

March 17, 2020

Coronavirus: Updated Guidance for Employers Issued by Federal, State, and City Agencies

In the days since our prior Client Memorandum dated March 10, 2020, the public health situation in the United States and the world at large has continued to change rapidly and dramatically.¹ On March 11, 2020, the World Health Organization (the “WHO”) declared COVID-19 a pandemic, pointing to the troubling level of spread and severity of the virus.² Since then, numerous states and localities have closed schools, bars, restaurants, museums, theaters, libraries, and other public places. Restrictions have been placed on the number of individuals for social gatherings. Churches and houses of worship have suspended services. A number of cities and states have instituted curfews. The Trump Administration on March 16 released new guidelines for the public to follow over the next 15 days in hopes of slowing the spread of the virus, including closing schools, avoiding groups of more than 10 people, and limiting discretionary travel and visits to bars, restaurants, and food courts.³

These changes pose significant challenges for employers striving to strike a balance between protecting employees’ health, minimizing the business impact of the pandemic, and respecting employees’ right to privacy and to work free from discrimination. The mass closure of schools in numerous states and cities including New York City requires employers to consider how federal, state and local leave laws may apply to an employee who cannot work because of child care responsibilities. Federal, state, and local agencies have issued new governmental directives and guidance to help employers comply with their legal obligations and manage the risk to their workforces and businesses posed by COVID-19. This Client Memorandum serves as a follow-on to the [Employment Law Considerations and Practical Guidance for Employers Client Memorandum](#) issued on March 10 (“March 10 Memorandum”), and summarizes the most recent guidance for employers.

¹ For a more detailed discussion of some of the most relevant federal, state, and local statutes applicable to employers, please refer to our previous Client Memorandum dated March 10, 2020, which is available at: <https://www.paulweiss.com/practices/litigation/employment/publications/coronavirus-employment-law-considerations-and-practical-guidance-for-employers?id=30833>.

² Tedros Adhanom Ghebreyesus, “WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19 - 11 March 2020,” (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

³ N.Y. Times, “Coronavirus Live Updates: Trump Says to Limit Gatherings to 10 People,” (Mar. 16, 2020), <https://www.nytimes.com/2020/03/16/world/live-coronavirus-news-updates.html>.

Updated Federal Guidance

Guidance on OSHA

The Occupational Safety and Health Administration (the “OSHA”) recently updated guidance to better prepare workplaces for the coronavirus outbreak (the “OSHA Guidance”).⁴ According to OSHA, these guidelines do not create new legal obligations but are “advisory” recommendations and descriptions of pre-existing mandatory safety and health standards. The newly issued guidance states that prompt identification and isolation of potentially infectious individuals at a worksite is “a critical step” in protecting employees, and recommends that all employers take the following steps, to the extent possible.⁵

- Develop an infectious disease preparedness and response plan, which considers the level of risk of its workforce.
- Implement basic infection prevention measures, including establishing policies and practices such as flexible worksites and flexible work hours to increase the physical distance among employees.
- Develop policies and procedures for prompt identification and isolation of employees who are sick or experiencing symptoms of COVID-19.
- Develop, implement, and communicate about workplace flexibilities and protections.
- Implement workplace controls, including engineering controls, administrative controls, safe work practices, and use of personal protective equipment, depending on worker risk of occupational exposure. According to the Department of Labor (the “DOL”), most American workers will likely fall in the lower or medium exposure risk levels.

Guidance on FMLA and ADA

The DOL provided additional guidance on the application of the Family and Medical Leave Act (the “FMLA”) and the Americans with Disabilities Act (the “ADA”).⁶

- Employees who have COVID-19 or whose family members are sick from the virus may be entitled to up to 12 weeks of unpaid, job-protected leave under the FMLA if COVID-19 creates a “serious health condition.” A “serious health condition” under the FMLA means “an illness, injury, impairment or

⁴ OSHA, “Guidance on Preparing Workplaces for COVID-19,” <https://www.osha.gov/Publications/OSHA3990.pdf>.

⁵ *Id.* at 9.

⁶ Department of Labor, “COVID-19 or Other Public Health Emergencies and the Family and Medical Leave Act Questions and Answers,” <https://www.dol.gov/agencies/whd/fmla/pandemic>.

physical or mental condition that involves inpatient care . . . or continuing treatment by a health care provider.” At this time, leave taken by employees for the purpose of avoiding exposure to COVID-19 would not be protected under the FMLA.

- Federal law does not require employers to provide leave for employees caring for children due to school or child care closures. However, the DOL recommends that employers review their leave policies to consider providing increased flexibility to their employees given the public health emergency.
- Employers can have a policy of sending employees home if they show symptoms of COVID-19 as long as the policy does not discriminate against employees on the basis of race, age, national origin, or other protected characteristics.
- Employers can require an employee to provide a doctor’s note, submit to a medical exam (e.g., temperature check), or remain symptom-free for a certain amount of time before returning to work under the ADA’s “direct threat” exception. Employers are required to notify employees in advance if they plan to require a “fit-for-duty certification.”⁷ The DOL notes, however, that it may be difficult for employees to get a doctor’s note as healthcare resources may be overwhelmed. Employers should also keep in mind that state and local laws and/or collective bargaining agreements governing an employee’s return to work may apply.

Impact of COVID-19 Pandemic Designation on ADA Compliance

As discussed in our March 10 Memorandum, under the ADA, as a general rule, an employer is prohibited from requiring a medical examination or making a disability-related inquiry unless the employee’s condition could pose a “direct threat” to the workforce. However, the WHO’s designation of COVID-19 as a pandemic, the U.S. Centers for Disease Control and Prevention (the “CDC”)’s COVID-19 risk assessments, and state and local public health agency directives concerning COVID-19 now provide U.S. employers with further “objective evidence” that COVID-19 should be deemed a “direct threat” under the ADA, thereby justifying more proactive steps to protect the workforce, such as mandatory temperature readings. An employer can mitigate the risk of a disability discrimination claim by making clear that additional medical inquiries are intended to ascertain whether employees have symptoms, not whether they have an impairment or other medical condition. It is essential that any temperature readings are applied in a non-discriminatory manner and in the least invasive manner possible. And, any data obtained from checking temperatures or other medical inquiries should be treated as confidential medical information.

⁷ 29 U.S.C. § 2614; 29 C.F.R. § 825.312.

Impact of Expanded DHS Travel Restrictions

On March 13, the Department of Homeland Security (the “DHS”) announced a new process for U.S. citizens, legal permanent residents, and their immediate families who are returning home after visiting several European countries,⁸ Iran, and China.⁹ Under this process, travelers coming back from the restricted countries are required to go through enhanced entry screening upon approval and immediately quarantine themselves at home. In light of this new development, employers would be able to ask employees whether they are affected by the new DHS process and, if so, work from home regardless of whether they have COVID-19 or are experiencing symptoms.

New York State Interim Guidance

On March 11, New York State issued “Interim Guidance for Procedures When Identifying an Employee with Concerns for COVID-19 Exposures” (the “NYS Interim Guidance”).¹⁰ The NYS Interim Guidance includes the definitions that New York local health departments use when determining whether to institute mandatory or precautionary quarantine, and provides the following protocols.¹¹

- Required Mandatory Isolation¹²: Mandatory isolation is required if an individual has tested positive for COVID-19, regardless of whether the individual is displaying symptoms for COVID-19.
- Required Mandatory Quarantine¹³: Mandatory quarantine is required if an individual has been in close contact (6 ft.) with someone who has tested positive for COVID-19, but is not themselves displaying

⁸ These countries include Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and Switzerland.

⁹ Department of Homeland Security, “Department of Homeland Security Outlines New Process for Americans Returning from Certain European Countries, China, and Iran,” (Mar. 13, 2020), <https://www.dhs.gov/news/2020/03/13/departement-homeland-security-outlines-new-process-americans-returning-certain>.

¹⁰ NYS Department of Health, “Interim Guidance for Procedures When Identifying an Employee with Concerns for COVID-19 Exposures,” (Mar. 11, 2020), <https://ocfs.ny.gov/main/news/2020/COVID-2020Mar11-Interim-Guidance-Employee-Risk-Factors.pdf>.

¹¹ See NYS Department of Health, “2019 Novel Coronavirus (COVID-19) Interim Containment Guidance: Precautionary Quarantine, Mandatory Quarantine and Mandatory Isolation Applicable to all Local Health Departments (LHD),” https://www.health.ny.gov/diseases/communicable/coronavirus/docs/quarantine_guidance.pdf.

¹² Isolation “separates sick people with a quarantinable communicable disease from people who are not sick.” See *id.*

¹³ Quarantine “separates and restricts the movement of people who were exposed to a contagious disease to see if they become sick.” See CDC, “Legal Authorities for Isolation and Quarantine,” <https://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html>.

symptoms for COVID-19, or if the individual has traveled to China, Iran, Japan, South Korea or Italy and is displaying symptoms of COVID-19. If an individual fails to comply with mandatory quarantine, they can be directed by legal order to do so.

- **Precautionary Quarantine:** Precautionary quarantine is recommended if an individual (i) has traveled to China, Iran, Japan, South Korea or Italy while COVID-19 was prevalent, but is not displaying symptoms, or (ii) is known to have had a proximate exposure to a person who has tested positive for COVID-19 but has not had direct contact with such a person and is not themselves displaying symptoms, or both.

The NYS Interim Guidance urges employers to remind employees that the risk of the coronavirus is not correlated with race, ethnicity, or nationality. It also reiterates that an employer should not make any determinations of risk based on race or country of origin, and should be sure to maintain confidentiality with respect to the identity of employees who are affected by COVID-19.

New York City Guidance for Non-Healthcare Employers

On March 13, New York City issued guidance for employers who are in non-healthcare settings (the “NYC Guidance”).¹⁴ In addition to reiterating that employers should create an outbreak response plan, encourage good personal hygiene, and guard against racism and stigma, the NYC Guidance identifies the following other measures an employer may consider taking:

- **Social distancing:** Employers are encouraged to consider creating staggered work hours for their workforce (*e.g.*, changing some employees’ work hours to 8 a.m. to 4 p.m. while having other employees work from 9 a.m. to 5 p.m.) or permitting flexible work schedules in order to decrease person-to-person contact among employees.
- **Disinfection:** Employers should disinfect frequently touched surfaces and objects (*e.g.*, drinking fountains and elevator buttons) daily, and when disinfecting, employees should wear and use appropriate personal protective equipment. Hand sinks should have clean running water, soap, and paper towels at all times.
- **Keeping Sick Employees Home:** If employees, regardless of their recent travel history, have symptoms of an acute respiratory illness including cough, fever, or shortness of breath, employers should recommend that they stay home until they no longer have a fever for at least 72 hours without taking

¹⁴ NYC Department of Health, “Coronavirus Disease (COVID-19): Guidance for Businesses and Non-Health Care Settings,” (Mar. 10, 2020), <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/novel-coronavirus-faq-for-businesses.pdf>.

any fever-reducing medications. Also, employers may consider relaxing leave policies to accommodate employees who are feeling sick.

- **Isolating Employees Who Develop Symptoms at Work:** If an employee develops symptoms at work, employers should place the ill employee in a private room away from others and ask them to wear a face mask. Sick employees should be sent home immediately.

The NYC Guidance also provides information about resources available to employers and employees, and encourages employers to ensure that employees are aware of these resources. For example, employers and employees who are feeling distressed or overwhelmed by the outbreak can contact a confidential help line that provides supportive therapy and crisis counseling by trained counselors by calling 888-NYC-WELL (888-692-9355) or texting “WELL” to 65173. Employees who experience discrimination or harassment due to their race, national origin, or other characteristics may lodge a complaint with the New York City Commission on Human Rights by calling 311.¹⁵

Treatment of School Closures Under Current Federal, State and City Leave Laws

As discussed in our March 10 Memorandum, New York City’s Earned Safe and Sick Time Act requires employers with five or more employees to provide each covered employee who works more than 80 hours per calendar year with up to 40 hours of paid sick leave per calendar year (companies with four or fewer employees must provide up to 40 hours of unpaid leave).¹⁶ Under the NYC law, employees may use their sick time for, among other reasons, their own illness or health condition, caring for a family member, or when the employer’s business or the employee’s child’s school or day care is closed due to a public health emergency.

There is currently no corresponding provision under the New York State’s Paid Family Leave Act (“PFLA”) to cover a leave necessitated by school or day care closure due to a public health emergency.¹⁷ The PFLA requires employers to provide eligible employees with job-protected paid leave for, among other reasons, the care of a family member with a serious health condition, but does not cover school closures. Employees are eligible for leave under the PFLA when they have worked 20 hours or more per week for 26 consecutive weeks, or after they have worked for 175 days if working less than 20 hours per week. Eligible employees

¹⁵ See *id.*

¹⁶ See NYC Consumer Affairs, “Paid Safe and Sick Leave: What Employees Need to Know,” <https://www1.nyc.gov/site/dca/about/paid-sick-leave-what-employees-need-to-know.page>.

¹⁷ See 12 NYCRR part 380. See also New York State, “How are Paid Family Leave (PFL) and the Federal Family and Medical Leave Act (FMLA) different?,” <https://paidfamilyleave.ny.gov/paid-family-leave-and-other-benefits>.

could receive up to 10 weeks of paid leave. The PFLA does not cover an employee's own serious health condition.

At this time, no federal law requires an employer to provide leave for private sector employees who take off from work to care for healthy children dismissed from school or day care due to a public health emergency. That being said, the DOL encourages employers to "review their leave policies to consider providing increasing flexibility to their employees and their families"¹⁸ "given the potential for significant illness under some pandemic influenza scenarios."¹⁹ In addition, on Saturday, March 14, the House passed H.R. 6201 - the Families First Coronavirus Response Act, which could potentially provide up to three months of paid family and medical leave to certain employees who are affected by school closings, among other things.²⁰ The House amended the bill on March 16, limiting employees' eligibility for paid family and medical leave. A more detailed discussion of H.R. 6201 will be provided in an upcoming client alert, after it is passed by the Senate.

The OSHA Guidance can be found here: <https://www.osha.gov/Publications/OSHA3990.pdf>.

The DOL Guidance on FMLA and ADA can be found here:
<https://www.dol.gov/agencies/whd/fmla/pandemic>.

The NYS Interim Guidance can be found here: <https://ocfs.ny.gov/main/news/2020/COVID-2020Mar11-Interim-Guidance-Employee-Risk-Factors.pdf>.

The NYC Guidance can be found here: <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/novel-coronavirus-faq-for-businesses.pdf>.

The DHS announcement on the arrival restrictions can be found here:
<https://www.dhs.gov/news/2020/03/13/departments-homeland-security-outlines-new-process-americans-returning-certain>.

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¹⁸ Department of Labor, "COVID-19 or Other Public Health Emergencies and the Family and Medical Leave Act Questions and Answers," <https://www.dol.gov/agencies/whd/fmla/pandemic>.

¹⁹ *Id.*

²⁰ The text of the House bill is available here: <https://www.congress.gov/bill/116th-congress/house-bill/6201/text>.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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