

Debevoise Coronavirus Checklists— U.S. Employer Considerations

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Employers of all sizes are facing unprecedented human resource challenges in the face of the COVID-19 pandemic. We know that many employers are already developing responses, and there is no one-size-fits-all approach. Here are ten employment law considerations to keep in mind when planning for the impact of the virus on the workplace.

Regularly Monitor Government Guidance for Employers. The CDC, OSHA, DOL and state and local governmental authorities have issued guidance for employers. Links to this guidance can be found [here](#) among our links to External Resources. Governmental guidance is rapidly evolving, and it is critical for employers to stay current on developments that could impact their worksites.

Prioritize Health and Safety. Take all reasonable steps necessary to ensure employee health and safety consistent with governmental guidance. Actively encourage sick and exposed employees to stay home. Promptly send sick employees home and require symptomatic or exposed employees to stay home for at least 14 days or until healthy. Where feasible, consider allowing remote work arrangements, limiting visitors and restricting business travel. Maintain environmental sanitary practices at worksites.

Make ADA-Compliant Medical Inquiries. While disability-related inquiries and medical examinations are usually prohibited under the Americans with Disabilities Act, COVID-19 poses a “direct threat” that has shifted the compliance requirements during the pandemic. Management can ask employees to disclose why they are absent from work and whether they have virus symptoms. However, do not mandate that an employee seek or obtain medical care.

Protect Employee Privacy. If an employee becomes ill or exposed to COVID-19, there will be good reasons to want to share that information, but it is also important to maintain the confidentiality of employees’ medical data as required by law, including the medical status and identities of diagnosed employees or family members of employees.

Evaluate Sick Leave Policies. Ensure that sick leave policies are consistent with current governmental guidance and that employees are reminded of these policies. Consider whether it is feasible to modify current sick leave policies to afford greater flexibility and additional paid time off to employees.

Comply with Federal and State Leave Laws. Assess whether an employee's leave qualifies for job-protected leave under the federal Family Medical Leave Act (the "FMLA"), state law, local sick leave laws or company policy. Eligible employees who are covered by the FMLA are entitled to up to 12 weeks of job-protected unpaid leave during a 12-month period due to a serious health condition or to care for a spouse, daughter, son or parent who has a serious health condition. An asymptomatic quarantine is not a serious health condition that would trigger FMLA protections.

Be Mindful of Discrimination Risks. As always, employer policies and decisions concerning the terms and conditions of employment must comply with anti-discrimination laws. Treat all employees equally—and without regard to any legally protected characteristics—under any employer policy or practice, including with respect to medical inquiries, modification of work hours, telecommuting and the availability of leave or other benefits. Protect employees from discrimination and retaliation by other employees if they are known or suspected to have COVID-19.

Don't Run Afoul of Wage and Hour Laws. Any pay reductions must comply with applicable laws, including state wage theft laws, and any contractual or collective bargaining requirements. Exempt employees generally must receive their full salary for any week in which any work is performed to maintain the employee's exempt status. A salary reduction may also create overtime obligations if an exempt employee's salary drops below the applicable threshold under the Fair Labor Standards Act or similar state laws. Non-exempt employees must only be paid for the time they actually spend working. While hours may be more difficult for managers to monitor for remote workers, employers should continue to require non-exempt employees to record and be paid for all work time.

Don't Forget "WARN." Consider any potential notification requirements under the Federal WARN Act or state "mini-WARN" acts. Decisions to close facilities permanently or to furlough employees for periods longer than six months may trigger federal WARN Act requirements, which require advance notification of 60 or 90-days depending on the jurisdiction. Temporary layoffs or furloughs less than six months may trigger mini WARN Act requirements.

Communication is Key. Effective employee communications can often mitigate legal risks. Take steps to effectively communicate with employees, whether through regular

email updates, an intranet site or memos to employees distributed at the worksite. Establish clear points of contact for employees to direct questions and concerns.

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Many of these employment issues involve legal judgments, and managers should check with human resources or internal or external counsel if there are questions about specific situations. If you have any questions or require assistance with compliance with federal and state employment laws during this challenging time, please do not hesitate to reach out.



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