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CLIENT ALERT | EMPLOYMENT LAWS DURING COVID-19

By: Sean F. Darke, Esq.

With the United States workforce changing every day due to the spread of COVID-19, the following will provide employers basic information, when contemplating next steps when handling decisions about their workforce. This article does not address the recently enacted Families First Paid Sick Leave, as that law is discussed in a separate article.

TELEWORK POLICY

Employers who have the capability to allow workers to telework, specifically with the ability to work remotely, has exploded in the past few weeks. However, employers need to review the Illinois Expense Reimbursement Law to ensure they're not violating the law. The Illinois General Assembly enacted this law on January 1, 2019; that has a major effect on businesses allowing workers to telework.

This law was an amendment to the Illinois Wage Payment and Collection Act ("IWPCA") that require all Illinois employers to reimburse their employees for "all necessary expenditures or losses incurred by the employee within the employee's scope of employment and directly related to services performed for the employer." 820 ILCS 115/9.5 (2019). Illinois employers who have required or authorized workers to work remotely will more than likely need to pay those workers for the "necessary expenditures." Necessary expenditures are defined as "all reasonable expenditures or losses required of the employee in the discharge of employment duties that inure to the primary benefit of the employer." 820 ILCS 9.5(a)(2019). This could mean that businesses will need to compensate workers who use their personal laptop, certain tools, equipment, cell phone, internet service, etc. while working remotely. However, Illinois' expense reimbursement law allows for businesses to have a written expense reimbursement policy dictating the amount and requirements for expenses. Illinois employers will want to ensure employees or their own… compliance during the COVID-19 pandemic as their workforce begins their telework.

PROHIBITING AN EMPLOYEE TO COME TO WORK

Employers need to protect its employees during a pandemic and provide reasonable safeguards. One way to provide such protection is to prohibit employees who have shown symptoms or who have recently traveled to a CDC Level 3 country, due to the known threat that their employee poses in spreading COVID-19 to other employees are much higher in those situations.

As a result, on March 18, 2020, the Equal Employment Opportunity Commission (EEOC) issued guidance on this very topic. The first matter addressed by the EEOC is that the Americans with Disability Act and Rehabilitation Act do not interfere with employers who follow guidance from the CDC or any other public health authority. The EEOC provides the following principles:

1. **How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic?**
   a. During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

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2. **When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic?**
   a. Generally, measuring an employee's body temperature is a medical examination. 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. However, employers should be aware that some people with COVID-19 do not have a fever.

3. **Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19?**
   a. Yes. 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.

4. **When employees return to work, does the ADA allow employers to require doctors' notes certifying their fitness for duty?**
   a. Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.

5. **If an employer is hiring, may it screen applicants for symptoms of COVID-19?**
   a. Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule applies whether or not the applicant has a disability.

6. **May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam?**
   a. Yes. Any medical exams are permitted after an employer has made a conditional offer of employment. However, employers should be aware that some people with COVID-19 do not have a fever.

7. **May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it?**
   a. Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.

8. **May an employer withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it?**
   a. Based on current CDC guidance, this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer.

For more information please visit the EEOC website and search "What You Should Know About the ADA, the Rehabilitation Act, and COVID-19," or click here.

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EMPLOYEES WAGES DURING A SHUT DOWN

Another topic that employers are wondering about is whether or not it needs to pay employees' during a COVID-19 shut down. The answer is, it depend on the employee's status as exempt or non-exempt. Obviously, nothing prohibits an employer from paying its employees during a pandemic, which certainly creates higher worker moral, if the employer has the financial means to pay workers during a COVID-19 shutdown.

Under the Fair Labor Standards Act ("FLSA"), an employer only needs to pay non-exempt employees for actual working hours. As such, if an employer shuts down because of COVID-19, the employer does not need to pay its non-exempt workers for hours it would have worked, but for the shut-down. If the employer agrees to pay the non-exempt employee even though they are not working, such payments would be excluded from any overtime calculations. Whether an employer needs to pay exempt employees during a shutdown gets more complicated.

Normally, employers do not need to pay exempt employees who perform zero work during the work week. In fact, an employer could direct its exempt employees under a bona fide plan or policy to take earned vacation time during the shut-down, which will result in the exempt employee receiving their full salary. The key is that the exempt employee continues to receive their same predetermined salary amount, regardless of the quality or quantity of work the employee performs. However, if the exempt employee is ready, willing and able to work, an employer cannot make deductions from the exempt employee's pay when no work is available because of the shutdown. Further, another issue is arising where an employer requests their exempt employee to take on additional job duties or assignments, which could harm the employee's exempt status. In these situations, the employer will want to analyze whether or not the employee's primary duties still fall under an overtime exemption.

The statements above are just a few of the issues that employers are currently experiencing. As more and more guidance and relief are being provided by state and federal governments, employers should discuss its specific issue with its legal representative as the legal landscape is changing day-to-day.

DISCLAIMER: This article is just a guide to point your company in the correct direction and should not be used as legal advice for your specific situation. In order to have your company's specific situation reviewed, contact a qualified Labor and Employment attorney before relying on any commentary as each situation is unique and complex.

Sean Darke is a Partner at Litchfield Cavo's Chicago office. He focuses his practice on labor and employment issues and successfully defends businesses in all areas of employment and labor law, including wage and hour laws in both State and Federal court. Most recently, Sean has been named a Leading Lawyer in the area of Employment Law Management Side by *Leading Lawyers* annually since 2017.

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