



## COVID-19 Employment Update

Below is a summary of questions and issues that our clients have been dealing with in response to COVID-19. This Alert cannot address all COVID-19 issues as the circumstances of each company vary and the situation continues to evolve. Stradling has a multi-disciplinary group of attorneys ready to respond to your needs and we encourage you to reach out if you have any questions or are looking for guidance on these developing issues.

### How do I identify employees with COVID-19?

- Employers must use caution when asking employees about their medical condition or conducting medical screening. Guidance from the EEOC states that employers can ask questions about whether or not employees are exhibiting symptoms of a pandemic illness (for COVID-19, those typically are fever, coughing, or respiratory problems), but not underlying disabilities that might make them more susceptible to the disease.
- Employees can be sent home if they exhibit COVID-19 symptoms such as coughing and respiratory problems. Employees can also be asked if they have symptoms of disease, such as be asked whether they have a fever, and can be encouraged to self-report.
- The ADA generally prohibits employers from requiring medical examinations like temperature screening. This may change depending on the severity of the outbreak and employers should continue to monitor CDC guidance.
- CDC guidance may already permit or require temperature screening for some employers, primarily those directly involved in health care.
- Employers can track industry specific guidance at the CDC's website.

### What if an employee gets COVID-19?

- The identities of employees who contracted the disease should be kept confidential. Identifying infected employees can raise issues related to privacy and personal medical information.
- Take steps to isolate other employees who may have been infected from other employees. They may be asked to work remotely, work in a separate area, or simply sent home.
- Make sure possible affected areas are disinfected and review OSHA guidance for safety measures for the workplace.
- Employers should inform third parties, such as clients, vendors, or landlords who might be affected by the spread of the disease or who came into contact with employees with the disease.

### Sending employees home from work

- Employers can send their employees home if they exhibit or report symptoms of COVID-19, which is consistent with the recommendation of the CDC.
- While private sector employees generally do not have to be paid or provided special paid leave when sent home for exhibiting or reporting symptoms of COVID-19, companies may be required to pay employees under a variety of laws and

obligations such as paid sick leave requirements, the terms of collective bargaining agreements, employee handbooks, and individual employment agreements. This also applies to public sector employees employed at-will.

- Public employees who are not at-will and are sent home for COVID-19 related reasons but will not be performing any work have property rights in their continued employment and may need to continue to be paid based on due process requirements. It is likely that any due process rights do not have to be provided prior to being sent home without pay, but post-deprivation due process likely must be provided. The nature of the due process that must be provided will depend on the circumstance including applicable MOUs.
- Exempt employees generally must be paid for a full week for any workweek in which they performed any work.
- In California, it is likely “reporting time” pay must be paid if employees are sent home before completing half their scheduled shift unless a state of emergency is declared. The amount required to be paid is at least 2 hours but not more than 4 hours.
- Employees may also be protected under leave laws that do not require paid leave but do provide reinstatement rights, and in some cases continued payment of the employer’s share of health insurance premiums. For example, family and medical leave laws apply to employees with serious health conditions and employees caring for family members with a serious health condition.
- Employees may be able to receive compensation under government provided income replacement programs. In California, these include State Disability Insurance, Paid Family Leave, and unemployment insurance. Employees should be encouraged to apply for any applicable government benefits.
- Employees generally cannot be required to use their accrued vacation or sick leave. We suggest asking employees if they want to apply their accrued unused paid sick leave and/or vacation balances to receive compensation during their leave

period. However, requiring the use of paid leave may be allowed during leaves under the Family and Medical Leave Act and certain state leave laws.

- Employers can generally require an employee to return with a doctor’s clearance, but difficulty obtaining a COVID-19 test or general strain on the health care system can create complications for this requirement. Employers should review applicable sick leave laws when asking for a doctor’s note to take paid sick leave off due to COVID-19 or when returning to work after a COVID-19 related absence, and ensure that any requirement is applied in a consistent and nondiscriminatory manner.
- Supervisors should be trained so they do not overact to COVID-19 concerns and comply with all legal requirements.

### **Discrimination laws and the Americans with Disabilities Act (ADA)**

- The ADA and related state laws prohibits discrimination against employees who have a disability or are perceived as having a disability. Federal and some state laws also prohibit discrimination on the basis of race or national origin. The CDC advises that “Employers will need to closely monitor any concerns that employees of Asian descent are being subjected to disparate treatment or harassed in the workplace because of national origin. This may include employees avoiding other employees because of their national origin.”

### **Travel restrictions—business and personal**

- It is recommended that employers suspend all nonessential business travel to high risk areas.
- Whether employees can be required to travel on business can depend on government imposed restrictions which can be accessed at the CDC website.
- There are individualized considerations to be taken into account if an employee refuses to travel to a permitted location due to COVID-19 fears, such as whether that employee is more at risk of infection than others in the population.

- Employers cannot restrict an employee's personal travel, but may ask employees whether they have traveled to a high-risk area if the CDC recommends travelers to quarantine themselves when returning from certain locations. The CDC currently recommends a 14-day quarantine for employees traveling to countries with a Level 3 Travel Health Notice, including China, Iran, Italy, and South Korea.
- If an employer has reason to believe that an employee has visited a Level 3 area, that employee can be required to stay home and quarantined for up to 14 days or until they get medical clearance for their return to work, whichever is sooner.

### Remote work policies

- A temporary telecommuting policy can be effective at reducing workplace health concerns as well as the transmission of the disease. Employers who may wish to implement such an option should develop a telecommuting policy at this time.
- Employers can provide a written survey to determine which employees have the necessary equipment to telecommute. Employees who must use their personal devices when required to telecommute may need to be reimbursed for the related expense.
- If an employee has a disability that makes them more susceptible to COVID-19, such as an immune system deficiency, telecommuting can be a reasonable accommodation under the ADA.
- Telecommuting can pose security issues related to the transmission and storage of documents and other materials. Employers should assess their information security issues if employees work from potentially unsecure personal devices at home.

### Employees refusing to work or travel

- Employees cannot refuse to work unless they reasonably believe they are in imminent danger due to potential exposure to COVID-19. This likely does not apply to employees with no elevated risk of contracting the disease who only have general concerns. The assessment of this issue may depend on whether there have been any confirmed COVID-19 cases in the workplace and that employee's potential exposure to those cases.

### Force majeure in contracts and CBAs

- Some contracts or collective bargaining agreements have a "force majeure" clause that may apply to the COVID-19 pandemic. Whether or not the clause excuses performance under the contract will vary depending on the language of the clause and the mandatory requirements of state and local health officials such as banning events over a certain number of attendees.

### H.R. 6201

- The House of Representatives has passed a bill which amends the FMLA to provide up to 12 weeks of paid emergency leave related to the outbreak of COVID-19. As written, the bill applies to employers with fewer than 500 employees and makes eligible employees who have been employed for at least 30 days. The total number of employees will be calculated as is currently done under the FMLA.
- Employees would be permitted to take medical leave based on recommendations from public health officials pertaining to the presence of employees in the workplace, the employee's or family member's exposure to or symptoms of COVID-19, as well to care for a child whose school or child care is unavailable due to the COVID-19 public health emergency.
- The first 14 days of this leave would be unpaid during which an employee may, but cannot be required, to use any paid leave provided by employer policies or state and local laws. After the first 14 days, an employer would be obligated to provide paid leave equal to two-thirds of the employee's regular rate for the employees normally scheduled workday.
- While this paid leave applies to some employees who are not otherwise covered by the FMLA, it does not extend the 12 weeks of FMLA leave otherwise available to covered employees.
- The bill authorizes the Secretary of Labor to issue regulations to exclude health care providers and emergency responders from the employees eligible for the paid leave and to exempt businesses with fewer than 50 employees from these new requirements if it would jeopardize the viability of the business as a going concern.

- The bill also requires employers to provide full time employees 80 hours of paid sick leave for the COVID-19 related reasons described above. In addition, paid sick leave is provided if an employee needs to self-isolate due to a COVID-19 diagnosis, obtain a diagnosis or medical care if experiencing symptoms, and to care for a family member who is doing the same. Part-time employees would be entitled to pay for their average number of hours worked over a two week period.
- Paid sick leave under this provision must be paid at the employee's regular rate, unless the employee is taking the leave to care for a family member or for a child whose school closed, in which case the rate of pay may be two-thirds of the employee's regular rate.
- This leave is in addition to any sick leave already provided by employer policy or state or local laws, and existing policies cannot be revised to avoid providing the paid sick leave to which employees are currently entitled.
- Employers would also be required to post notice of these benefits.
- Employers would be provided a 100% tax credit for the amounts paid pursuant to the requirements of this legislation.
- The bill still needs to be taken up by the Senate and signed by the President. It is expected to be passed and signed, but there may be changes before the legislation is enacted.
- If passed as written, the bill will go into effect 15 days after passage. The provisions regarding 12 weeks of paid FLMA leave will expire a year after passage, and the paid sick leave provisions will expire on 12/31.

## We are available to assist

Please do not hesitate to reach out to us for assistance in dealing with the effects of the COVID-19 pandemic on your company.

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