COVID-19: FAQs on Federal Labor and Employment Laws

We remain in an unprecedented state of affairs. First and foremost, we hope that you and your families are and continue to remain safe and healthy.

Several states (including Pennsylvania) have mandated all non-essential businesses close their physical locations. We anticipate New Jersey and Delaware will make similar declarations in the near future. NEMR's team of professionals are all working remote, are fully operational and are here to provide continued support.

As policy updates related to COVID-19 continue to be created, the NEMR Total HR Team is tracking this information to provide you with the details you

need to make employment related decisions.

Below are some answers to frequently asked questions (FAQs) about the latest developments on the virus and guidance from federal agencies.

Sending Employees Home; Excluding Employees from Work; Requiring Employees to Work from Home; Returning Employees to Work

Q. May an employer require a return-to-work doctor's note for an employee to return to work after exhibiting COVID-19 symptoms?

A. A doctor's note should not be a prerequisite for returning to work, according to the CDC. This is in part because this requirement would place a high burden on the healthcare system and healthcare provider offices and medical facilities may not be able to provide documentation in a timely fashion. If an employee's situation meets the ADA's "direct threat" standards, however, an employer may require a return-to-work doctor's note (see question 8). Though the CDC's guidance urges against requiring a return-to-work note, if the employee's illness is a "serious health condition" under the FMLA (see questions 23 and 24), the employer would be able to require a return-to-work note if the employer complies with the FMLA's guidelines for requiring such documentation, including, among others, notifying the employee in the initial determination that fitness- for-duty notes will be required and consistently applying the requirement to all FMLA leaves.

Vacation, Paid Time Off, and Paid Sick Leave

Q. May an employer require an employee with COVID-l9 to use his or her vacation time and/or other paid time off for the absence?

A. Yes, subject to (a) the provisions of the employer's current vacation time, paid time off (PTO), and other applicable policies, and (b) any state laws (e.g., implied contract of employment) restricting an employer's ability to interpret or amend those policies.

Wage and Hour

Q. May an employer dock an exempt employee's salary during office, plant, or facility closures or other time spent away from work due to COVID-19 if he or she has exhausted all applicable vacation time/sick leave/PTO (including under any applicable paid sick leave laws)? (Updated March 11, 2020)

A. For exempt employees, it depends on whether the absence is initiated by the employer or by the employee.

- If the absence is initiated by the employee (including for his or her own illness or that of someone for whom he or she is caring), the employer may dock the exempt employee for full-day absences only.
- If the absence is initiated by the employer (e.g., the employee must stay home for a mandatory quarantine period, even though he or she is asymptomatic and willing to come to work), the employer may dock the exempt employee only for full seven-day absences that coincide with the employer's pay week.

Employers should consider the impact docking exempt employees' pay may have on whether employees will continue to voluntarily stay at home when they feel sick, disclose that they feel sick, or disclose that they have traveled to a high-risk area, if there is a perception that they will suffer a financial

consequence for doing so.

Q. How should an employer handle expenses, such as internet or phone service costs, for employees who are asked or required to telework? (Updated March 11, 2020)

A. If an employer requires an employee to work remotely who is not normally set up to do so, the employer may need to reimburse employees for any additional phone, internet, or other expenses incurred (beyond what the employee would otherwise have paid for their personal use) to enable the employee to telework at the company's request. While not directly addressing whether employers must reimburse home expenses used in the course of telework, the DOL advised that if employers require a non-exempt employee to work from home, employers may not require the non-exempt employee to pay for business expenses, where doing so reduces the non-exempt employee's earnings below the required minimum wage or overtime compensation. For exempt employees not subject to required minimum wage or overtime requirements, additional phone, internet, or other expenses may be viewed as impermissible deductions under the FLSA "salary" basis test. Employers should evaluate any applicable state wage and hour laws to ensure they do not contain different or additional requirements or provisions.

FMLA

Q. May an employer disclose an employee's actual or probable COVID-19 diagnosis to others? (Updated March 11, 2020)

A. Yes, according to the CDC, employers should inform fellow employees of their potential workplace exposure, but only to the extent necessary to

adequately inform them of their potential workplace exposure, while maintaining confidentiality under the ADA (i.e., without revealing the infected individual's name unless otherwise directed by the CDC or applicable public health authority). Employers may communicate to non-exposed employees generally that there has been a potential COVID-19 exposure, without sharing additional identifying information. Employers also may be able to communicate to appropriate non-employees (e.g., customers, vendors, and others with whom the employee may have come in contact while working) that there was a potential COVID-19 exposure, again without sharing identifying information. In all cases, time and circumstances permitting, employers may find it helpful to coordinate with state or local health authorities for guidance and direction regarding the scope and content of disclosures.
Employers also should evaluate any applicable state privacy law or state "mini-ADA" laws to ensure they do not contain different or additional requirements or provisions.

Workplace Safety

Q. Are there any OSHA requirements that must be followed when an employee is diagnosed with COVID-19?

A. Yes, in some cases. First, employers must ensure that the infected employee stays away from the workplace. OSHA may cite an employer under the general duty clause if the employer allows or directs a known infected employee to come to work and expose other employees to the risk of infection.

If an employee in the workplace is suspected of having COVID- 19 (i.e., someone displaying symptoms of COVID-19), that employee must be

quarantined immediately. For example, employers may want to move such an employee to an isolation room and close the doors or, if an isolation room is not available, to a location away from workers, customers, and other visitors. Employers may want to take steps "to limit spread of the employee's infectious respiratory secretions," including providing the employee with a surgical mask and asking him or her to wear it, if he or she can tolerate doing so. Employers may also want to restrict contact with the potentially infectious employee and contact the CDC and/or local health authorities for further guidance.

Second, employers are required under OSHA's recordkeeping regulation (29 C.F.R. Part 1904) to record illnesses that are "work related" and meet one of the recording criteria, which include days away from work, job transfer, and medical treatment. A work-related illness that meets these criteria must be recorded on the employer's OSHA Form 300, and a Form 301 must also be completed. "An illness is work-related if it is more likely than not that a factor or exposure in the workplace caused or contributed to the illness." An employee who contracts COVID-19 from a family member or while on a personal trip has not experienced a work-related illness. If, however, that employee infects a coworker, the coworker has suffered a work-related illness if one of the recording criteria (e.g., medical treatment or days away from work) is met.

OSHA's recordkeeping regulation exempts the "common cold and flu" from the recordkeeping requirements. COVID-19, however, is not a common cold or flu. OSHA's current guidance states that "COVID-19 is a recordable illness when a worker is infected on the job."

Third, employers may be required to report an employee's coronavirus

infection to OSHA. If the infection is work related (e.g., the infection was contracted on the job or during business travel), and the infected employee is hospitalized as an in-patient, the hospitalization must be reported to OSHA within 24 hours of the incident. If the infected employee is not hospitalized as an in- patient but dies from the infection, the death must be reported to OSHA if it occurred within 30 days of the work-related incident.

Some state plans have different requirements. In California, for example, if an employee contracts the COVID-19 on the job or during business travel, it would be reportable to Cal/OSHA if the employee suffers a "serious injury or illness" as a result of the infection. A COVID-19 infection would be considered a "serious injury or illness" in California if it "requires inpatient hospitalization for more than 24 hours for other than medical observation, or in which a part of the body is lost or a serious degree of permanent disfigurement occurs."

Note that the virus to which individuals are exposed is SARS-CoV-2. The disease it causes is COVID-19. For readability, these FAQs use the term "COVID-19." Where appropriate, readers should read COVID-19 as the SARS-CoV-2 virus.

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