

Coronavirus: What Employers Need to Know

Presented by:
Campbell Durrant, P.C.

535 Smithfield Street, Suite 700
Pittsburgh, PA 15222
(412) 395-1280

One Belmont Avenue, Suite 300
Bala Cynwyd, PA 19004
(610) 227-2591



Presenters



Patrick J. Harvey
(610)-227-2595
pharvey@cdblaw.com



Bradley J. Betack
(610)-227-2597
bbetack@cdblaw.com



Overview

- › Practical labor and employment guidance on how to keep your employees and the public safe while providing essential public services during COVID-19 (coronavirus) pandemic

- › Addressing the most immediate and frequently asked employer questions



COVID-19

- › COVID-19, or the coronavirus, is a respiratory virus that has now been declared by the World Health Organization (WHO) a global pandemic.
 - Confirmed cases report symptoms of fever, cough and shortness of breath.
 - It is spread mainly from person to person either in close contact with each other or through the transmission of respiratory droplets when an infected person coughs or sneezes.
 - Symptoms are showing up in people within 14 days of exposure to the virus.
 - Coronavirus is highly contagious and its death rate is estimated by the CDC to be ten times that of the flu.



COVID-19

- › President Trump has declared a federal state of emergency
- › Pennsylvania Governor Tom Wolf has ordered all non-essential businesses throughout the Commonwealth to shut down through March 30.
- › Many municipalities have altered operations, including closing buildings to the public, and setting up remote work arrangements.



Reducing Coronavirus Risk in the Workplace

- › The Centers for Disease Control (“CDC”) issued “Interim Guidance for Businesses and Employers” to assist employers with planning and responding for the coronavirus pandemic
 - Recommend a variety of commonsense strategies
 - › Enhanced workplace hygiene
 - › Environmental cleaning
 - › Employee education
 - › Social distancing



Reducing Coronavirus Risks in the Workplace

- › Enhanced Workplace Hygiene per CDC Guidelines
 - Wash hands vigorously with soap and water or an alcohol-based hand rub for at least 20 seconds.
 - Avoid touching one's face, especially eyes, nose and mouth.
 - Exercise respiratory etiquette and cover one's mouth when coughing or sneezing.
 - Maintain at least six feet of distance between oneself and others, including those who are coughing, sneezing or have a fever.



Reducing Coronavirus Risks in the Workplace

- › Environmental Cleaning per CDC Guidelines
 - Routinely clean all frequently touched surfaces in the workplace, such as workstations, countertops, and doorknobs.
 - Provide disposable wipes so that commonly used surfaces (for example, doorknobs, keyboards, remote controls, desks) can be wiped down by employees before each use.



Reducing Coronavirus Risks in the Workplace

- › Employers should consider modifying certain workplace policies and procedures to encourage those who are sick to stay home
 - › Suspending the requirement for sick notes
 - › Adding flexibility in leave policies during an outbreak
 - › Teleconferencing/telecommuting

- › Any policy changes should be clearly communicated in writing to employees as done solely in response to the emergency pandemic, and will be rescinded as soon as emergency is over.

Frequently Asked Questions

1. If an employee is exhibiting flu-like symptoms, can you send them home?

› Yes

- › You can and should send home any employee with flu-like symptoms.
- › Employers should direct all employees to notify supervisors or HR if they experience flu-like symptoms and not to report to work if they have such symptoms.

› Do I have to pay this employee?

- If the employee is sent home due to illness, employee can utilize available leave
 - › Consider flexibility with leave policies
 - › Advancing leave
 - › New federal legislation



2. An employee calls in sick with flu-like symptoms, what should I do?

- › Employers should proactively encourage employees with flu-like symptoms to stay home.

› Can I require a sick note?

- Employers can apply their notice requirements in their policies/CBAs
 - › Flexibility in applying notice requirements may be necessary however.

› Do I have to pay this employee?

- › Regular sick leave policy should apply
- › Consider advancing leave, if none available



3. How much information can I request from employees who report being sick?

- › Employers may ask employees if they are experiencing influenza-like symptoms, such as fever or chills, a cough, or sore throat, during this outbreak.
 - Employers must maintain all information about employee illness as a confidential medical record in compliance with the Americans with Disabilities Act (“ADA”).
- › As part of employer policy, employees should be directed to report all flu-like symptoms to their direct supervisor and HR.



4. When Should Employees with Flu-Like Symptoms Return to Work?

- › Employees who have been diagnosed with COVID-19 should only discontinue isolation after consulting health care providers and state and local health departments.
 - Employers may require the employee to provide proof that isolation can be discontinued before the employee returns to work.
- › In absence of medical clearance or due to lack of available testing, many employers have required employees to self-quarantine for 14-days, even without actual confirmation of COVID-19
- › Do I have to pay this employee?
 - › Regular sick leave policy should apply
 - › Consider advancing leave, if none available



5. Can I require absent employees to provide a doctor's note certifying fitness to return to work?

- › Yes.
 - An employer is always entitled to know why an employee has not reported for work.
 - Employers may require fitness for duty certifications during the COVID-19 pandemic.
 - › As a practical matter, however, employers may need to be flexible because doctors and other health care professionals may be too busy to provide fitness-for-duty documentation.
- › If absence is due to travel, the CDC recommends that individuals who have traveled to countries designated as Level 3 outbreaks self-quarantine for fourteen (14) days after returning to U.S.



6. Can I affirmatively require employees to report potential exposures to COVID-19?

- › If an employee is complaining of flu-like symptoms, employers can question whether they have been exposed to COVID-19 or been around anyone confirmed with COVID-19.
- › For employees traveling, an employer may ask whether employees are returning from certain locations, even if the travel was personal, and these are not considered disability related inquiries.
 - Currently, the CDC recommends that individuals who have traveled to countries designated as Level 3 outbreaks (widespread, ongoing transmission) self-quarantine for fourteen (14) days after returning to the U.S.
 - As of March 16, 2020, the CDC has designated China, Iran, South Korea, Italy, the United Kingdom, and nearly every other country in Europe as Level 3 outbreaks.
 - Employers can require employees who have traveled to a Level 3 country to remain home for the recommended fourteen (14) day isolation period.



7. What if an employee refuses to work due to fears of Coronavirus?

- › You should contact employee and determine basis for fears
 - Assure employee that all appropriate precautions are being taken
 - Municipalities have duty to provide essential services to residents, cannot do that without employee participation
- › Unless medical basis exists for absence, employee should be required to come to work.
- › If employee provides medical basis, such as psychiatric disorder or pre-existing conditions results in weakened immunity, engage in the ADA/interactive process.



8. Do I qualify absences due to coronavirus as FMLA Leave?

- › Employers should be prepared to conditionally designate absences as FMLA Leave to employees who are:
 - Displaying symptoms of the flu or coronavirus;
 - Test positive for coronavirus;
 - Required to take leave to care for individual with coronavirus.
- › Employers can require FMLA certification, but should consider softening timelines for submitting forms.



9. Has Congress passed a paid leave bill?

- › The Families First Coronavirus Response Act (FFCRA), House Resolution 6201, is part of Congress' comprehensive legislative response to the economic and public health crisis caused by the coronavirus pandemic.
 - Includes a number of changes to public assistance programs, unemployment compensation benefits administration, as well as mandates for certain paid leave related to coronavirus-related work absences

- › Bill was passed by the Senate and signed into law by President Trump on March 18.
 - Goes into effect 15 days from enactment.



Employment Aspects of FFCRA

- › Amends FMLA by authorizing “public health emergency leave” “because of a qualifying need related to a public health emergency.”
 - Automatic sunset provision – December 31, 2020

 - An “eligible employee” for public health emergency leave is “an individual who has been employed for at least 30 days by the employer.

 - The definition of “employer” is “fewer than 500 employees” rather than the 50 or more employees which must be present in order for other types of FMLA leave to apply to an employer.



Employment Aspects of FFCRA

- › A “qualifying need related to a public health emergency”
 - “the employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider is unavailable, due to a public health emergency”

- › Qualified leave under this portion of the FFCRA does not apply to an employee’s need for leave due to his or her own illness
 - Is addressed in Emergency Paid Sick Leave Act



Employment Aspects of FFCRA

- › The Act provides that this is employer-paid leave:
 - First 10 days are unpaid (employee can use accrued leave)
 - After the first 10 days, employer shall provide paid leave for each day of leave that employee takes with an aggregate cap on total amount paid per day and total compensation

- › Act gives the DOL Secretary the authority to issue regulations, excluding health care providers and emergency responders from this portion of the Act
 - Police, firefighters, paramedics



FFCRA – Unemployment Compensation

- › The FFCRA extends unemployment compensation benefits for states that experience an increase of 10 percent or more in their unemployment rate over the previous year.
 - Legislation provides for 100% of the extended unemployment compensation benefits (i.e., for the 26 weeks after the initial 26-week benefit period) to be funded by the federal government, instead of shared 50% by the states.

- › Pennsylvania reported 120,000 claims for unemployment benefits in the last two (2) days
 - More than half of what the state reported for the entire first quarter of 2019



FFCRA – Employer Paid Leave

- › Perhaps the most significant piece of new legislation contained in the FFCRA is the Emergency Paid Sick Leave Act (“EPSLA”).

- › The Paid Sick Days Act applies to local governmental employers.



FFCRA – Employer Paid Leave

- › The EPSLA provides that an employer “shall provide each employee” with paid sick time “to the extent that the employee is unable to work (or telework) due to a need for leave because
 - (1) the employee is subject to a 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 is seeking a medical diagnosis;
 - (4) the employee is “caring for an individual” who is subject to a quarantine or isolation order, or has been advised by a health care adviser to self-quarantine;
 - (5) the employee is caring for a son or daughter if the school or the place of care for the son or daughter has closed, or the child care provider is unavailable; or,
 - (6) the employee “is experiencing any other substantially similar condition specified by the Secretary of HHS, in consultation with the Secretary of the Treasury and the Secretary of Labor.”



Public Health Emergency Paid Sick Leave

- › Provides for paid sick leave time:
 - (1) Full-time employees are entitled to 80 hours of paid sick leave;
 - (2) part-time employees are entitled to paid sick leave based on the number of hours “that such employee works, on average, over a 2-week period”
 - There is a daily and aggregate limit on compensation
 - › Campbell Durrant will be issuing an e-alert with the full details on the bill, including the required calculations to make.
- › Employers cannot require that employees use other paid leave before the employee uses his or her paid leave.
- › This portion of the bill will also sunset on December 31, 2020.
- › Act gives the DOL Secretary the authority to issue regulations, excluding health care providers and emergency responders from this portion of the Act
 - Police, firefighters, paramedics



10. Can I furlough/layoff employees due to Coronavirus?

- › Generally, yes.
 - If business operations are interrupted, an employer has the managerial right to opt to furlough or lay off employees, or adopt a reduced work schedule

- › However, all applicable handbooks, personnel policies and CBAs must be reviewed to determine notice requirements, pay requirements, restrictions on managerial rights, etc.



11a. If Municipality Is Closed, Do Employees Get Paid?

- › Answer depends on the category of employee
 - If the employee is non-exempt under the FLSA, and a non-union employee, most likely answer is no
 - › Non-exempt employees may be paid only for hours actually worked.

 - If employee is exempt salaried employee under the FLSA, and a non-union employee, that employee generally must be paid their full salary, regardless of hours worked, unless no work is performed in a given workweek
 - › Answer depends on length of furlough or layoff for this category



11b. If Municipality Is Closed, Do Employees Get Paid?

- › Unionized Employees
 - Consult the applicable collective bargaining agreement for:
 - › “Force Majeur” or Emergency clauses: CBA may suspend contractual obligations in cases of “Acts of god” or other circumstances beyond the parties’ control
 - › Many CBAs have procedural requirements that must be followed regarding the layoff of employees
 - Notice requirements
 - If less than the full workforce is laid off, generally by reverse seniority
 - Compensation requirements
 - › Impact Bargaining Requirements



12. Are furloughed/laid off employees eligible for unemployment benefits?

- › Generally speaking, yes.
 - Employees are entitled unemployment compensation benefits if they are laid off, furloughed, or their hours are reduced.



13. Can we make operational changes in response to COVID-19?

- › Generally, yes
 - For Non-union employees, employers have wide discretion to act
 - For unionized employees, consult CBA
 - › Provisions restricting management rights
 - › Force majeure or emergency language
 - › Reach out to collective bargaining representatives



Operational changes - Employee travel

- › Employer can and should consider suspending business travel
 - Employers can temporarily suspend all business-related travel or restrict it on a case-by-case basis.
 - Even if such travel or attendance has been previously approved, employees should be required to seek additional approval, based upon the continually unfolding events.

- › If an employer directs an employee to travel, and he/she refuses, treat this refusal on a case-by-case basis



Operational Changes – Remote Work Arrangements

- › This should be considered on a case-by-case basis
 - Many functions of municipal government are not conducive to work from home arrangements.

- › Keep in mind the future
 - Allowing it even on a temporary basis may make it more difficult in the future to argue that a work-from-home arrangement is an undue burden.

- › Communicate with employee if arrangement is temporary and set clear guidelines on expectations.



14. Are municipalities required to comply with open meetings requirements?

- › The Pennsylvania Office of Open Records (“OOR”) has taken the position that the Sunshine Act still applies.
 - If an official emergency declaration prevents in person public participation, a meeting via teleconference, webinar, or method that allows for two-way communication is permissible.
 - Must provide a reasonably accessible method for the public to participate and comment



15. Are the courts still functioning?

- › The Pennsylvania Supreme Court announced that all trial and appellate courts are closed, at least through April 3.
 - Time calculations and deadlines relevant to court cases are suspended through April 3 as well.

- › The Pennsylvania Labor Board has closed, as a result of Governor Wolf's emergency declaration.



Helpful Links

- › Campbell Durrant – COVID-19 Employer Resource Page
 - › <https://www.cdblaw.com/covid19.php>

- › EEOC Coronavirus Guidelines
 - › https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitation_act_coronavirus.cfm

- › CDC Employer Guidance
 - › <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

