and beyond legal requirements and, thereby, elect to pay wages for employees either during a company-

wide shutdown or for employees who must remain out of work on self-quarantine, due to showing signs of illness, or when mandated by the employer as a precautionary measure. Certainly, such generosity on the part of an employer will be well received and will go a long way toward the preservation of positive morale.

**Please contact any member of the Labor, Employment, and Employee Benefits team if you have any questions about this Client Alert, or any issues that may arise in your workforce due to the coronavirus.**