KIM VAUGHAN LERNER SM

THE POWER OF PERSPECTIVE

Dear Friends,

COVID-19 has created an unprecedented event for everyone. As state and local governments implement measures allowing businesses to reopen, we wanted to provide this e-mail answering a number of commons questions we have received from companies in regard to considerations to account for with employees returning to work.

Please do not hesitate to reach out to us by telephone (954-527-1115) or e-mail (blerner@kvllaw.com). We are here to help, and wish for everyone to stay safe and be well.

Sincerely,

Brian Lerner
Chair, Labor & Employment

What if employees refuse to return to work when the company reopens?
Many companies have furloughed employees, who currently are receiving unemployment benefits, or otherwise have employees working remotely. If all orders requiring the closure of the company are lifted, then the company has a right to require employees to come back to work. If an employee refuses to return to work after reasonable notice, then the company does have the right to terminate the relationship. Note that this could result in the employee no longer being eligible for unemployment benefits.

Many employees may feel unsafe returning to work right away. So long as the company is following CDC and OSHA guidelines and taking measure to keep the workplace safe, then an employee can be terminated for not returning to work based on a general worry or concern about going back to work. Again, caution should be taken. If the company is not following CDC and OSHA guidelines and not taking steps to keep the workplace safe, then an employee who objects to the safety issues may attempt to protect his/her employment based on state and local whistle-blower laws.

Can the company stop employees from wearing masks at work or can employees refuse to work unless allowed to wear masks?
This is a rapidly evolving situation, and there is no uniformity. For example, in Florida, there is no blanket state order requiring masks. But many counties and cities do have blanket orders in place requiring masks. Likewise, in Florida, there is an order requiring masks for certain businesses while counties and cities cover more businesses than the state. As such, it is imperative that companies check state, county, and city governments for any orders that may apply. At the federal level, the CDC recommends that everyone wear a mask in settings where social distancing is difficult to maintain. Moreover, OSHA recommends allowing employees to wear masks, although it has issued guidance stating that in most circumstances, an employee cannot refuse to work without a mask, without showing, among other factors, that there is a real danger of death or serious injury. Accordingly, it is the better practice that

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companies permit the use of masks at work or otherwise not refuse an employee's request to wear a mask.

What can the company do when it knows that an employee has a medical condition that might place the person at higher risk if s/he gets COVID-19, but the employee has not asked for an accommodation?

Because the employee has not asked for an accommodation, the company is not legally required to take any action. If the company is concerned about the employee's health being jeopardized by returning to the workplace, the Americans with Disabilities Act does not allow the company to exclude the employee or take any other adverse action solely because the employee has a medical condition that the CDC identifies as potentially placing him or her at "higher risk for severe illness" if s/he gets COVID-19. Under the Americans with Disabilities Act, such action is not allowed unless the employee's disability poses a "direct threat" to his or her health that cannot be eliminated or reduced by reasonable accommodation. Even if the company determines that an employee's disability poses a direct threat to his own health, the company still cannot exclude the employee from the workplace or take any other adverse action unless there is no way to provide a reasonable accommodation absent undue hardship. Note that some companies may be sensitive to individuals that are pregnant. The company cannot exclude a pregnant employee because of her pregnancy as doing so would constitute sex discrimination.

Can an employee ask for a change in the workplace (an accommodation) to avoid exposing a family member who is at higher risk of severe illness from COVID-19?

No. The Americans with Disabilities Act does not require that the company accommodate the employee without a disability based on the disability-related needs of a family member or other person with whom s/he is associated. For example, an employee without a disability is not entitled under the Americans with Disabilities Act to telework as an accommodation in order to protect a family member with a disability from potential COVID-19 exposure.

Can the company take an employee's temperature or make an employee take a COVID-19 test to determine whether s/he might be infected?

Yes. Some states have issued orders recommending or requiring temperature checks. At the federal level, the EEOC confirmed that measuring an employee's body temperature or administering a COVID-19 test is permissible given the current circumstances. While the Americans with Disabilities Act places restrictions on the inquiries that an company can make into an employee's medical status, and the EEOC considers taking an employee's temperature or administering a test to be a "medical examination" under the Americans with Disabilities Act, the EEOC recognizes the need for this action now because the CDC and state/local health authorities have acknowledged community spread of COVID-19. One thing to bear in mind is if the employee asks for an alternative method of screening. In such a case, the company should operate as if the employee is making a request for accommodation under the Americans with Disabilities Act.

Can the company require employees to undergo antibody testing before being allowed to return to work?

No. While administering a COVID-19 test is permissible, the EEOC has issued guidance that antibody testing before allowing employees to re-enter the workplace is not allowed at this current time.

Can the company ask an employee to stay home or leave work if s/he exhibits symptoms of COVID-19?

Yes, the company is permitted to ask an employee to seek medical attention and get tested for COVID-19. The EEOC confirmed that asking employees to go home is permissible and not considered disability-related if the symptoms present are akin to COVID-19.

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Can the company require an employee to notify the company if s/he has been exposed, has symptoms, and/or has tested positive for COVID-19?
Yes. The company should require any employee who becomes infected with COVID-19 and has reported to work to notify the company. To avoid confidentiality breaches, the company should designate one person to receive that notice.

What can the company do if an employee *tests* *positive* for COVID-19?
The infected employee should be sent home until released by his/her health care provider. Before the infected employee departs, ask her/him to identify all individuals who worked in close proximity for a prolonged period of time with him/her. With that full list of employees, as a preventative measure, the company should send home these employees who worked closely with that infected employee to ensure the infection does not spread. Under no circumstances should the company share the name of the infected employee with any employees. This could violate confidentiality laws. If the company's office is located in a shared office building, then the company should inform building management of a COVID-19 case in the office so that building management may take whatever precautions it deems necessary.

What can the company do if an employee *suspects* having COVID-19 but has not been confirmed by a health care provider?
Take the same precautions as noted above. Treat the situation as if the suspected case is a confirmed case for purposes of sending home potentially infected employees. Communicate with your affected workers to let them know that the employee has not tested positive but has been exhibiting symptoms that lead the belief that a positive diagnosis is possible.

What can the company do if an employee *self-reports* *coming* *into* *contact* with someone who has or had COVID-19?
Take the same precautions as noted above. Treat the situation as if the exposure case is a confirmed case for purposes of sending home potentially infected employees. Communicate with your affected workers to let them know that the employee has not tested positive but has been exposed to someone who has COVID-19 and thus the company is acting out of an abundance of caution.

How long should the infected employee and other employees sent home remain home?
Anyone sent home should first consult and following the advice of their health care provider regarding the length of time to stay at home. The minimum however should involve following CDC guidelines in effect at the time, which are available at https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/steps-when-sick.html. Currently, the CDC provides for those who worked in proximity to someone infected with COVID-19 to stay home until fourteen days after last exposure, maintain social distance from others, and self-monitor for symptoms (i.e., coughing, shortness of breath or difficulty breathing, fever, chills, muscle pain, sore throat, new loss of taste or smell, etc.). If the employee will not take a test to determine if still contagious, then three things must occur: (1) three days of no fever without the use of medicine that reduces fever; (2) other symptoms have improved (e.g., improvement in coughing or shortness of breath); and (3) at least ten days have passed since the symptoms first appeared. If the employee has taken a test to determine if still contagious, then three things must occur: (1) no fever without the use of medicine that reduces fever; (2) other symptoms have improved; and (3) the employee received two negative tests in a row, twenty-four hours apart.

What can the company do if an employee is exhibiting symptoms but refuses to leave the workplace?
The company should try to make the employee understand the reasons why the departure is necessary to maintain the health and safety of the entire workplace. If there are benefits available such as paid sick leave, use of accrued vacation, or something else that may appease them, the company should

explain these benefits and how the employee can utilize them. If the employee still refuses to leave the workplace, then the company can consider (a) explaining that the employee is now trespassing on private property and if they do not leave, then the company will be forced to call local law enforcement to escort them off the premises; or (b) terminating the employee for insubordination. Termination of the employee, however, should be considered as a last resort.

What steps should the company take if there is an infected employee?
The minimum should involve following CDC guidelines in effect at the time, which are available at https://www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html. Currently, the CDC recommends closing off areas used by the infected persons and wait as long as practical before beginning cleaning and disinfection to minimize potential for exposure to respiratory droplets. Further, the CDC currently recommends that cleaning staff should clean and disinfect all areas (e.g., offices, bathrooms, and common areas) used by the infected persons, focusing especially on frequently touched surfaces.

Note that currently there is no obligation to report a suspected or confirmed case of COVID-19 to the CDC. The health care provider that receives the confirmation of a positive test result is a mandatory reporter who will handle that responsibility.

With businesses reopen, what is the status of the Families First Coronavirus Response Act (FFCRA) and obligations for companies under that law?
The FFCRA remains in place and will stay in effect through December 31, 2020. This means companies still have to provide paid sick leave and emergency FMLA should employees qualify. This may impact many businesses. While state and local governments may reopen businesses, many continue to keep schools closed. This means employees may qualify for paid leave because they cannot find coverage for their children, who are forced to stay home due to school closures.

If not done already, every employee should receive an e-mail that provides them with a copy of the U.S. Department of Labor's FFCRA notice. A copy of the notice is available at https://www.dol.gov/agencies/whd/pandemic. The company may comply by sending an e-mail telling employees that the company is sending to them in that e-mail a copy of the DOL's notice. The company should retain a copy of the e-mail in case of DOL investigation or an employee claims s/he did not receive notice. A copy of the notice also should be posted in the office, preferably in the same location as other required posted notices.

What companies are covered by the Emergency Paid Sick Leave Act and are there any exemptions?
The law applies to companies that have *less* than 500 employees. There are exemptions for employers of health care providers and emergency responders. There also is a possible exemption for companies that have less than fifty employees, who are able to establish that the requirements of the law would jeopardize the business as an ongoing concern.

Which employees are entitled to paid sick leave under the Emergency Paid Sick Leave Act?
The law requires a company to give paid sick leave to an employee (regardless of how long s/he has worked for the company) for the following: (1) the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19; (2) the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (3) the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis; (4) the employee is caring for an individual who is subject to (1) or (2) above; (5) the employee is caring for his/her son or daughter if the school or place of care for the son or daughter has been closed, or the child care

provider of such son or daughter is unavailable, due to COVID-19 precautions; or (6) the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

How much paid sick leave must employees receive?
Full-time employees are entitled to eighty hours of paid sick leave. Part-time employees are entitled to a number of hours of paid sick leave equal to the number of hours that s/he works, on average, over a two-week period. Companies should note that they cannot require that the employee use any other available paid leave before using paid sick leave under the Emergency Paid Sick Leave Act. Companies also should note that that once an employee takes paid sick leave and returns to work, the company is not required to provide any further paid sick leave.

An employee using this form of paid leave for reasons related to his or her own isolation or care must be paid his or her regular rate of pay for the time absent, up to a maximum of $511 per day ($5,110 for the leave). An employee this form of paid leave for purposes of caring for a child or other family member must be paid up to 2/3 of his or her regular rate of pay, up to $200 per day ($2,000 for the leave period).

What companies are covered by the Emergency Family and Medical Leave Expansion Act and are there any exemptions?
The law applies to companies that have *less* than 500 employees. There are exemptions for employers of health care providers and emergency responders. There also is a possible exemption for companies that have less than fifty employees, who are able to establish that the requirements of the law would jeopardize the business as an ongoing concern.

Which employees are entitled to emergency FMLA leave?
The law requires companies to give emergency FMLA leave to all employees who have been with the company at least thirty days (as compared to one year and have worked 1,250 hours as generally required for leave under the Family and Medical Leave Act). An employee is entitled to emergency FMLA leave if s/he is unable to work (or telework) due to a need for leave to care for the employee's son or daughter who is under eighteen because the child's school or place of care has been closed or his or her childcare provider is unavailable due to a public health emergency. The law defines public health emergency to be an emergency with respect to COVID-19 as declared by federal, state, or local authorities.

How much emergency FMLA leave must employees receive and is any of that leave paid?
The law requires both paid and unpaid leave. The first ten days of emergency FMLA are unpaid. The employee however may choose (and the company may require the employee) to substitute any accrued vacation leave, personal leave, or medical or sick leave for unpaid leave. Note that for most employees, this ten day period will be paid given that the employee would be receiving compensation under the Emergency Paid Sick Time Act. After ten days, the company must provide partial paid leave for each additional day of leave. The amount paid must not be less than two-thirds of an employee's regular rate of pay for the number of hours the employee would otherwise be scheduled to work. In the case of an employee whose schedule varies from week-to-week and thus cannot determine whether certainty the number of hours that would have been worked, the amount is based on a calculation looking at a six-month average. In either case, there is a cap of $200 per day and an aggregate limit of $10,000.

What are companies obligated to do for employees returning from emergency FMLA leave?
For companies with twenty-five or more employees, they must restore the employee to his/her position consistent with the Family and Medical Leave Act. For companies with less than twenty-five employees, job restoration is not required if all three of the following conditions are satisfied: (1) the employee takes emergency FMLA leave; (2) the position held by the employee does not exist due to economic conditions or other changes in operating conditions that affect employment and are caused by a public health emergency during the period of leave; and (3) the company makes reasonable efforts to restore the employee to an equivalent position. If no equivalent positions are available at the time the employee tries to return from emergency FMLA leave, the company must attempt to contact the employee if an equivalent position becomes available in the next year.

What records does the company need to keep when an employee takes paid sick leave or emergency FMLA?
If an employee takes paid sick leave or emergency FMLA, then the company should require the employee provide appropriate documentation in support of the reason for the leave, including the following: (1) the employee's name; (2) qualifying reason for requesting leave; (3) statement that the employee is unable to work, including telework, for that reason; and (4) the date(s) for which leave is requested. Documentation of the reason for the leave also will be necessary, such as the source of any quarantine or isolation order (e.g., a copy of the federal, state, or local quarantine or isolation order) or the name of the health care provider who advised of self-quarantine. If the company intends to claim a tax credit under the FFCRA for payment of the wages, then the company should retain this documentation in order to claim the tax credit.

If an employee takes paid sick leave or emergency FMLA, must the company continue the employee's health coverage?
The company must continue the employee's health coverage. Under the Health Insurance Portability and Accountability Act, an company cannot establish a rule for eligibility or set any individual's premium or contribution rate based on whether an individual is actively at work (including whether an individual is continuously employed), unless the absence from work due to any health factor (such as being absent from work on sick leave) is treated, for purposes of the plan or health insurance coverage, as being actively at work.

If the company provides group health coverage that the employee elected, then the employee is entitled to continued group health coverage during the emergency FMLA on the same terms as if the employee continued to work. If the employee is enrolled in family coverage, then the company must maintain coverage during the emergency FMLA. The employee generally must continue to make any normal contributions to the cost of the health coverage.

The answers provided above attempt to address the questions under federal law. Please be sure to check state and local laws, which may provide additional protections or restrictions. To stay up to date on COVID-19, including best practices, please visit https://www.cdc.gov/.

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