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Workplace Policy Institute

Coronavirus Resources: Labor and Employment Law Challenges and Obligations Facing Employers

Moderator:
Shannon Meade, Vice President Public Policy and Legal Advocacy

Presenters:
Brad Hammock, Shareholder
Casey Kurtz, Shareholder
Claire Deason, Shareholder
Bruce Millman, Shareholder
Littler Mendelson, P.C.

National Restaurant Association • Restaurant.org

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Contact Information

Brad Hammock
bhammock@littler.com
 Direct: 703-286-3124

Casey Kurtz
ckurtz@littler.com
 Direct: 412.201.7633

Claire Deason
cdeason@littler.com
 Direct: 612-630-1000

Bruce Millman
bmillman@littler.com
 Direct: 212.583.2677

Shannon Meade
smeade@restaurant.org
 Direct: 202-331-5994

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Agenda



- Updates
- Occupational Safety and Health Administration/Safety Obligations
- Leave Considerations
- Americans with Disabilities Act Issues
- Wage/Hour Considerations
- Furloughs/WARN

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Updates

- Number of Cases
- Guidance from the Centers for Disease Control
- Shelter-in-Place Orders
- Limitations on Gatherings
- Restaurant/Bar Restrictions and Closings (examples below as of March 16)

Location	Restriction Type	Details
California	Limited service	Capacity at 50%
DC	Limited service	limited to 6 or less and 6 feet apart
Ft. Lauderdale	Limited hours	Close at 10 pm
Illinois	Limited service	Only take out, delivery or drive thru until 3/30
Massachusetts	Limited service	Only take out, delivery or drive thru
Miami	Limited hours and limited service	Capacity at 50% and Close at 11 pm
Nashville	Limited service	Capacity at 50%
NOLA	Limited service	Drive thru only
NYC	Limited service	Only take out, delivery or drive thru
New York State	Limited service	Capacity at 50%
Ohio	Limited Hours	Take out or drive thru; Close at 9 pm
Pennsylvania	Limited Hours	Montgomery, Delaware, Bucks and Chester Counties can have drive thru and delivery only
Puerto Rico	Limited hours	Close from 9 pm - 5 am
South Beach	Limited hours	Close from 10 pm - 6 am

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OSHA/Safety

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OSHA and the General Duty Clause

- Section 5(a)(1) of the Occupational Safety and Health Act of 1970 requires all employers to maintain workplaces free from recognized, serious hazards.
- There is no federal OSHA standard specific to COVID-19 or airborne transmissible diseases. Thus, Section 5(a)(1) would be generally applicable.
- There could be other OSHA standards that could apply tangentially:
 - Personal Protective Equipment
 - Respiratory Protection
 - Hazard Communication
- At this time, OSHA is focused primarily on the healthcare setting where there is the potential for more direct transmission of COVID-19.

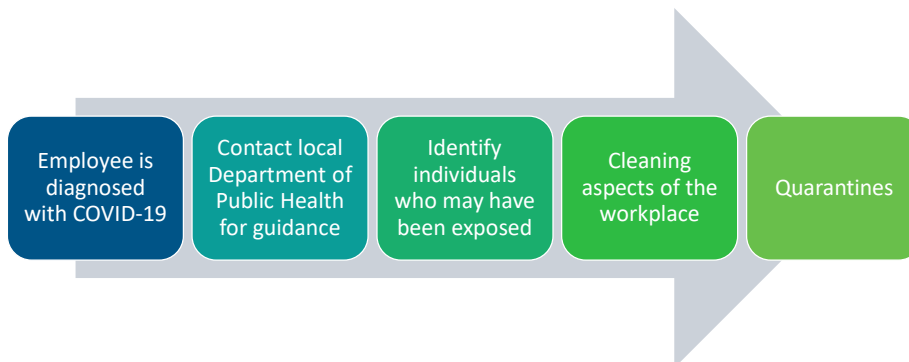
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What About Primary Exposure In the Workplace?



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CDC Recommended Cleaning Protocols

- For non-healthcare facilities (e.g., schools, institutions of higher education, offices, daycare centers, businesses, community centers) that do not house persons overnight and are not meant for cleaning staff in healthcare facilities, repatriation sites or households.
- PPE required does NOT include respirators but includes disposable gloves and gowns **for all tasks, including handling trash**
 - Gloves and gowns should be compatible with the disinfectant products being used.
 - Additional PPE might be required based on the cleaning/disinfectant products being used and whether there is a risk of splash.
 - Gloves and gowns should be removed carefully to avoid contamination of the wearer and the surrounding area. Be sure to **clean hands** after removing gloves.
 - Gloves should be removed after cleaning a room or area occupied by ill persons and hands must be cleaned immediately after gloves are removed.
 - Cleaning staff should immediately report breaches in PPE (e.g., tear in gloves) or any potential exposures to their supervisor.
- The guidelines state that employers should: (1) develop policies for worker protection (2) **provide training to all cleaning staff on site prior to providing cleaning tasks** (3) training must include when to use PPE, what PPE is necessary, how to properly don (put on), use, and doff (take off) PPE, and how to properly dispose of PPE.
- Regarding timing/scope of cleaning:
 - It is recommended to close off areas used by ill person(s) and wait as long as practical before beginning cleaning and disinfection to minimize potential for exposure to respiratory droplets.
 - Open outside doors and windows to increase air circulation in the area. If possible, wait up to 24 hours before beginning cleaning and disinfection.
 - Cleaning staff should clean and disinfect all areas (e.g., offices, bathrooms, and common areas) used by the ill person(s) focusing especially on frequently touched surfaces.
- General cleaning practices and training common in industry likely sufficient.

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OSHA Recommended Cleaning Protocols

- **Environmental Decontamination**
 - When someone touches a surface or object contaminated with the virus that causes COVID-19, and then touches their own eyes, nose, or mouth, they may expose themselves to the virus.
 - Because the transmissibility of COVID-19 from contaminated environmental surfaces and objects is not fully understood, employers should carefully evaluate whether or not work areas occupied by people suspected to have virus may have been contaminated and whether or not they need to be decontaminated in response.
 - Outside of healthcare and death care facilities, there is typically no need to perform special cleaning or decontamination of work environments when a person suspected of having the virus has been present, unless those environments are visibly contaminated with blood or other body fluids. In limited cases where further cleaning and decontamination may be necessary, consult U.S. Centers for Disease Control and Prevention (CDC) guidance for cleaning and disinfecting environments, including those contaminated with other coronavirus.
 - Workers who conduct cleaning tasks must be protected from exposure to blood, certain body fluids, and other potentially infectious materials covered by OSHA's Bloodborne Pathogens standard (29 CFR 1910.1030) and from hazardous chemicals used in these tasks. In these cases, the PPE (29 CFR 1910 Subpart I) and Hazard Communication (29 CFR 1910.1200) standards may also apply. Do not use compressed air or water sprays to clean potentially contaminated surfaces, as these techniques may aerosolize infectious material.

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FMLA Leave / Emergency FMLA Leave

- FMLA: Leave for employee with “serious health condition” (SHC) or to care for family member with SHC; state mini-FMLA rights may be broader
- Emergency FMLA (**NEW – Effective No Later than April 2, 2020; Ends Dec. 31, 2020**)
 - Covered Employers: those with less than 500 employees. (U.S. DOL may exempt employers with <50 employees where law's requirements would jeopardize the viability of the business as a going concern.)
 - Broader employee eligibility: Employee on payroll for at least 30 calendar days. (U.S. DOL may exempt certain health care providers and emergency responders.)
 - **Reasons for leave** very narrow:
 - Care for child under 18 years old if school or place of care has been closed due to a public health emergency
 - Care for child under 18 years old if child care provider is unavailable due to a public health emergency
 - **Amount of leave:** Up to 12 workweeks.
 - **Compensation during leave:**
 - First 10 days are unpaid, but employee may elect to use accrued vacation or personal, medical or sick pay concurrent with unpaid leave. Employer may not require use of paid time off.
 - Leave taken after first 10 days must be paid at not less than 2/3 the employee's regular rate for number of hours employee otherwise would be scheduled to work, subject to per-day cap of \$200 and overall cap of \$10,000.
 - Tax credits available where paid leave is given.
 - DOL Regulations expected before effective date.

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Paid Sick Leave

- Paid Sick Leave: Some state/local laws apply more broadly than FMLA.
 - Some jurisdictions have issued specific guidance on application to COVID-19-related absences
 - In many jurisdictions, possible argument that quarantine is covered “preventive care”
- “Special” Employer-Provided COVID-19 Paid Sick Leave
 - Discretionary paid leave offered outside of any legal mandate
 - Motivation: Encourage employees to be forthright about symptoms associated with COVID-19 in interest of limiting spread of the virus within your workforce
 - Option of requiring use before or after employee’s use of other accrued paid time off (unless prohibited by law mandating other paid sick leave)
 - Understand that future legally-mandated paid sick leave may not permit offset related where this type of leave was previously offered and used by employee

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Emergency Paid Sick Leave

- Emergency Paid Sick Leave (*NEW – Effective No Later than April 2, 2020; Ends Dec. 31, 2020*)
 - Covered Employers: those with less than 500 employees. (U.S. DOL may exempt employers with <50 employees where law’s requirements would jeopardize the viability of the business as a going concern.)
 - Even broader employee eligibility: All employees eligible – no 30 calendar-day requirement (U.S. DOL may exempt certain health care providers and emergency responders.)
 - **Reasons for leave:**
 1. employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
 2. employee has been advised by a health care provider to self-quarantine because of COVID-19;
 3. employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
 4. employee is caring for an individual subject or advised to quarantine or isolation;
 5. employee is caring for a son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 precautions; or
 6. employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

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Emergency Paid Sick Leave

- Emergency Paid Sick Leave (*NEW – Effective No Later than April 2, 2020; Ends Dec. 31, 2020*)
 - **Amount of leave:**
 - Full-time employees: 80 hours.
 - Part-time employees: Average number of hours employee works over 2-week period.
 - **Compensation during leave:**
 - Paid at employee's regular rate of pay, except when for reasons 4, 5, and 6 above, in which case pay is at 2/3 of employee's regular rate.
 - Daily cap of \$511 and overall cap of \$5,110 for reasons 1, 2 and 3 above
 - Daily cap of \$200 and overall cap of \$2,000 for reasons 4, 5 and 6 above
 - Employer cannot require the employee to first use accrued leave under an employer policy
 - No offsets based on paid sick leave previously-provided by employer on voluntary basis
 - No carryover of unused leave to 2020 and no payout at termination required
 - Tax credits available where paid leave is given.
 - DOL Regulations expected before effective date.

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COVID-19 ADA Considerations

- COVID-19 not inherently a “disability,” but it could be one, triggering duty to consider accommodation
- ADA discrimination – “regarded as disabled” only requires regarding employee as having an impairment, not an impairment that substantially limits a major life activity
- Duty to consider accommodating those with underlying disabilities that may pose “direct threat” of harm to self or others
- “Direct threat” = “significant risk of substantial harm” to health or safety of employee or others, which cannot be eliminated or sufficiently reduced by a reasonable accommodation

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COVID-19 ADA Considerations

- Post-Offer, Pre-Employment Medical Inquiries and Examinations
 - Permissible under ADA within specific parameters
 - Can be targeted to uncover COVID-19 symptoms and diagnoses
- Current Employee Medical Inquiries and Examinations
 - Must be “job-related and consistent with business necessity”
- “Direct Threat” Exclusions from Workplace – Need basis to believe that employee may have medical impairment posing “direct threat” of harm to self/others in the workplace
 - Right to require medical information to address justified belief that employee may be “direct threat” and to exclude employee from workplace pending receipt
 - Practical considerations:
 - Employees may have difficulty getting HC provider to respond
 - Given current limits on testing and limited knowledge about virus, HC provider may not be able to provide sufficient information about likelihood of harm and/or nature of the threat
- Fitness for Duty Certifications
 - Usually will need to be focused on the “direct threat” analysis, so commonly-used fit for duty forms (keyed to employee’s ability to perform essential job functions) should not be used

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ADA issues: Taking Employees’ Temperatures

- EEOC link: https://www.eeoc.gov/facts/pandemic_flu.html
 - Pre-employment: The ADA prohibits an employer from making **disability-related inquiries** and requiring **medical examinations** of employees, except under limited circumstances
 - **During employment:** The ADA prohibits employee disability-related inquiries or medical examinations unless they are job-related and consistent with business necessity.
 - A “**direct threat**” is “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”
- **Direct threat** is an important ADA concept during an influenza pandemic.
- EEOC Guidance – As of March 17, 2020, the EEOC has issued guidance specifically concerning COVID-19, the ADA and the Rehabilitation Act. This guidance clearly provides: “The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.” The EEOC has also opined, “Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and attendant precautions, employer may measure employees’ body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.”

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Wage/Hour

- Working from Home
 - Non-exempt employee timekeeping, off the clock risks, meal and rest break compliance.
 - Expense reimbursements – difficult in some states, particularly CA.
- Cutting Hours and/or Pay for Exempt Employees:
 - Salary basis test requires minimum pay regardless of hours worked; some states over \$1k per week. Salary also must be “bona fide” – cannot be tied to quality or quantity of work. And employee has to be paid full salary for **ANY** week where they do **ANY** work.
 - Reductions to schedule and pay in concert should not be *ad hoc*, or short term – “months, not weeks.” Do not change back early; make a long-term change, and stick to it.
 - Many employers are considering reclassifying exempt employees to non-exempt. The same risks apply, and this should be done carefully and with legal review.

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Wage/Hour (continued)

- Cutting Hours and/or Pay for Non-exempts:
 - Reporting time rules – do not call people in and send them home.
 - Notice requirements – many states require advanced notice of changes to pay; typical time frame is a pay period in advance.
 - Predictive scheduling – if employees are subject to predictive scheduling, check to see if an exception applies in these circumstances, or if the law has been suspended for the pandemic.

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Wage/Hour (cont'd)

- Paid Time Off/Vacation time:
 - Requiring employees to use accrued vacation time is generally permissible in most states, but the policy will control, and California has cases that arguably go both ways.
 - Requiring employees to *not* use accrued vacation time – the policy will control, and be very careful in states where accrued paid time off is considered a vested benefit/wage.
 - Advances on PTO.

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Furloughs/WARN

- Terminology
 - Layoff – generally permanent
 - Temporary layoff/furlough
 - Furlough can involve weekly strategies
- Federal WARN
 - Do not terminate but place on temporary furlough
 - Layoff under 6 months is not WARN trigger.
 - Layoff lasts beyond 6 months?
 - Unforeseeable Business Circumstance (UBC)
 - Natural Disaster

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Furloughs/WARN (cont'd)

- State mini-WARN statutes – California is the big issue!
 - No 6 month exception for triggering event.
 - No Unforeseen Business Circumstance.
 - Covered Establishment/Mass Layoff requires 50 layoffs in 30-day period.
 - New Hires are not covered.
 - We have several untested arguments:
 - Layoff may not be due to lack of work.
 - Short furlough may not be a “layoff.”
 - Covered Establishment Termination may not apply to temporary cessations.
 - No specific defense because of closure because of government order, but federal WARN UBC defense could be adopted.
- Other state mini-WARN statutes in play:
 - Maine – applies only to closing but no UBC defense. Not clear if temporary closing is subject to Act.
 - NJ – No UBC, but Layoff of less than 6 months is not a trigger. Must guarantee reinstatement in 6 months. New rules take effect on July 19.
 - Vermont – Layoff must be less than 90 days. UBC available
 - Wisconsin – Layoff must be less than 60 days. UBC available

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Questions?

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