

## **Questions and Answers – Employers & The COVID-19 Coronavirus March 16, 2020**

A new virus first identified in Wuhan, China in late 2019 has been spreading across the globe and is now in the United States. The new coronavirus, COVID-19, is a pneumonia-like infection. SESCO recommends employers review the following answers to common questions we have received, and contact us if questions remain or if they wish to obtain a sample policy.

This general guidance is based on U.S. federal employment law and the current medical assessment of COVID-19, as of March 16, 2020. State and local laws may apply, and medical assessments may change, resulting in different conclusions. If employers have specific questions that reach beyond this general guidance, we recommend they contact us at 423-764-4127 or [sescomgt@sescomgt.com](mailto:sescomgt@sescomgt.com)

Much of what an employer can and can't do will be guided by guidance and directives issued by the Center for Disease Control (CDC). We recommend employers review the following link

### **EMPLOYER RIGHTS DURING A PANDEMIC**

#### **Question: What options are available to employers to continue operations?**

Answer: An employer may utilize a variety of options to continue operations. Such options include offering voluntary layoffs, paid or unpaid leave of absence, telework, and reduction in hours or rate of pay. Unless specifically prohibited by law or regulation, employers have free reign to operate their business as they see fit.

#### **Question: When can an employer require an employee not come to work?**

Answer: An employer can do so in three situations. First, if an employee has returned from a "Level III" country as designated by the CDC; currently those countries are China, Iran, Italy, and South Korea. Second, if an employee is exhibiting symptoms of COVID-19 such as a fever (100.4 F or higher) and shortness of breath/difficulty breathing. Third, if an employee has had direct contact with someone who has a confirmed diagnosis of COVID-19. In these situations an employer is not required to pay an employee for the time out and we recommend requiring employee being away from work for a 14-day period and providing a fitness for duty release before they return to work.

#### **Question: Does the CDC's guidance to prohibit "gatherings" of 50 or more people for 8 weeks apply to employers?**

Answer: No. Businesses are specifically exempted from this guidance from the CDC.

## **WAGE-HOUR**

### **Question: Must we keep paying employees who are not working?**

Answer: The answer is straightforward for nonexempt employees (i.e. employees subject to overtime pay). Nonexempt employees are paid for the actual time worked. Thus, if they do not report for work or the employer is closed, they are not paid. An employer may choose to allow these employees to use vacation or other paid time off to cover the lost wages.

The answer is a little more complicated for exempt employees (i.e. employees not subject to overtime pay). Exempt employees must be paid if they are ready, willing, and able to work; this is so even if the employer closes for the day. An employer that remains open may lawfully deduct one full-day's absence from the salary of an exempt employee who does not report for work for the day. The Department of Labor considers this an absence due to personal reasons; therefore, a deduction of a full-day's pay will not violate the salary basis rule or otherwise affect the employee's exempt status. An employer may, as an option, require an exempt employee who fails to report for work in this situation take vacation or other paid leave to cover the full-day's absence. Deductions from an exempt employee's salary for less than a full-day's absence are not permitted.

Vacation, Paid Time Off, and Paid Sick Leave

### **Question: May an employer require employees with COVID-19 or employees that have had direct contact with individuals with COVID-19 to use available paid leave?**

Answer: Yes, subject to the provisions of the employer's current paid leave policies, and any state laws.

### **Question: Does the federal government require paid sick leave or paid Family and Medical Leave related to leave for COVID-19?**

Answer: While the U.S. House of Representatives had passed legislation requiring such for employers with less than 500 employees, such is not law as of yet because the Senate and the President have not acted on such legislation.

## **WORKPLACE SAFETY ISSUES**

### **Question: Can an employee refuse to come to work because of fear of infection?**

Answer: Generally, no. Employees are only entitled to refuse to work if they believe they are in imminent danger. The threat must be immediate or imminent, which means that an employee must believe that death or serious physical harm could occur within a short time.

## **TRAVEL ISSUES**

### **Question: Can we prohibit an employee from traveling on their personal time?**

Answer: No, you generally cannot prohibit otherwise legal activity, such as travel abroad by an employee. This includes pregnant employees or those with medical conditions. However, you should educate your employees before they engage in travel to risky environments, and you can – and should – monitor those employees returning from such travel for signs of illness.

### **Question: What should I do if an employee has recently traveled to an affected area or otherwise may have been exposed to COVID-19?**

Answer: The Americans with Disabilities Act Amendments Act (ADAAA) places restrictions on the inquiries that an employer can make into an employee's medical status. The ADAAA prohibits employers from making disability-related inquiries and requiring medical examinations, unless (1) the employer can show that the inquiry or exam is job-related and consistent with business necessity, or (2) where the employer has a reasonable belief that the employee poses a direct threat to the health or safety of the individual or others that cannot otherwise be eliminated or reduced by reasonable accommodation.

According to the Equal Employment Opportunity Commission (EEOC), whether a particular outbreak rises to the level of a "direct threat" depends on the severity of the illness. The EEOC instructs employers that the assessment by the CDC or public health authorities provides the objective evidence needed for a disability-related inquiry or medical examination.

## **EMPLOYEE LEAVE**

### **Question: Does the Family and Medical Leave Act (FMLA) apply?**

Answer: Employees requesting leave could conceivably be protected by the FMLA to the extent they otherwise meet FMLA-eligibility requirements. Generally, employees are not entitled to take FMLA leave to stay at home to avoid getting sick. Even in the absence of state or federal protection, an employer's internal policies may extend protection to such individuals. Of course, there is nothing to prevent you from voluntarily extending an employee's leave, even in the absence of any legal obligation.

### **Question: Does contraction of COVID-19 coronavirus implicate the ADAAA?**

Answer: Generally, no, because in most cases COVID-19 is a transitory condition. However, some employees could make an argument that the ADAAA is implicated if the virus substantially limited a major life activity, such as breathing. Moreover, if an employer "regards" an employee with COVID-19 as being disabled, that could trigger ADAAA coverage.

**Question: May an employer encourage employees to telework as an infection-control strategy?**

Answer: Yes. The EEOC has opined that telework is an effective infection-control strategy. The EEOC has also stated that employees with disabilities that put them at high risk for complications of pandemic influenza may request telework as a reasonable accommodation to reduce their chances of infection during a pandemic.

**CONFIDENTIALITY**

**Question: Is an employer's knowledge that an employee has COVID-19 subject to the privacy restrictions of the Health Insurance Portability and Accountability Act (HIPAA)?**

Answer: Not usually, unless the employer acquired the information in its role as the administrator of the health insurance plan. Because most employers will learn of a COVID-19 diagnosis from the employee or his or her family, HIPAA usually will not be implicated.

**Question: May an employer disclose an employee's COVID-19 diagnosis to others?**

Answer: 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.

**WORKERS' COMPENSATION**

**Question: Could COVID-19 be covered by workers' compensation?**

Answer: Workers' compensation claims and procedures are based on state laws and carrier-specific requirements. Generally, however, state workers' compensation laws require an employee to prove that he or she contracted the illness in the course and scope of employment and that the illness is caused by a hazard recognized as peculiar to a particular employment. Some states specifically exclude from coverage contagious diseases resulting from exposure to fellow employees or from a hazard to which the ill employee would have been equally exposed outside of his or her employment.