

## **MRLA Legal Center: Employment Law Essentials for a Pandemic (Honigman)**

**March 12, 2020**

As the spread of COVID-19 fills headlines, more and more businesses are asking what can be done to keep their employees safe and maintain continuity of business operations in an uncertain world. In this client alert, we provide an overview of some key legal considerations, answers to frequently asked questions, and where to go to find other reliable information and advice. Please be assured that we at Honigman have plans and procedures in place to ensure we will be able to meet client deadlines and service client needs no matter what COVID-19 brings.

### **Employment Law Essentials for a Pandemic**

1. Don't discriminate. The earliest incidences of COVID-19 occurred in Asia, and some individuals are wrongly associating the disease with persons of Chinese national origin. Just because COVID-19 outbreaks have been concentrated in certain regions, employers may not discriminate on the basis of national origin, ethnicity, disabilities, or other protected categories.
2. Be careful about inquiries into underlying medical conditions or disabilities.
3. Don't commingle employee medical information with personnel files.
4. Don't forget about leave under the Family Medical Leave Act ("FMLA") or leave as an accommodation under the Americans with Disabilities Act ("ADA").

### **Frequently Asked Questions**

Honigman is a business-minded law firm that provides timely, practical, and prudent legal advice. For weeks, our attorneys have been helping businesses plan and respond to the expanding COVID-19 pandemic. Below is a summary of some of the common questions we have received.

#### ***What can I ask my employee when they call in sick?***

Employers may ask an employee if they have symptoms consistent with COVID-19, including cough, shortness of breath or a fever. All information about the employee's illness must be maintained in a confidential medical record that is separate from the employee personnel file.

#### ***My employee has symptoms of COVID-19, what do I do now?***

If an employee calls in sick, instruct them to stay home from work until they and any other person residing in their home has been free of symptoms for the duration of the incubation period. According to the Centers for Disease Control and Prevention (“CDC”), the longest incubation period is expected to be 14 days. If an employee reports to the workplace with symptoms, privately instruct them to go home and seek medical advice. Be respectful when doing so and mindful of any embarrassment they might feel. Make sure you keep all medical information and the employee’s identity confidential. Once you remove the employee from the workplace, you should clean and disinfect the employee’s work area and other common areas (bathrooms, break room, etc.) and do so in a manner so as to minimize exposure. You may also have an obligation to report the symptoms to local public health agencies.

***What do I do if my employee or their family member has contracted COVID-19 but the employee cannot use paid sick leave to cover the absence?***

Depending on the severity and other circumstances, COVID-19 might constitute a serious health condition that qualifies for up to 12 weeks of unpaid leave under the FMLA for the employee’s medical treatment or recovery or for the employee to care for a serious health condition of an immediate family member. State laws may provide additional protections. If the employee’s leave may qualify for FMLA, be sure to timely provide all notices regarding eligibility for leave, any required medical certification, leave designation, and the like.

***What if my employee wants to come to work even though they are sick?***

The Occupational Safety and Health Act (OSH Act) and state law equivalents require you to generally provide your employees with a workplace that is free from recognized hazards that are causing or are likely to cause death or serious physical harm. This can include unreasonable exposure to contagious or infectious diseases. You may order an employee to stay away from the workplace if they are displaying symptoms of a contagious disease, such as COVID-19. Note that if an employee is infected by COVID-19 on the job, that is a recordable illness that must be reported on OSHA300, OSHA301, and OSHA300A forms.

***Must I pay my employee when they are out sick due to COVID-19 after they have exhausted their paid time off?***

No. However, you can choose to give your employee more paid leave than they would be entitled to under your policies. If you have a unionized work force, you should discuss the grant of additional leave with the union representatives before implementation.

***My employee is staying home on quarantine. Do I need to pay them?***

If an employee is quarantined at home and working, then, yes, you need to compensate them for their work. If they are not working while quarantined, then you can require the employee to exhaust available paid time off, such as vacation time and paid sick leave, while they are away from work. If

an employee is staying home, not working, and out of available paid leave, whether you have to pay the employee depends on their status as an exempt or non-exempt employee under the Fair Labor Standards Act (FLSA) and corresponding state law. Generally, if the employee is non-exempt, such as an hourly employee, they are not entitled to be paid when not working. If the employee is classified as exempt under the FLSA, the employee must be paid their full salary if they perform any work during a workweek. However, if the exempt employee performs no work during a workweek they may not be entitled to pay for that week. Further, the FLSA may provide for some salary reduction corresponding to full-day absences occasioned by sickness where they have exhausted all available sick leave. Be careful before making any salary deduction, however, because an impermissible deduction could jeopardize the employee's exempt status. Overall, it would be prudent to consult with your attorney before withholding pay for employees who are quarantined and not working.

***My company does not have a work-from-home policy, but my employee says they are at a high risk of contracting COVID-19 and wants to work from home. What do I do now?***

Although the CDC and medical professionals predict that most individuals who catch COVID-19 will weather it without incident (and may not even know they have the virus), the CDC warns that certain groups of individuals have a heightened risk if they are older or have weakened immune systems or underlying serious health conditions. If an employee reports that they are at increased risk for contracting the disease because, for example, they take medication that suppresses their immune system, then you should engage in the interactive process under the ADA and explore whether you should provide a reasonable accommodation such as permitting work from home.

***Can I order my employees to wash their hands more often?***

Yes. The Equal Employment Opportunity Commission (EEOC) has confirmed that requiring additional infection control practices, such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal, does not violate the ADA.

***My employee was out of work with symptoms of COVID-19 and wants to return to work. Can I require a doctor's note before letting them return?***

Yes. You can require a note that confirms the employee is no longer infected and not otherwise posing a direct threat to the health of the workforce. But that's different than whether you should or whether it is realistic. If the pandemic reaches the proportions that some predict, doctor's offices will be stretched to their limit, and employees may not be able to get in to see their doctor.

***My employee has been actually diagnosed with COVID-19. Should I require a doctor's note before they come back to work?***

Yes, and because they have actually been diagnosed, it is reasonable to require a doctor's note before they return.

***My employee is refusing to come to work because they claim they are afraid of catching COVID-19 and they do not think I'm doing enough to keep the workplace virus-free. Can I discipline them?***

In most cases, yes, but it is important to review the situation with counsel. If there is a reasonable basis for claiming that the office environment presents a risk of imminent danger, you might find yourself facing allegations that you are retaliating against the employees unlawfully. If they are expressing a concern for the health of their co-workers, they could also be engaged in concerted activity that it is protected by the National Labor Relations Act. But in other circumstances, if the employee's fears are objectively unreasonable, it might be just another excuse from an employee who doesn't want to come to work.

***My employee wants to know how to keep from contracting COVID-19. What should I say?***

Unless you are a licensed and trained medical professional, you should not give medical advice. You can share with your employees the steps you are taking to keep employees safe at work, including increasing the frequency of sanitizing the office; providing tissues, hand sanitizers, and disinfectant wipes; benefits programs; and the option to work from home if possible. Public health agencies, like the CDC, have helpful resources as well that can be shared with employees.

***What should I do when my employee just returned from a country where the CDC has reported a heightened risk of contracting COVID-19?***

Follow CDC guidance and remember your general duty under the OSH Act to keep your employees safe. This may mean ordering the employee to stay home for at least a 14-day quarantine period.

***I don't want to refuse paid sick leave to my employee who is sick, but I can't afford to give infinite paid sick leave. Is there anything else I can do?***

We understand your concern for and motivation to help your employees. Some employers have opted to grant "advanced" sick leave where employees use sick leave before they've earned it, and then continue with a negative sick leave balance.

***One of my employees has COVID-19. What should I tell my other employees?***

You should tell potentially affected employees that they may have been exposed to COVID-19, but do not disclose medical information about the specific employee infected with COVID-19, including their identity.

***Can I ask my employee about their travel plans and tell them not to travel?***

Yes, you can ask an employee about business and personal travel plans. As for restricting travel, that depends on the nature of the travel. If the employee is traveling for work, you have the right to require pre-approval of all travel plans, restrict transit through certain regions of the world, or prohibit

travel all together. If the employee's travel plans are personal and not work-related, restricting travel may violate applicable state laws governing off-duty conduct.

***What about visitors at work? Can I close the office to non-employees?***

Yes. You can limit the number of non-employees in the workplace, including limitations on an employee's family members' ability to visit the workplace. You can also limit access to the workplace by vendors and other third parties. Review your contracts with any vendors to see if there are any notice requirements. Communicating these limitations in advance is important. If you have a union, check your collective bargaining agreement to see if you have granted the union unrestricted access to your workplace, and notify the union of any anticipated changes to company policies.

***I hear several companies are establishing Pandemic Response Plans. Where do I start?***

Pandemic Response Plans generally include provisions regarding the assessment of risk, delegation of authority, contingency planning, succession planning, communication strategies, and variations in personnel policies to be triggered during a pandemic. State and federal agencies, including the Federal Emergency Management Agency ("FEMA"), the United States Department of Health and Human Services ("HHS") and the CDC have released guidelines and checklists to assist public and private entities plan for disaster response and continuity of operations, including during a pandemic. We have helped our clients prepare Pandemic Response Plans that comply with applicable labor and employment laws.

***I have more questions not listed here. Who should I ask?***

For more guidance, contact either your relationship attorney at Honigman or a member of Honigman's [Labor and Employment Department](#).