ALERTS

Employer Concerns — COVID-19

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As COVID-19 spreads across the globe, employers must act quickly while continuing to comply with applicable employment laws and the evolving guidance put forth by various government agencies. Below are some of the main issues facing employers and guidance on what employers can and cannot do.

Potentially Infected Employees

If an employee exhibits flu-like symptoms while at work, employers are permitted to ask them to seek medical attention. Employers can ask employees to get tested for COVID-19 as long as the employee's condition could pose a "direct threat" to the workforce, defined as a "significant risk of substantial harm to the health and safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." Moreover, according to guidance set forth by the Equal Employment Opportunity Commission ("EEOC"), an employer may require symptomatic employees to go home without violating the Americans with Disabilities Act ("ADA"). If an employee tests positive for COVID-19, employers are expected to send home all employees who were in close contact (within six feet) with that employee for a 14-day self-monitoring period to help prevent the spread of the infection. The employer should then inform other employees in the same work location or facility of this potential exposure to the virus in the workplace.

Discrimination and Harassment Issues

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Employers should ensure the confidentiality of employee medical information to prevent discrimination and harassment against employees exhibiting symptoms. All practices and policies regarding COVID-19 must be uniformly applied to avoid the risk of employee discrimination claims (i.e., employers should not treat employees differently based on their ethnicity, national origin, disability, age or any other protected class).

Wage and Hour Issues

The Fair Labor Standards Act ("FLSA") generally does not require an employer to pay employees who are not working. Exempt employees (i.e., certain executive, professional and administrative employees who are exempt from the overtime pay requirements), however, must ordinarily be paid their full weekly salary if they work during any portion of the workweek. Employers could also be obligated to keep paying employees because of an underlying employment contract or collective bargaining agreement.

Remote Work

The EEOC has advised that telework is an appropriate infection-control strategy. An employer can choose to implement a remote work period to assist in the effort to slow the spread of COVID-19. If employers decide to leverage their remote work capabilities, they should prepare policies concerning the providing and appropriate use of computers and other items necessary to work remotely. One area to focus on is the protection of confidential or sensitive information.

Employee Leave

Employers can require that employees take available sick or paid leave for absences related to COVID-19. The CDC advises employers to review current policies and to "ensure that [ ] sick leave policies are flexible and consistent with public guidance and that employees are aware of these policies." For quarantined employees who cannot perform their jobs remotely, employers may consider an extension of paid leave benefits.

Employees may be eligible for short-term disability leave if they are diagnosed with COVID-19 and are sick and unable to perform the major duties of their job due to the sickness.

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If an employee's symptoms rise to a serious medical condition that renders the employee unable to work, that employee may be eligible for unpaid leave under the Family and Medical Leave Act ("FMLA"). Employees caring for a qualifying family member with COVID-19 who meet the criteria under FMLA may also be permitted to take such protected leave. Employees who refuse to come to work due to fear of contracting COVID-19 are likely not eligible for FMLA leave. Similarly, the New York Paid Family Leave Act provides employees with up to 10 weeks of paid leave to care for a family member with a serious health condition. This leave cannot be used for the employee's own health condition.

On March 14, 2020, the U.S. House of Representatives passed the Families First Coronavirus Response Act which has the support of President Trump. Assuming this act, or something similar, is passed by the senate, several provisions will affect employers. The act includes three separate provisions relating to employee absences due to COVID-19 — a temporary expansion of the FMLA, including providing for paid FMLA leave, a new federal paid sick leave law and expanded unemployment insurance benefits.

Health Plan Design

Sponsors of health plans can amend their plans to provide new eligibility rules and/or benefits in response to the COVID-19 outbreak. For example, the IRS recently issued guidance permitting high deductible health plans ("HDHPs") to provide benefits associated with the testing and treatment of COVID-19 without a deductible or with a deductible that is lower than the one that would normally apply under the plan.

Plan sponsors may also elect to amend their plans to waive copays and co-insurance for COVID-19 testing. In New York, for example, insurance carriers for fully-insured health plans must waive cost sharing for COVID-19 testing as well any emergency room, urgent care and office visits associated therewith. Because this is a state insurance mandate, self-insured plans are not required to do so.

Plan sponsors should also review their plans' eligibility terms to make sure the rules are not unintentionally exclusionary. For example, plan sponsors may wish to consider amending their eligibility rules to ensure employees continue to have access to their health plan coverage throughout any potential quarantine time. In addition, plan sponsors should ensure that

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any new class of individual they may hire (e.g., temporary employees) to fill work-related gaps during the COVID-19 outbreak are receiving the appropriate coverage required under the terms of the plan and applicable law.

Finally, plan sponsors should ensure that plan documents, including summary plan descriptions and summaries of benefits and coverage, are easily accessible to all participants who may be working remotely.

HIPAA Privacy Considerations

The Office for Civil Rights at the U.S. Department of Health and Human Services issued a bulletin to remind covered entities and business associates of their obligations with respect to individuals' protected health information ("PHI") under HIPAA's Privacy Rule ("Privacy Rule"). The bulletin outlines the limited circumstances when PHI may be disclosed under the Privacy Rule during the COVID-19 outbreak.

Under the Privacy Rule, covered entities and business associates may disclose PHI, without a person's individual HIPAA authorization, in limited circumstances including:

- As necessary to treat the patient or a different patient;
- To a public health authority, such as the CDC or a state health department, that is legally authorized to collect such information;
- To an affected individual's family members, relatives, friends or other people identified by the individual as involved in his or her care; and
- To lessen or prevent a serious or imminent threat to the health and safety of a person or the general public.

Even if a disclosure of PHI is permitted under HIPAA, a covered entity or business associate must take reasonable steps to ensure that the information disclosed is limited to the minimum amount necessary to accomplish the purpose of the disclosure. Disclosures to the media or the general public about a specific individual with COVID-19 or his or her test results or treatment are generally prohibited without the individual's written authorization. Different rules apply if the individual is incapacitated or unconscious and cannot give his or her authorization. While HIPAA does not apply to many employers, because they are not covered entities or business associates, maintaining confidentiality of employee health

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information is also required under the ADA and various state privacy protection laws.

OSHA and Workplace Safety Issues

Under the Occupational Safety and Health Act ("OSHA"), employers have a general duty to provide a safe and healthy workplace for their employees. OSHA recently published guidance (https://www.osha.gov/Publications/OSHA3990.pdf) which outlines some of the steps employers can take to help maintain a healthy work environment, protect their workforce and comply with the law. The OSHA guidance recommends that employers develop an infectious disease preparedness and response plan, if one is not already in place. OSHA further advises that employers implement basic infection prevention measures.

COVID-19 is an unprecedented situation and guidance is being issued and evolving daily. Employers should continue to monitor all CDC and other government communications on a daily basis and should keep in touch with their workforce through regular communications.

Authored by Mark E. Brossman, Ronald E. Richman, Donna K. Lazarus, Scott A. Gold, Melissa J. Sandak and Max Garfield.

If you have any questions concerning this *Alert,* please contact your attorney at Schulte Roth & Zabel or one of the authors.

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Related People

Mark Brossman

Partner

New York

Ronald Richman

Partner

New York

Donna Lazarus

Partner

New York

Scott Gold

Special Counsel

New York

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Max Garfield

Special Counsel

New York

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