Ellenoff Grossman & Schole LLP

CLIENT ALERT

COVID-19
Q&A FOR EMPLOYERS

Much about the COVID-19 situation is fluid and evolving quickly. Below, we have summarized the answers to the most frequent questions concerning compensation, working conditions, and accommodating infected employees.

1. Do I have to pay my employees if I temporarily close my business because of the COVID-19 pandemic and my employees perform no work?

Whether an employer is required to pay an employee depends on whether the employee is classified as exempt or non-exempt. Employers do not have to pay non-exempt employees who do not work. However, employers are required to pay exempt employees their full weekly salary if the exempt employee works any part of the workweek. If no work is performed during the entire week, employers are not obligated to pay the exempt employee their salary for that week. Employers should be mindful that sending emails or making phone calls remotely constitutes work which must be compensated. Depending upon the circumstances, employers in NY, IL and NJ may have to pay statutorily mandated accrued, unused sick time.

2. Can my employee file for unemployment insurance if I temporarily close my business, lay them off, or reduce their hours?

Yes. Employees who suffer a loss of employment because of a shut down or reduction in staff due to the COVID-19 pandemic are likely eligible for unemployment insurance. Each state has different eligibility requirements. NY has waived its 7-day waiting period for unemployment insurance.

New York employers should provide laid off and terminated employees with the NYDOL Record of Employment form at separation. The Record of Employment is available here:

https://www.labor.ny.gov/formsdocs/ui/employer-forms-publications.shtm.

New Jersey employers should provide laid off and terminated employees with Instructions For Claiming Unemployment Benefits. The Instructions are available here:

https://nj.gov/labor/handbook/formdocs/FormIntroBC10.html.

Other states may require notices as well.

3. Do I have to pay my employees if I send them home because business is slow?

Likely yes. In New York, call-in pay is owed to non-exempt employees for reporting to work on a given day even if they are sent home early. The law makes no exceptions for situations like the current emergency. The amount to be paid depends on the employer's industry.

For hospitality employers, non-exempt employees must be paid for a minimum of at least 3 hours for one shift, OR the number of hours in their regularly scheduled shift (whichever is less); and, for employers in most other industries, non-exempt employees must be paid for at least 4 hours or the number of hours in the regularly scheduled shift, whichever is less. Payment for actual attendance should be paid at the employee's regular or overtime rate and payment for the balance of the call-in pay can be at the minimum wage.

4. If I am forced to close my business or lay off a significant portion of my workforce, do I have obligations under the WARN Act?

You may, depending on whether you are a covered employer under the federal WARN Act or a state's counterpart.

The New York State WARN Act applies to employers with at least 50 employees and requires advance notice to affected employees if the business is required to close down or suffers a mass layoff. Similarly, the federal WARN Act applies to employers with at least 100 employees and also requires advance notice to affected employees if the business is required to close down or suffers a mass layoff. Generally, New York businesses must provide affected employees with 90 days' advance notice of a closing or mass layoff.

However, if the closure or layoff is the result of "unforeseeable business circumstances," the timing of the notice can be reduced from 90 days to whatever is reasonable. Both the Federal WARN Act and the New York Act provide that "an unanticipated and dramatic major economic downturn or a government-ordered closing of an employment site that occurs without prior notice" qualifies as "unforeseeable business circumstances." The notice to the employee must explain why the business is giving reduced notice.

Many states, including, New Jersey, California and Illinois, also have their own WARN Acts that require notice of closures and mass layoffs.

5. Am I required to let employees work remotely? Can I force them to work remotely?

Generally, employers are not required to permit employees to work remotely. If an employee is infected or on self-quarantine, however, telecommuting may be a necessary reasonable accommodation under the Americans with Disabilities Act (ADA), New York State Human Rights Law or New York City Human Rights Law.

It is at an employer's discretion to require employees to work remotely. However, employers should refrain from only requiring certain protected classes of employees to work remotely. For example, employers cannot require employees over a certain age to work remotely simply because they are at greater risk. Doing so would likely violate applicable anti-discrimination laws.

When employees are working remotely, it is important to set reasonable expectations regarding working schedules, response time and prompt communication. Further, employers must ensure appropriate protections are implemented regarding confidentiality and data security.

6. Can I discipline employees for refusing to come to work because they fear infection with COVID-19?

Employers are cautioned against taking disciplinary action against employees who refuse to work due to a fear of infection with COVID-19.

Under the Occupational Safety and Health Act, employers may not retaliate against employees who refuse to work where the employee has a reasonable belief of imminent danger. Whether any working environment rises to the level of imminent danger will depend on factors including, but not limited to, whether there has been a confirmed diagnosis at the workplace, whether employees have recently traveled to an infected area, and whether employees are regularly exposed to individuals who are likely infected.

Additionally, employers are prohibited from retaliating against employees engaged in protected activity, as defined under the National Labor Relations Act. Participating in a concerted refusal to work in unsafe conditions is a clear example of protected activity.

7. Can retail employers cancel employees' shifts without advance notice and can fast food employers cancel shifts without paying shift premiums as required under the New York City Fair Workweek Act?

Yes. Retail and fast food employers are not required to give advance notice of changes to employees' schedules or pay premiums for schedule changes, as applicable, if the employer is unable to operate due to threats to employee safety, or when a federal, state or local state of emergency has been announced.

8. What sort of leave are employees who are diagnosed with COVID-19 or caring for an infected family member entitled to?

Employees who are diagnosed with COVID-19 may be entitled to take leave under the Family and Medical Leave Act (FMLA) or may apply for state short-term disability leave. Additionally, such employees may be granted leave as a reasonable accommodation under federal, state or local disability laws.

Employees who are caring for a family member diagnosed with COVID-19 may be entitled to take leave under the FMLA or paid leave under the New York Paid Family Leave law.

In either situation, employees in New York City are entitled to paid leave under the New York City Earned Safe and Sick Time Act.

9. Can I ask my employee to stay home or leave work if I suspect they have been exposed to COVID-19?

If an employee exhibits symptoms of COVID-19, an employer may ask the employee to leave the workplace. Employers should recommend that the employee seek medical attention and be tested. However, employers should not ask employees if they have a compromised immune system or chronic health condition that makes them susceptible to COVID-19.

Additionally, employers may inquire whether an employee has traveled to an affected area. If the CDC or other local public health officials have recommended that people who visited certain affected areas self-quarantine, an employer may require an employee who has travelled there to stay home.

10. Can I ask my employee for a doctor's note before returning to work if the employee had exhibited COVID-19 symptoms?

An employer may request a doctor's note from employees returning to work after illness but not without some risk. Under the ADA, if an employer has a reasonable belief that an employee returning to work from a health-related absence presents a direct threat to the health of other individuals at work, the employer may request medical documentation showing that the employee does not present a direct threat. Employers bear the burden of showing a direct threat exists; however, it should not be difficult for employers to establish that COVID-19 constitutes such a direct threat.

However, generally, the New York City Earned Safe and Sick Time Act prohibits employers from requiring documentation unless an employee has been absent for more than three days. Strictly applying the NYC rule that no documentation can be required unless the employee uses more than three consecutive sick days prohibits the employer from doing what is permissible under the federal ADA and, as a result, inhibits the operation of the ADA. Since federal law prevails over state and local laws where they conflict, it is likely that a court will not allow the NYC Earned Safe and Sick Leave Time Act to prohibit an employer from asking for doctors' notes during this pandemic.

11. If one of my employees is diagnosed positive for COVID-19, what do I do?

Employers should inform all employees and visitors who worked closely with the infected employee of their exposure to COVID-19 and recommend self-quarantine for 14 days to ensure the infection does not spread. However, employers should not identify the infected individual by name. A deep cleaning of the working space should be undertaken. Employers are not obligated to report a case of the COVID-19 to the CDC.

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If you have questions or would like additional information, please contact EGS's Employment Law Practice Group Leader, Amanda M. Fugazy at afugazy@egsllp.com or the primary EGS attorney with whom you work.

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