ECKERT SEAMANS ATTORNEYS AT LAW

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Labor & Employment Alert

COVID-19: PANDEMIC UPDATE

On March 11, 2020, the World Health Organization ("WHO") declared the novel coronavirus – COVID-19 – a pandemic. In its announcement, the WHO opined that this virus will continue to spread at an alarming rate and it stressed the importance of preparation. On March 14, 2020, the U.S. Centers for Disease Control and Preparedness ("CDC") designated COVID-19 a pandemic.

THE AMERICANS WITH DISABILITIES ACT ("ADA") DURING A PANDEMIC

The ADA generally prohibits employers from conducting medical inquiries and examinations. Now that COVID-19 is a pandemic, the Equal Opportunity Commission (EEOC)'s Guidelines on "Pandemic Preparedness in the Workplace" are in effect. The Guidelines sanction certain otherwise impermissible medical inquiries and examinations, such as:

- Sending employees home if they exhibit symptoms of COVID-19;
- Asking employees if they are experiencing any symptoms of COVID-19;
- Taking employees' temperatures to determine if they have a fever;
- Inquiring if they have had exposure to COVID-19 during a trip;
- Requiring employees to follow infection-control practices; *e.g.*, regular hand washing;
- Requiring employees to wear personal protective equipment; *e.g.*, face masks or gloves;
- Requiring or permitting alternative work arrangements; *e.g.*, telecommuting;
- Asking why an employee is absent from work; and
- Requiring a worker to provide certification that he or she medically can return to work.

While employers have more latitude under the EEOC's Guidance, they should proceed with caution to avoid disparate treatment claims from employees and to ensure that they comply with the ADA's interactive process where they receive requests for reasonable accommodation.

WAGES, ALTERNATIVE WORK ARRANGEMENTS, AND PTO

Last week, the U.S. Department of Labor ("DOL") issued Guidance on the payment of wages under the Fair Labor Standards Act ("FLSA") with respect to absences related to COVID-19, use of paid time off ("PTO"), and the differences on handling exempt and non-exempt employees. The Guidance reminds employers that exempt employees must be paid their salary if they work a portion of any workweek, but that employers can require exempt employees to utilize available PTO time for days not worked. Non-exempt employees must be paid for the hours that they work. Absent

restrictions on the use of PTO under a union contract, employers can require non-exempt employees to use available PTO for days not worked, unless there are state or local requirements to the contrary.

The Guidance addresses alternative work arrangements (*e.g.,* telecommuting). It states that employers "may encourage or require employees to telework as an infection-control or prevention strategy." Employers, however, cannot make their employees pay for additional costs incurred in connection with working from home if they are business expenses and their payment would reduce the employees' earnings below the minimum wage or overtime compensation. It is also not permissible to make employees pay for these additional costs if telecommuting is a reasonable accommodation for a qualified disability. Employers must evaluate if a reimbursement is necessary on a case-by-case basis and should consult with counsel first.

If there are mandatory or voluntary office closures, the next question for employers is, "do I have an obligation to pay employees and what wage replacement options are available for workers?" Absent passage of HR 6201 or similar legislation, there is no federal requirement to provide wage continuation. Collective bargaining agreements, individual employment agreements and state or local laws might require pay continuation in some circumstances, so be sure to review the specifics of your situation.

On March 14, 2020, the U.S. House of Representative passed the H.R. 6201, the Families First Coronavirus Response Act ("Families First"). The Senate has not yet taken action on the bill. As of the date of publication, it is unclear what the final form of this proposed law will be. The bill, in its current form, provides for some paid leave for certain absences related to COVID-19 (*e.g.* self-isolation, quarantine, testing, caring for family members, and caring for children whose schools or daycares are closed) and additional funding for states with high unemployment rates.

TELECOMMUTING ISSUES

As employers explore telecommuting as an option, they should:

- Draft a telecommuting policy and agreement that establishes employees' eligibility requirements, performance expectations, and cyber security;
- Require all non-exempt employees to verify the number of hours that they work;
- Remind employees that not all essential functions can and will be worked from home and that telecommuting is a temporary solution; and
- Notify employees that they may need to come to the office to perform certain essential functions.

LABOR

Employers with a unionized workforce face a unique set of challenges. Under the National Labor Relations Act ("NLRA"), employers have a duty to bargain with a union over certain mandatory subjects, such as wages, hours, benefits, and certain other terms and conditions of employment. The last category includes furloughs, leaves of absence, payment for leaves, etc. If employers unilaterally make decisions regarding those matters or fail to bargain over them, they can face an unfair labor charge. Employers must review applicable collective bargaining agreements to determine their rights and if they need to bargain with their unions, focusing on management rights, leaves of absence, paid time off, and health and safety sections of their collective bargaining agreements, which may empower them to make decisions about assigning work, layoffs, and scheduling without first negotiating with the union. Where employers have time to negotiate, they must do so before implementing a policy that relates to a subject of mandatory bargaining. Emergencies, such as a pandemic, might permit employers to argue that they do not need to negotiate with a union before implementation of a policy, but they would need to negotiate afterwards. The strength of this argument will depend on the individual circumstances.

In the face of a pandemic, employees may express concerns about their safety at work; *e.g.*, the risk of exposure that an assignment creates or their employer's sanitization practices. In such instances, employers must refrain from taking any adverse action against the complaining employee because they raise safety concerns. In fact, the NLRA protects employees who engage in concerted activity for their mutual aid or protection; *e.g.,* employees complain that their employers' client meetings in areas with high incidence rates can expose them to COVID-19. This right applies to all employees regardless of whether they are in a union.

BENEFITS

Since some state regulators recently mandated that insurers pay without cost sharing for the diagnosis and treatment of COVID-19, employees should inquire into whether their plan offers similar screening and treatment without cost sharing. Several carriers have announced that diagnosis and treatment of COVID-19 will be made available without cost-sharing under their plans. If an employer is fully insured with one of these carriers, its employees will benefit from the carrier's decisions. For self-insured plans, an employer wishing to waive any cost-sharing requirement for its employees should discuss the option with their third-party administrator. The bill for Families First indicates that cost sharing, prior authorizations, or other medical management requirements for certain diagnostic testing for COVID-19 will not be permissible.

For employees in high-deductible health plans who contribute to a health savings account ("HSA"), coverage of COVID-19 diagnosis and treatment might make them ineligible to contribute to their HSA. In the new Notice 2020-15, the IRS has removed this impediment, indicating, until further notice, the first-dollar coverage diagnosis and treatment of COVID-19 will not cause such participants to be ineligible to contribute to their HSA.

As the pandemic spreads, employees are likely to feel the financial strain of lost-wages and burdensome medical costs that may come with missed work and hospitalization. For employers with 401(k) plans that permit hardship withdrawals, a withdrawal to pay medical expenses may be an option to pay for these expenses.

Employees may have questions about the options available to them under their benefit plans and request an SPD or other related plan documents. If employees are working remotely or otherwise are unable to physically obtain these documents, employers should consider electronic delivery. DOL and IRS rules offer a safe harbor for the electronic delivery of plan-related documents such that they comply with ERISA plan disclosure rules.

INSURANCE CONSIDERATIONS

COVID-19 may expose employers to liability and may cause them to suffer losses. Employers, therefore, should consult their insurance policies with counsel to determine if they have coverage, and the extent of such coverage. Policies to review include:

- Business Interruption
- General Liability
- Directors and Offices
- Errors and Omissions
- Employment Practices Liability

Employers should remember that the terms and the conditions of their policy, the existence of endorsements and extensions, and the specific facts will determine whether there is coverage.

WORKERS ADJUSTMENT RETRAINING NOTIFICATION ACT

The federal Worker Adjustment and Retraining Notification (WARN) Act offers protection to workers by requiring covered employers to provide 60 days' notice in advance of covered plant closings or covered mass layoffs. There are exceptions to the 60-day advance notice requirement: 1) faltering business; 2) unforeseeable business circumstances; and 3) natural disasters. The exceptions under WARN do not excuse an employer from providing the required notice of a mass layoff or plant closing, but provide employers with a defense to providing less than the required 60 days' notice under the statute. Some states and local governments have enacted similar laws (Mini-WARN Acts) that have different thresholds of coverage and notice requirements. If COVID-19 necessitates a layoff or a plant closing, employers should consult with counsel on WARN and Mini WARN Act requirements.

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