

MEMORANDUM

DATE: March 16, 2020

RE: Update for Employers regarding Coronavirus (COVID-19)

Greetings:

We wanted to bring you up to date on the latest developments on the coronavirus pandemic, and explain how the various laws and governmental directives impact employers. We have limited this email to a discussion of the legal requirements employers face, and will keep you posted as new events occur:

Families First Coronavirus Response Act

On Friday, March 13, 2020, the U.S. House of Representatives passed the Families First Coronavirus Response Act (HR 6201). The bill now goes to the Senate, which plans to take it up today. Although the Senate may change the bill, the House version gives us a sense of what Congress is thinking. Also, the House bill was cobbled together quickly, and as a result some of its provisions are ambiguous and conflict with other provisions. Many of those problems should be cleaned up during the reconciliation process that occurs before the bill is signed.

The House version contains the following provisions relevant to employers:

- **Testing:** The bill requires private health plans to provide coverage for COVID-19 diagnostic testing, including the cost of provider, urgent care center and emergency room visits to receive testing. Coverage must be provided at no cost to the consumer.
- **Emergency Unemployment Stabilization Act:** This portion of the bill provides government-paid “emergency paid leave benefits” under the Social Security Act to employees who:
 - are diagnosed with COVID-19;
 - are under quarantine (including self-imposed quarantine), at the instruction of a health care provider, employer, or a local, State or Federal official, in order to prevent the spread of COVID-19;
 - provide caregiving for an individual under quarantine (including self-imposed quarantine), at the instruction of a health care provider, employer, or a local, State or Federal official, in order to prevent the spread of COVID-19; or
 - provide caregiving because of the COVID-19-related closing of a school or other care facility or care program, for a child or other individual unable to provide self-care.

Employers are required to provide notification to laid-off workers of their eligibility to apply for coronavirus-related unemployment benefits.

The federal government will provide \$1 Billion in emergency grants to states to help fund unemployment insurance programs.

- **Emergency Family and Medical Leave Expansion Act:** Employers with fewer than 500 employees must provide family leave to any employee who has worked for the employer for at least 30 days if the employee has a need for leave for one of the following reasons:
 - To comply with a recommendation or order by the governing health authority or a health care provider on the basis that:
 - The employee's physical presence at work would jeopardize the health of others because: (a) of the employee's exposure to the coronavirus; or (b) the employee exhibits symptoms of the coronavirus; and
 - The employee cannot both perform his or her job duties and comply with such recommendations or order.
 - To care for a family member of an eligible employee with respect to whom a health authority or health care provider determines that the family member's presence in the community would jeopardize the health of other community members because: (a) of the family member's exposure to the coronavirus; or (b) the family member's display of coronavirus symptoms;
 - To care for the employee's son or daughter if the child's school or place of care has been closed, or the child-care provider is unavailable, due to a public health emergency.

The first 14 days of family leave is unpaid, although an employee may elect to use any available paid leave (the employer may not require an employee to do so). After that 14-day period the employer must provide paid leave for the following 14 days. It is unclear whether this paid family leave is in addition to the paid sick leave discussed in the bullet point directly below.

Employers with 50 or fewer employees may be exempted from the requirement if they can establish an undue hardship.

- **Emergency Paid Sick Leave Act:** This portion of the bill requires employers with fewer than 500 employees to provide paid sick leave to employees for any of the following uses:
 - To self-isolate because the employee is diagnosed with coronavirus;
 - To obtain a medical diagnosis or care if the employee is experiencing coronavirus symptoms;
 - To comply with a recommendation or order by the governing health authority or a health care provider on the basis that the employee's physical presence at work would jeopardize the health of others because of (a) the employee's exposure to the coronavirus; or (b) the employee exhibits symptoms of the coronavirus;

- To care for or assist a family member who (a) is self-isolating because the family member has been diagnosed with COVID-19; or (b) is experiencing symptoms of coronavirus and needs to obtain medical diagnosis or care;
- To care for or assist a family member with respect to whom a public official or health care provider determines that the family member's presence in the community would jeopardize the health of other community members because of (a) the family member's exposure to the coronavirus; or (b) the family member's display of coronavirus symptoms;
- To care for the employee's child if the child's school or place of care has been closed, or the child's child-care provider is unavailable, due to coronavirus.

Under this bill, full-time employees are entitled to 80 hours of paid sick leave, and part-time employees are entitled to the average number of hours that they work in a two-week period. Sick leave is paid at the employee's regular rate, but leave relating to children and family members can be paid at two-thirds the regular rate.

Employers must post a notice created by the Department of Labor notifying employees of their right to paid sick leave under this law.

Paid sick leave under this bill is in addition to any other paid leave employers make available to employees as of the day before the law is enacted; and it takes priority over any other available paid leave. Also, employers are limited in their ability to modify whatever paid leave programs they had in place at the time this law went into effect.

- **Tax Credits.** HR 6201 provides a refundable tax credit (against the employer portion of Social Security taxes) equal to 100% of sick leave wages paid to employees under the bill. The credit is capped at \$511 per day for wages paid to employees, and \$200 per day if the employee was caring for a family member.

NOTE: This bill is not yet law. We will send out an update once the bill passes Congress and the President signs it.

OSHA-Related Requirements

- Employers with Occupational Exposure to Infectious Diseases

Although OSHA began rulemaking on a standard to protect employees from occupational exposure to airborne and other infectious diseases in 2009, it halted those efforts in 2017. Consequently, there are no mandatory requirements to implement an effective and ongoing infection and exposure control program that provides protection to health care workers from COVID-19. However, in 2007 the CDC issued non-binding guidelines for preventing the transmission of infectious agents, which can be found here:

<https://www.cdc.gov/infectioncontrol/pdf/guidelines/isolation-guidelines-H.pdf>. OR-OSHA has also adopted non-COVID-19-specific requirements pertaining to bloodborne and other pathogens

(<https://osha.oregon.gov/OSHAPubs/2261.pdf>). The House bill discussed above requires the Secretary of Labor to promulgate an emergency temporary standard to protect health care workers from occupational exposure to COVID-19 not later than 30 days after the bill passes.

- All Employers

Both the federal and state governments require all employers to furnish a workplace that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm.” That requirement (referred to as the “General Duty Clause”) imposes a negligence standard on employers – did the employer exercise reasonable care to provide a safe workplace? The CDC has business-specific guidance here: <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>. We recommend you review that guidance and adopt whatever measures you deem appropriate to ensure your compliance with the General Duty Clause.

Existing State and Federal Leave Laws

Aside from the bill pending in Congress, the coronavirus crisis implicates a number of other leave-related laws that apply to Oregon employers:

- Sick Employees

If an employee becomes ill, three laws are usually implicated: Oregon’s Sick Leave Law (OSLL); OFLA/FMLA; and the ADA. The OSLL covers any employee illness; OFLA/FMLA covers only “serious health conditions” (with the exception of sick child leave, discussed below); and the ADA covers only disabilities. As an example, an employee with a common flu would be covered by the OSLL (because that law covers any illness). But the employee would be covered by OFLA/FMLA only if on that particular occasion the flu met the definition of a serious health condition (meaning the employee was absent from work for three consecutive days and sought medical treatment, the employee was hospitalized overnight, or the employee was undergoing a continuing regimen of medical treatments). In all likelihood the common flu would not constitute a disability under the ADA.

With respect to coronavirus, that condition would definitely be covered by the OSLL; in all likelihood would be covered by OFLA/FMLA to the extent eligible employees were infected with the virus or were being treated for its symptoms; and could potentially be a disability under the ADA, depending on the circumstances.

- Sick Family Members

Employees with sick family members will normally only have protection under the OSLL and OFLA/FMLA using the framework described above. In most cases the ADA will not apply.

- Sick Children

As with employees dealing with sick family members, employees with sick children also have rights under the OSL and OFLA/FMLA, including an additional bank of leave for children who are sick but do not have a serious health condition (referred to as “sick child leave”).

- Mandatory School/Business Closures

Neither OFLA/FMLA nor the ADA impose obligations on employers simply because the government has required a business or school to close. However, under the OSL, employees are entitled to use accrued sick leave if: (a) a public official declares a public health emergency and closes the employee’s place of business, or the school or place of care of the employee’s child; or (b) a public health authority or health care provider determines that the presence of the employee or the employee’s family member in the community would jeopardize the health of others, such that the employee must provide self-care or care for the family member; or (c) the employee is excluded from the workplace under any law that requires the employer to exclude the employee from the workplace for health reasons.

Because both the President and Governor Brown have declared a public health emergency and many schools have closed, employees with children will be entitled to use paid sick leave under this provision.

- Voluntary Office Closures

If an employer voluntarily chooses to close its business (as opposed to being required to by the government), the OSL, OFLA/FMLA and ADA will not apply, except with respect to individual employees who may qualify for protection under those laws because they or family members are sick, or for other qualifying reasons. That is true even if you close an office or facility because of the mere existence of the epidemic (i.e., to prevent further spread of disease). As a result, you cannot force employees to use OSL or OFLA/FMLA leave. You can, however, require that employees use any available vacation or PTO leave.

If you decide to close an office or facility, you are not required to pay non-exempt employees for time they were off work. Likewise, you are not required to pay exempt employees if they miss full work weeks, but if they work any days during a work week, you must pay them their full salary for that work week (you can, however, deduct the full missed work days from their leave bank(s) if you have a *bona fide* leave policy in place). You are also not required by law to maintain the employees’ benefits, although COBRA is implicated in that case.

NOTE: When it passes, the bill pending in Congress will affect both the employer’s and employee’s rights and responsibilities regarding business closures.

Predictive Scheduling Law

Oregon's predictive scheduling law applies to a limited set of employers with 500 or more employees, and requires certain advance notice of scheduling changes. Because the coronavirus pandemic may result in decreases in your business's staffing needs (or unpredictable staffing needs and worker availability), employers who are subject to the scheduling law should seek guidance as appropriate. The law provides for employer relief in extenuating circumstances, such as natural disasters and declarations of public officials, including Governor Brown's current emergency declaration. Employers should be proactive in communicating with employees about their operations and schedules, especially given the constantly evolving nature of this public health emergency.

What Employers Can Require and Ask

- You can, and should, require employees to stay home if they are sick or have been in contact with someone who exhibits coronavirus symptoms.
- While the ADA limits certain inquiries and "medical examinations," if an employee shows visible symptoms you can ask the employee if they are feeling well.
- If you reasonably believe an employee is sick, you can and should send the employee home. Be consistent: treat employees who exhibit the same symptoms the same.
- You may require an employee who exhibits coronavirus symptoms to confirm their "fitness for duty" and may require that employees who have been absent obtain a doctor's note before returning to work. NOTE: Under the OSL, employers may not require medical verification in advance of sick time that is expected to last less than three consecutive scheduled workdays; and employers must pay any associated costs for providing medical verification or certification.
- You may require a 14-day absence for employees who have coronavirus symptoms or have been in contact with someone who does.

Additional Resources

- The Oregon Employment Department has issued a one page summary of the laws that apply to various absences
here: https://www.oregon.gov/employ/Documents/EDPUB190_0320.pdf
- A Washington version of the same chart is
here: <https://esdorchardstorage.blob.core.windows.net/esdwa/Default/ESDWAGOV/newroom/COVID-19/covid-19-scenarios-and-benefits.pdf>
- <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>
- <https://www.cdc.gov/coronavirus/2019-ncov/index.html>
- <https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf>
- https://www.eeoc.gov/facts/pandemic_flu.html
- <https://www.dol.gov/agencies/whd/flsa/pandemic>
- <https://www.osha.gov/Publications/OSHA3990.pdf>

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For more information, please contact our Labor and Employment attorneys, Amanda Walkup, Andy Lewis and Mario Conte.

This summary provides general information and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. If you have specific legal questions, you are urged to consult with your attorney concerning your own situation.