Legal Know-How for Associations Post Pandemic

Rayna H. Jones
Ogletree Deakins

Leaves and Accommodation Requests

COVID-19 ABSENCE
CDC High Risk Guidance

- CDC expanded list of risk factors
- Those at risk of severe COVID-19 illness
  - e.g. age, serious heart condition, chronic kidney disease, obesity, immunocompromised from organ transplant, chronic obstructive pulmonary disease, Type 2 diabetes
- Conditions potentially increasing a person’s risk for severe illness from COVID-19
  - e.g. asthma, hypertension/high blood pressure, immunocompromised (bone marrow transplant, immune deficiencies, HIV, or immune weakening medicines), smoking, Type 1 diabetes, pregnancy, neurological conditions, liver disease

Family and Medical Leave

- 12 weeks protected leave
- Serious health condition
  - Employee or family member
- That makes an employee unable to perform one or more essential functions of the job
Can a High Risk Employee Use FMLA to Avoid Getting COVID at Work?

- “Leave taken by an employee for the purpose of avoiding exposure to COVID-19 would not be protected under the FMLA”
  - DOL COVID-19 and the Family and Medical Leave Act Questions and Answers
- But what if employee is seeking treatment and is unable to work due to COVID-19
- What if has to stay home but asymptomatic

Can an Employee Use FMLA to Avoid Exposing High Risk Individual to COVID?

- No. Employee can use FMLA only if the high risk individual is suffering from COVID-19 complications, making it a serious health condition
- May be able to use Emergency Paid Sick Leave if health care provider has ordered high risk individual to self-isolate or self-quarantine
**ADA/REASONABLE ACCOMMODATION**

- For employees who have underlying medical condition that makes them high risk
- When do we have the duty to accommodate?
- Being “afraid” of COVID-19 is not enough
- Interactive process

**Reasonable Accommodation**

- Consider telework
- Provide additional protective gear
- Erect barrier between employee with disability and other employees or move employee with disability to closed-door office or remote work area
- Change work hours/shift
- Remove marginal job functions presenting enhanced risks
- Reassign to different job role involvement lesser risk
Reasonable Accommodation?

- Is telework a reasonable accommodation for employees who do not want to expose high risk individuals to COVID-19?
- EEOC: “[A]n employee without a disability is not entitled under the ADA to telework as an accommodation in order to protect a family member with a disability from potential COVID-19 exposure.”

Protecting Employees Who Haven’t Asked for Protection

- Employers cannot forcibly exclude employees simply because they fall within a high risk category
- Employees must present a “direct threat” to their own health that cannot be eliminated or reduced by reasonable accommodation
- The disability must pose a “substantial risk of significant harm” to the employee’s health
- Made on a case-by-case basis
Face Coverings

- What if employee refuses to wear a face covering?
- Engage in interactive process
- Health care provider must confirm that
  - Employee has a statutory disability
  - That prevents the employee from wearing the face mask

Mitigating Measures

- **Avoid Discrimination**
  - Ensure consistency with testing & policy to exclude employees based on symptoms, exposure, positive tests
  - Do not mandate all employees in protective class can’t work
- **ADA Privacy Requirements**
  - Maintain medical information (including record of temperatures & symptoms) in a confidential manner and separate from employment files
  - Do not identify an employee that tested positive, even when informing employees of possible exposure at work
- **Accommodations When Employee Refuses to Return to Work**
  - Engage in interactive process if employee has a disability
    - May need provide reasonable accommodation
  - Concern Regarding Age – no accommodation requirements for age but can provide if requested; do not prohibit from work all employees above certain age
Emerging COVID-19 Claims

COVID-19 Employment Litigation Claims Rising Weekly
**Emerging COVID-19 Claims**

- Whistleblower
- Retaliation
- Wrongful discharge
- Workplace safety
- Title VII – Discrimination
- FMLA/FFCRA/PDA
- Leave and accommodations
- Customer and Employee Masking
- NLRA unfair labor practices charges
- WARN
- Wage & Hour

**COVID-19 Allegations - Examples**

- Employer allegedly fired plaintiff after he notified employer of exposure to COVID-19
- Hospitality employer allegedly did not install plexiglass shields to protect employees from COVID-19 in high-risk areas; made no effort to enforce a mandatory quarantine following positive employee tests
- Employer allegedly failed to provide plaintiff with paid leave when child’s school was closed by public officials
- Employer placed pregnant plaintiff on furlough due to the COVID-19 pandemic and then replaced her position while on leave and terminated plaintiff
COVID-19 Allegations - Examples

- Estate of former maintenance worker alleges employer did not act when employee reported symptoms, failed to adequately sanitize workplaces, and failed to provide protective equipment, adequate handwashing areas and sanitizing dispensers, or enforce social distancing protocols
- FFCRA – DOL Wage and Hour Division cited paving company for failing to provide emergency sick leave
- WARN – former rental car company employee filed suit for employer’s alleged failure to provide advance notice of layoffs

Connecting a Disconnected Workforce
**COVID-19 and the Workplace**

- Approximately 8 months of being out-of-office
- Many employers have indicated they will not consider having employees in the office until 2021
- Some employers are going to indefinite remote work

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**Employers expect the shift to remote work to continue…**

Source: Workforce of the Future (BCG faciliated five-C suite roundtables, conducted 50 client discussions, and collected more than 36 survey responses from top clients on the topic of return to workplace and future workforce). Note: Because of rounding, respondent percentages may not add up to 100%.

Remote working models: include hybrid remote model in person and remote work, 30% work from home, and 30% remote.

Working Remotely: Initial Considerations

- Consider implementing a policy or teleworking agreement
- Outline any eligibility requirements and job expectations
- Include any approval process that may be required
- Consider ADA implications
- If workforce at issue is unionized, review applicable collective bargaining agreements
- How will the company manage employee engagement?

Wage & Hour Issues

- Teleworking
- Screening activities
  - At home not compensable
  - During work shift = compensable
  - On-premises, pre-shift
    - Not compensable if required only by employer
    - Compensable if required by government order
- Ensure adequate procedures are in place to capture all time worked by employees, including overtime for non-exempt employees
Wage & Hour Issues

- Exempt
  - Must generally be paid for any workweek that they perform any amount of work (subject to certain exceptions)
  - Emergency change in duties
- Non-Exempt Employees
  - Risks of off-the-clock and overtime claims increase when non-exempt employees telework – Prohibit OTC work
  - Also risk of claims of interruption of meal and rest periods (checking emails, reviewing digital workplace apps)

Workers’ Compensation

- Does it apply to remote workers? Yes.
  - Depending on the nature of a home injury, employee may be eligible for workers’ compensation
  - Employers may want to take the following steps:
    - Require employees to designate a specific area of the home for work, lunch, and rest breaks
    - Attempt a virtual site check of the employee’s home office