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State-Specific Coronavirus Employer Q&A.

Based on questions we have received over the last several days, here are some general principles that employers should keep in mind when navigating issues related to COVID-19:

1. Communicate with employees, but be mindful of privacy rights and considerations.
2. Have a centralized, internal communication and planning team. This team should be made up of individuals from operations, human resources, security, legal, and information technology.
3. Make a safe workplace a top priority.
4. Do not discriminate, and apply workplace policies in a fair and neutral manner.
5. Evaluate options for leave of absences, whether paid or unpaid.
6. Have a plan for layoffs or a temporary shut-down.
7. Stay up to date on the latest developments for the locations in which operations are conducted.

Below are general answers to specific questions that may arise in considering the above-mentioned principles. COVID-19 is a very complex topic and is constantly evolving, and therefore, it is important to stay abreast of new information, as well as federal, state, and local advisories in an employer's areas of operation. **Note that the answers below focus mainly on federal law and state laws of Indiana, Ohio, Illinois, Kentucky, and Minnesota.**

NOTE:

****This is not meant to be construed as legal advice or guidance on a particular circumstance as each issue that arises for a particular employer will require a fact-intensive evaluation of many factors, including without limitation the employer's policies, the severity of COVID-19 as indicated by public health officials, and local or nationwide emergency regulations and directives.**

If you have questions regarding your particular situation or circumstances, please feel free to contact any member of Taft's Employment & Labor Relations Group directly.

When should an employer require employees to stay at home?

Employers can legally request and require an employee to stay home for the COVID-19's 14-day incubation period if the employee presents a real threat to other employees. Such employees include those who are ill or are experiencing any of the COVID-19 symptoms, those who have been exposed through another individual, or those who have traveled to countries where there is a high exposure risk.

Employers may also decide to suspend operations for a period of time if directed to do so by a local, state, or federal governmental authority or if it becomes more prudent to prevent employees from coming into work (for example, if there are confirmed cases of COVID-19 in the area). In this case, employers could consider teleworking arrangements with employees.

To avoid any sort of discrimination issues (especially on the basis of national origin and/or perceived

disability), employers should put the duty on the employee to come forward and self-report such symptoms or exposure risks. In addition, employers should be sure to treat all employees in a specific job category in the same and consistent manner.

What if an employee tests positive for COVID-19?

Employers should immediately send home all employees who have worked with that particular employee within the last 14 days, and should also notify any clients, customers, or other third parties with whom the employee had contact. Employers also should not identify by name the individual who tested positive (see below for privacy concerns).

Can an employer prevent employees from personal travel?

Not necessarily. While an employer cannot typically prohibit legal travel, the employer may choose to deny time off if the denial is based on the destination, business cost of a resulting quarantine, or other legitimate business-driven reasons. The reason cannot be the national origin of the employee. Employers can require employees to self-quarantine for the 14-day incubation period once they return home from travel.

Employers should educate their employees before they engage in such travel and that such travel may result in quarantine or self-monitoring for a prolonged period of time. In addition, employers should monitor those employees returning from such travel for signs of illness.

What if an employee shows symptoms of COVID-19?

An employer may ask an employee if he or she is experiencing symptoms of COVID-19, but make sure the inquiry is limited to relevant symptoms. If the employee feels ill or is experiencing symptoms, the employer may send him or her home and encourage him or her to see a doctor.

On March 18, 2020, the EEOC issued guidance clarifying that employers may ask an employee who calls in sick if he or she is experiencing COVID-19 symptoms – which the EEOC identifies as fever, chills, cough, shortness of breath, or sore throat. Relatedly, the EEOC advises that employers may delay the start date for an applicant or withdraw a job offer made to an applicant (if the employer would need the employee to start immediately) if the applicant has been diagnosed with COVID-19 or exhibited symptoms of it.

Can an employer take the temperatures of its employees?

According to the EEOC's March 18, 2020 guidance, yes. (Prior to the issuance of this new guidance, the answer had not been entirely clear.) While measuring an employee's temperature is a medical examination under the ADA, the EEOC's new guidance states: "Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature."

The EEOC also clarified that an employer may also screen applicants for COVID-19 and take an applicant's temperature, so long as it is performed after a conditional job offer and the employer does so on a consistent basis.

Still, as a practical matter, an employee or applicant may be infected with the COVID-19 coronavirus without exhibiting recognized symptoms such as a fever, so temperature checks may not be the most effective method for protecting the workforce.

Can an employer ask employees to disclose whether they have a medical condition that could make

them especially vulnerable to COVID-19 complications if they are not experiencing any symptoms?

No. Making disability-related inquiries of employees without symptoms is prohibited by the ADA.

Should leave taken as a result of COVID-19 be designated as FMLA?

Yes. For an employee to invoke their 12 weeks of unpaid FMLA leave, he or she must have a "serious health condition" and otherwise satisfy the FMLA eligibility criteria. Based on recent reports, COVID-19 would qualify as a serious health condition depending upon the specific situation. Accordingly, an otherwise eligible employee with COVID-19 or an employee who is taking care of a qualifying family member with COVID-19 would be permitted to take protected FMLA leave.

However, employees who refuse to come to work out of fear of contracting COVID-19 would not qualify for FMLA leave.

Also, it is important to keep in mind that many states have paid sick leave and family medical leave laws that may be implicated in the event an employee (or dependent family member) contracts COVID-19. Be sure to check the state and local laws of each jurisdiction in which the employer operates or has employees.

****Update:** The U.S. House of Representatives passed the Families First Coronavirus Response Act on March 14, 2020, and the bill has been sent to the Senate. It includes many provisions that apply to employers, such as emergency-based FMLA and paid sick leave. The bill is expected to undergo revisions prior to being passed by the Senate, and therefore, a more detailed update regarding the passed version of the bill will follow.

Is telework an option?

As a general rule, there is no requirement that an employer allow employees to telecommute. In determining whether to allow particular employees to telecommute, an employer should ensure that its flexible workplace policies are administered in a way that does not discriminate against an employee because of a protected characteristic (such as race, sex, national origin, age, disability, etc.). An employer should be prepared to offer a legitimate, nondiscriminatory explanation for why it may choose to allow some employees to work from home and not others.

In addition, employers should have a system in place to track hours worked by non-exempt employees to ensure that proper wages (including overtime if applicable) are paid.

Employers should also consider possible implications under the ADA (and related accommodation laws) when deciding whether, and in what circumstances, it will allow employees to work from home. Under the ADA, employers have an obligation to provide reasonable accommodations to employees with a disability unless doing so will present an undue hardship. Intermittent or temporary telecommuting arrangements may be a reasonable accommodation for such employees if they can successfully perform the essential functions of a job without coming to work. By allowing temporary telecommuting arrangements in response to COVID-19, an employer may impact its ability to decline temporary telecommuting arrangements as a reasonable accommodation to persons with disabilities in the future. Therefore, employers should carefully consider the precedent set by allowing employees to telework in response to COVID-19 when the essential functions of their position cannot be adequately performed at home. If the employer allows employees to telecommute where it would not otherwise do so because of the unique challenges posed by the COVID-19 outbreak, it should make clear in its communications that the telecommuting accommodation is being granted due to the extraordinary circumstances posed by the virus.

What if an employee has children affected by a school closure?

At this time, there is no federal law that requires employers to provide leave (whether paid or unpaid) for employees caring for healthy children who are unable to attend school. However, the Families First Coronavirus Response Act (in its current form) includes paid leave for employees caring for children as a result of a school closure. We will have more information on this once the bill is reviewed and passed by the Senate.

In addition, state laws may impose different requirements. For example, California requires most employers to provide unpaid leave to parents, guardians, grandparents, stepparents, foster parents or persons standing in loco parentis to a child for child care during unexpected school closures. Similarly, New York City mandates that employers provide employees with leave necessitated by the "employee's need to care for a child whose school or childcare provider has been closed by order of a public official due to a public health emergency." Chicago's paid sick leave ordinance provides that employees may take paid sick leave when their child needs care because their school is closed due to a public health emergency.

Even if there is no requirement in a particular state to pay employees while staying home to care for children during a school closure, employers should consider different options to support employees during this period. Some options include allowing affected employees to telework, attempting to coordinate reduced work schedules or coordinated childcare among affected employees or allowing affected employees to run a deficit in paid time off programs that can be repaid over time.

What if an employee refuses to come into work in order to avoid contracting COVID-19?

The employer should address this issue on a case-by-case basis and determine the basis of the particular employee's refusal before requiring the employee to come to work.

The Occupational Safety & Health Act permits employees to refuse to work if they believe on reasonable grounds that there is a dangerous condition at the work site or that the work constitutes a danger to their health and safety. If the office at which the employee works has confirmed cases of the virus, then it may be best to allow those employees to telework or to take leave time.

In addition, the National Labor Relations Act allows employees to engage in concerted action regarding the conditions of employment. Accordingly, an employee may be protected from discipline for refusing to come to work if the refusal is part of a concerted protest against unsafe working conditions.

Does contraction of COVID-19 generally implicate the ADA?

Generally no. In most cases, COVID-19 is a transitory condition and is, therefore, not a qualified "disability" under the ADA.

Keep in mind, however, that this answer could change in the event an employee develops lasting exacerbation of existing conditions or experiences symptoms that substantially limit a major life activity for a more extended period of time. In these circumstances, the employer should gather information regarding the medical impairment and engage in the interactive process with the employee to determine whether the employee can perform the essential functions of the job and, if so, what reasonable accommodations can be afforded to the employee to enable him or her to perform those essential functions.

How should employers prevent harassment or discrimination of those suspected of being infected?

Employers must take steps to prevent discrimination and harassment against individuals who are disabled or perceived as disabled because they are exhibiting symptoms suggestive of having contracted COVID-19. In order to accomplish this, employers should ensure the confidentiality of all employees' medical information and leave details to prevent harassment. Employers should consider reminding employees of anti-harassment and discrimination company policies, and should make sure that leave policies and other applicable workplace policies are being applied in a uniform, equitable, and neutral manner. And as always, employers must be vigilant about promptly responding to and investigating any complaints of harassment or bullying in the workplace.

If an employee contracts COVID-19, what information should be shared with other employees?

If an employee contracts a confirmed case of COVID-19, the employer should inform its other employees of possible exposure to COVID-19 in the workplace. This should be done by simply stating that an unidentified employee with whom they may have had recent contact has been exposed to or has tested positive for COVID-19.

Employers should not, however, disclose to co-workers the identity of the infected employee. Communications with employees about medical conditions should be kept confidential and medically-related documents kept in a location separate from the employee's personnel file.

Do employers need to pay exempt employees during periods of leave or a temporary shutdown?

No, unless the employee is still performing work. Employers must pay exempt employees their full salary for any week in which they perform any work, even if the employee is telecommuting. If an employer furloughs an exempt employee for an entire workweek, then no salary is owed for that full week and the employee's exempt status will not be impacted.

Do employers need to pay non-exempt employees during periods of leave or a temporary shutdown?

No. Employers must pay non-exempt employees only for hours actually worked.

Note that an exception does exist for non-exempt employees who receive fixed salaries for a fluctuating workweek. Such employees must receive their full salary of any week in which they performed any work.

Should an employer shut down facilities to avoid liability?

It depends. As mentioned above, the Occupational Safety and Health Act states that employers have a legal obligation to provide a safe workplace and requires employers to protect employees against "recognized hazards" to safety or health that may cause serious injury or death. Here, OSHA will likely rely upon recommendations issued by the Centers for Disease Control, the World Health Organization, or similar resources to determine the extent of a "recognized hazard."

Employers need to be mindful of when it becomes reasonably likely that employees at a worksite will be exposed to COVID-19, whether by the nature of the profession (i.e., first responders, health care workers, transportation workers) or by the presence of employees in the workplace who have tested positive for the virus. Employers will need to develop a plan with procedures in place to protect their workforce—and, the time is now to start developing such a plan. Such a plan can include: conducting employee awareness training, developing procedures for issuing and the use of personal protective equipment, developing a means of reporting illness or exposure, and preserving documentation and

records.

The prudent approach is to give employees the option to telecommute (if possible) or to take leave during this time. At the point in time when the employer determines that employees are at a higher risk of exposure by coming into work, then employers should re-evaluate and decide whether to cease operations at a particular facility (especially for those employees who cannot telecommute due to job duties).

Does the WARN Act apply to an employee furlough or temporary closing?

The Worker Adjustment Retraining Notification Act generally requires employers with 100 or more employees to provide at least 60 calendar days of notice to its employees prior to any plant closing or mass layoff. A plant closing is defined as 50 or more countable employment losses at a single site of employment in a 90-day period that results from ceasing operations in one or more operating units. A mass layoff is defined as 50 or more countable employment losses at a single site of employment in a 90-day period that also involves 33% of the active workforce at the site.

Notably, if employees are laid off for less than six months, then the employees do not suffer an employment loss and WARN Act notice requirements are not triggered. Keep in mind that it may be difficult to know how long the layoff will stay in place, so providing notice may be the most prudent approach.

In addition, the WARN Act provides an exemption when layoffs occur due to unforeseeable business circumstances. The employer, however, must still provide "as much notice as is practicable, and at that time shall give a brief statement of the basis for reducing the notification period." Accordingly, if the employer is in a position to evaluate the impact on its workforce, the employer must provide notice to employees who will be affected by a temporary shutdown. In addition, the employer must provide a statement to employees that explains why more extensive notice could not be provided—in this circumstance, it would be the unforeseeable nature of COVID-19 and its impacts on the workplace.

The WARN Act also has an exception for a "natural disaster." However, the Act does not specifically address whether a pandemic qualifies as a natural disaster, and therefore, it is not advisable to rely on this exception to avoid notice requirements.

What about state-specific WARN Acts?

Several states have "mini-WARN" laws, which may provide further notice requirements and apply to layoffs of a short duration. Indiana and Kentucky do not have a mini-WARN law and, therefore, Indiana and Kentucky employers must comply only with the federal WARN Act.

In addition to compliance with the federal WARN Act, an Ohio employer who lays off or separates fifty or more employees in a seven-day period because of a lack of work is required to furnish notice to the director of Ohio Department of Job and Family Services (ODJFS) the dates of layoff or separation and the approximate number of individuals being laid off or separated. Such notice must be made at least three days before the first layoff.

Similarly, Illinois employers who lay off, at a single site of employment, either 33% of their employees (excluding part-time employees) including at least 25 total employees (excluding part-time employees), or, who lay off at least 250 employees (excluding part-time employees), must give 60 days prior notice of the layoff. Notice is to be given to the employees and the Department of Commerce and Economic Opportunity and the chief elected official of each municipal and county

government where the layoff occurs. Notably, Illinois law provides for an exception to the notice requirement if the Illinois Department of Labor determines that the need for a notice was not reasonably foreseeable at the time the notice would have been required, and specifies what notice should be provided to the Department of Labor in order for that finding to be made.

Minnesota's "mini-WARN" law requires any employer providing notice under the federal WARN act to also report to the Minnesota Commissioner of Employment and Economic Development the names, addresses, and occupations of the employees who will be or have been terminated. The mini-WARN law encourages Minnesota businesses "considering a decision to effect a plant closing, substantial layoff, or relocation of operations … to give notice of that decision as early as possible" to the Commissioner, employees of the affected establishment, any employee organization representing the employees, and the local government where the establishment is located.

Do employer-instituted shutdowns entitle workers to unemployment benefits?

Yes, employees are generally entitled to unemployment benefits if they are furloughed when a facility temporarily shuts down and all other unemployment requirements are met.

In Indiana, the requirements include (1) being able, available and actively searching for work, (2) losing a job through no fault of the employee, and (3) the employee earned enough wages to qualify for payments. Indiana allows an employee to file a claim as soon as he or she becomes unemployed. There is also a one week waiting period after an employee files a claim, during which the employee will not receive benefits.

In Ohio, unemployment benefits are available to individuals who are totally or partially unemployed due to no fault of their own. The employee must be able to work, available for work, and actively seeking suitable work. Like Indiana, Ohio allows an employee to file a claim as soon as he or she becomes unemployed. There is generally a one-week waiting period after an employee files a claim, during which the employee will not receive benefits. However, by Executive Order on March 16, 2020, Ohio Governor Mike DeWine announced that individuals who are totally or partially unemployed, or who are participating in the SharedWork Ohio Program will not be required to serve a waiting period before receiving unemployment insurance or SharedWork benefits. Ohio employers can refer to the ODJFS website for specific information about Coronavirus and Unemployment Insurance Benefits.

In Illinois, employees temporarily laid off because of COVID-19 can qualify for UI benefits as long as they are able and available for and actively seeking work. Under emergency rules recently adopted, the individual need not register with the employment service. Further, if the individual is confined to their home due to (1) a medical professional's diagnosis of COVID-19, (2) necessary care for a family member diagnosed as having COVID-19, or (3) due to government recommended/imposed quarantine, is eligible for UI benefits if all other requirements are met. Illinois employers can refer to the Illinois Department of Employment Security website for further information about COVID-19 and UI benefits.

On March 16, Minnesota Governor Tim Walz signed an executive order making workers affected by COVID-19 eligible for unemployment benefits. Under the executive order, applicants are eligible for unemployment benefits if (1) a healthcare professional or health authority recommended or ordered that they avoid contact with others, (2) they have been ordered not to come to their workplace due to the outbreak, and (3) their children's school district, daycare, or other childcare provider is unavailable, and no reasonable accommodation from their employer or other childcare arrangement was available.

In Kentucky, unemployment benefits are available to individuals who are unemployed through no fault of their own, are able and available to work and are making a reasonable effort to obtain new work, and register for work when they file their claim. Kentucky allows an employee to file a claim as soon as he or she becomes unemployed. There is generally a one-week waiting period after an employee files a claim, during which the employee will not receive benefits. However, on March 16, 2020, Kentucky Governor Andy Beshear, by Executive Order, said Kentucky will waive the waiting period for unemployment compensation for those who are losing their jobs because of COVID-19 and will waive any work search requirements while the state of emergency is in effect.

Keep in mind that unemployment benefits will vary by state, and there may also be waiting time periods in place before benefits are provided.

What if the employee's hours are just reduced, then is the employee eligible for unemployment?

It depends. In Indiana, employees may also qualify for partial benefits if the employer reduces the work hours to less than the employee's regular full-time work week. Any severance pay or other employer-provided compensation will be deducted from the employee's unemployment benefit.

In Ohio and Illinois, employees may also qualify for partial benefits if the employer reduces the work hours to less than the employee's regular full-time work week. In both states, an individual is "partially unemployed" in any week if, due to involuntary loss of work, the total remuneration payable to the individual for such week is less than the individual's weekly benefit amount.

In Minnesota, employees are eligible for unemployment benefits if their hours are "substantially reduced," meaning reduced to below 32 hours per week.

In Kentucky, employees also may be eligible for partial benefits if they are still employed by their regular employer but are working less than their normal full-time hours due to lack of available work.

Some states also have "work share" programs. These programs are meant to soften the blow of full layoffs by allowing employers to reduce hours for full-time employees, who then may collect prorated unemployment benefits for the lost hours. To take advantage of a work share program, the employer must submit a plan to state officials for approval, and the requirements for a particular plan vary drastically by state. Some employers that implement work share programs continue to fund employee benefits while the program is in place. SharedWork Ohio is Ohio's voluntary layoff aversion program. Illinois and Minnesota similarly have work share programs in place. Indiana and Kentucky have not implemented an official work share program.

If an employee is ill and unable to work, will he or she be eligible for unemployment benefits?

Not likely. In Indiana, Ohio, Illinois, and Kentucky, claimants for unemployment benefits must be "able" to work. An ill employee likely would not meet that requirement. Similarly, in Minnesota, claimants must be "available for suitable employment."

If employees are no longer working, are they still entitled to group health plan coverage?

Not necessarily. Employers should check their group health plan document to determine how long employees who are not actively working may remain covered. Once this period expires, active employee coverage must be terminated (unless the carrier or self-funded plan sponsor otherwise agrees to temporarily waive those eligibility provisions) and a COBRA notice must be sent. Keep in

mind that employees do not have to be terminated or permanently laid off to be eligible for COBRA.

If the applicable plan is self-funded and the employer would like to waive plan eligibility provisions, the employer must first make sure that any stop-loss coverage insurance carriers agree to cover claims relating to participants who would otherwise be ineligible for coverage.

If an employee contracts COVID-19, does workers' compensation apply?

It depends on the circumstances. Taft has prepared a client alert on this point available here. Generally speaking, any illness or injury arising out of or in the course of employment would trigger workers' compensation—this includes a contagious illness that is contracted at work or while traveling for work. The problem is that, in most circumstances, it is difficult to know for sure how and where a particular employee contracts an illness.

If the employee travels for work from a place with little or no risk of contraction to a place with a high risk and is diagnosed within the 14-day incubation period after such travel, then it is likely that the illness will be deemed covered by workers' compensation. However, if an employee incidentally contracts COVID-19 from an infected co-worker, there likely will not be workers' compensation liability.

In addition, the State of Washington recently directed its Department of Labor and Industries to ensure workers' compensation protections for health care workers and first responders. The directive instructs the Department to change its policies regarding coverage for these two groups and to "provide benefits to these workers during the time they're quarantined after being exposed to COVID-19 on the job." While Indiana, Ohio, Illinois, and Kentucky have not issued a similar directive to date, they and other states may follow suit in the upcoming days or weeks. In Minnesota, if an emergency responder contracts an infectious or communicable disease that they are exposed to in the course of employment outside of a hospital, the disease is presumed to be an occupational disease due to the nature of their employment.

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