

Business Survival: Coronavirus, Work and the Law

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Nature of the threat

Coronavirus disease 2019 (**COVID-19**) is a respiratory illness that can spread from **person to person**. Caused by a novel coronavirus first identified related to an outbreak in Wuhan, China.

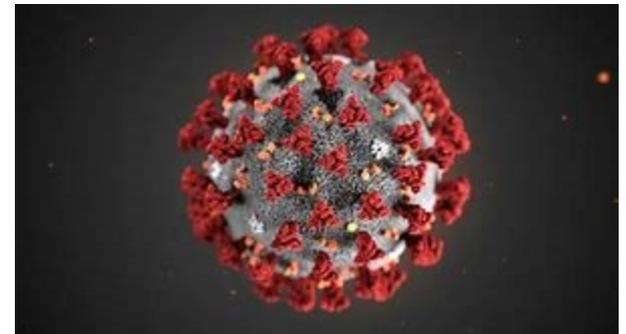
Virus is spread by inhaling respiratory droplets expelled by cough or sneeze and touching infected surfaces and then touching one's nose, mouth or eyes; virus appears to spread easily; reports of spread by persons before symptoms develop

Symptoms include **fever, cough, shortness of breath**

On March 11, 2020 the WHO declared the coronavirus outbreak an official pandemic

Currently, there is no vaccine

Source: www.cdc.gov



Initial considerations

Keeping the business going!

Impact on business contracts/sales

Relationships with third parties, including contractors

Insurance coverage for loss

Employee benefits

Safety is paramount

Employers have a duty to keep work safe

The federal Occupational Safety and Health Administration (“OSHA”) requires private employers to protect employees from recognized hazards. *OSHA Guidance on Preparing Workplaces for COVID-19*.

OSHA’s guidance instructs employers to follow existing safety standards, such as the Personal Protective Equipment (PPE) and Bloodborne Pathogens (BBP) standards to prevent/minimize occupational COVID-19 exposures. OSHA states that employers may need to provide employees with PPE such as gloves, eye and face protection, and respiratory protection when workers are exposed to high or very high risk levels.

COVID-19 is an “illness” for purposes of OSHA’s recordkeeping requirements. If exposure to COVID-19 is “work-related,” i.e., an event or exposure at work caused or contributed to the condition, then it would be recordable along with additional criteria (e.g., resulted in a fatality, days away from work, restricted duty, or medical treatment beyond first aid). If a work-related COVID-19 case results in a fatality or in-patient hospitalization, it must be reported to OSHA in a limited time period.

CDC planning considerations

Must protect workforce AND maintain continuity of operations

- Actively encourage sick employees to stay home/send home if sick or sick family member; must notify supervisor if diagnosed with COVID-19; employer notify public health officials and co-workers of possible exposure within ADA's/privacy laws confidentiality rules
- Consider modifying sick leave/attendance rules to be more flexible, particularly regarding absences related to family members, school closures
- **Do not condition time off on a doctor's note** for employees who have respiratory illnesses either to certify illness or to return to work as medical providers may be overwhelmed and not able to provide timely response
- Routinely clean premises, provide and use disinfectants, reinforce hygiene standards including hand-washing and sanitizing, and use coughing/sneezing etiquette
- Restrict business travel in relation to the threat in area of travel

And manage our people: Layoff vs. furlough?

A layoff is the permanent (or indefinite) termination of an employee's employment

- Likely triggers loss of health insurance coverage; eligibility for COBRA continuation coverage up to 18 months

A furlough is a reduction in the number of days or weeks that an employee may work

- Minimizes negative psychological and financial impact of a termination
- May still be entitled to health insurance, unemployment benefits
- Allows employer to be flexible, retain workers, respond to business fluctuations

Alternatively, employers may consider reducing the hours/pay of some or all workers

There are additional legal considerations for furloughs and reducing hours or pay rates of employees

What does an employer have to pay a laid off employee in CO?

In Colorado, if an employee is fired, including a layoff, an employee must be paid final wages, including accrued vacation, **immediately**. CRS 8-4-109

- If accounting unit responsible for payment is closed, wages are due no later than six hours after the start of accounting unit's next regular workday.
- If accounting unit is off the work site, wages are due no later than twenty-four hours after the start of accounting unit's next regular workday at work site, local office or employee's last-known mailing address

Severance pay is not required under federal or Colorado law.

Severance pay may be consideration for a release of claims. Special rules apply regarding release of age discrimination claims, particularly in a group layoff.

Do employees get unemployment pay if laid off or furloughed in CO?

If an employee is laid off, **or** furloughed and working less than 32 hours/week and earns less than unemployment benefits pay (about 55% of AWW over past 12 months), may receive UI benefits

- Job-attached status if expected to return within 16 weeks; need not show looking for other work
- Furloughed employee can earn wages and a weekly benefit amount (WBA)
- Current max WBA is \$618 per week; \$40,000/year estimated WBA is \$461/week

If an employee tests positive for COVID-19 and is quarantined for 14 days, or self-quarantines with flu-like symptoms, undetermined at this point pending **federal emergency rules**

Claims are filed online at coloradoui.gov/fileaclaim

May take 2-6 six weeks to receive benefits!

Source: <https://www.colorado.gov/pacific/cdle/unemployment-insurance-worker-faqs>

Work Share:

An alternative to layoffs

Similar to furlough in that employees are working reduced hours and are eligible for unemployment benefits and employer stays connected to good talent.

Employer must have a positive percent of excess in their unemployment account. Benefits are not paid from balance incurred from previous employers.

Must reduce the hours of at least 2 employees in a certain unit

Must reduce work hours of employees by at least 10% but by no more than 40%

Employer may not eliminate or reduce employee benefits, including insurance, vacation pay and holidays, PTO, etc.

Employees receive portion of the unemployment benefits available for a given week in which their work hours were reduced

Employers must apply to participate in work share programs

What if we have to lay off a LOT of people?

The federal Worker Adjustment and Retraining Notification (WARN) Act requires private employers with 100+ employees to provide at least 60 days' advance notice of a mass layoff or plant closing

- A facility closing must result in loss of employment for **50 or more employees** in any 30-day period; a mass layoff is of 500+ employees **or** 50-499 employees who constitute **33% of the active labor force** over a 90-day period
- There is an exception for unforeseen business circumstances, natural disasters and temporary closures

WARN notice is provided to workers or their union; State Dislocated Worker Unit; and to local government

Some states have mini-WARN obligations

Can an employer send a sick employee home?

Yes. The CDC recommends sending sick employees home/preventing sick employees from coming to work

- Allow employees to use any paid sick leave or other time off; employers may allow a negative leave balance
- If symptoms of COVID-19, may require employee to be tested (actually getting tested may be difficult)
- May require employee with COVID-19 to self-quarantine for up to 14 days; compare what employer has done with ill employees in the past?
- Document any decision to send an employee home based on objective evidence, e.g., observed symptoms, statements by the employee
- May report possible exposure to other employees; **don't identify employee(s) by name**

If an employee is sick, do they get FMLA leave?

Ordinary flu and common cold are not “serious health conditions” under the federal Family and Medical Leave Act (FMLA), but COVID-19 may present more serious health concerns, e.g., hospitalization and, therefore, may entitle an eligible employee to up to 12 weeks’ job-guaranteed FMLA leave.

- *Smaller employers* are not subject to the FMLA; must have 50+ employees; also, small, remote worksites excepted
- Employees must have worked at least 12 months/1,250 hours in one year before leave to be eligible
- FMLA leave may be taken for care of an ill spouse, child or parent
- FMLA leave is unpaid, but can be substituted with accrued paid leaves, e.g., vacation, sick leave (*New paid sick leave for COVID-19*)
- There is no FMLA leave to avoid/one fears exposure to COVID-19
- ***Expansive new FMLA provision to stay home with children if school/day care closed due to public health emergency***

Do employees get time off to be tested? Colorado HELP leave

Colorado Health Emergency Leave with Pay (Colorado HELP) rules, effective March 11, 2020, require **certain employers** to provide up to four paid sick days for employees with flu-like symptoms who are being tested for COVID-19.

The HELP leave **applies only** to employers in leisure and hospitality, food services, child care, public and private education at all levels, home health care (working with elderly, disabled, ill, or otherwise high-risk individuals), nursing homes, and community living facilities.

Unless too ill, employees must give notice of absence to be tested within 24 hours of being prescribed the test. Employer can require proof of testing by a health care provider.

Employer need not offer additional HELP leave if it already offers all employees an amount of paid leave sufficient to comply; if employee has already exhausted employer's paid leave, then permitted HELP leave

There is a new federal paid sick leave to cover time off for testing

Working in difficult times: FLSA compensation rules

Generally, **non-exempt employees** cannot “volunteer” to work for free
There are special rules for volunteers of public/non-profit employers

- An employer need only pay non-exempt employees for **hours worked**
- Must pay at least minimum wage (\$12.00 hour in CO) and overtime
- Can reduce the number of hours a non-exempt employee works

Exempt, salaried employees generally must receive their full salary in any week in which they perform **any work**, subject to limited exceptions

- Can require employees to take accrued paid leave as long as exempt employee still receives set predetermined salary
- Need not pay an exempt employee for a week in which they do no work

Employers are encouraged, not required, to offer alternative work arrangements (telework or remote work) and additional paid time off in the event work is closed/employee is quarantined; no unlawful discrimination in who gets more favorable treatment; may be an accommodation under the ADA

More FLSA furlough rules

Must pay non-exempt employees for hours worked on regular paydays; overtime as soon as practicable if not determinable in pay period

Must pay non-exempt employees for all hours worked; can reduce hourly rate and hours as long as paid at least minimum wage

Remember, exempt employees are different

- With limited exceptions, exempt employees must be paid a set salary for any week in which they do **any** work or risk losing exemption
- Exempt employees of public employers can be treated differently; subject to reduced salary in a budget-required furlough, 29 C.F.R. 541.710
- Exempt employee may volunteer to take days off for **personal reasons**, other than illness/disability, and may reduce salary for full days missed
- Can make prospective reduction in pay in economic downturn if change is bona fide, employee paid salary \geq \$684/week (\$35,568/year) and reflects **long-term** business needs; CO COMPS order raises salary level to \$40,500 eff.1/1/21

Source: DOL Wage Hour Fact Sheet #70 (September 2019)

Remote work?

Telework is a good option for jobs which can be done away from the office

- Must still follow federal and state law regarding safety, wages recording hours worked and overtime, and providing breaks and meal periods
- What types of jobs, employees and their work performance and record, are conducive to work from home or a remote site?
- Is the home/remote site properly equipped? If employee must pay for work equipment/supplies, can't reduce compensation below minimum wage
- Can connectivity, system access, and security of computers/networks/data be met and maintained?
- Telework may set a precedent in future cases under the ADA

Other ways to avoid layoffs

Reduce hours or rate of non-exempt, hourly employees as long as paid at least minimum wage; if a union, must bargain with union

Reduce salary of exempt employees due to economic slowdown; risk losing exemption

Temporary pay cuts “across-the-board” most likely to be defensible and non-discriminatory; any differing treatment must be objective and documented

Voluntary exit incentives, but may lose valuable employees and invite age discrimination concerns

In all cases, communication is the key to compliance

Is COVID-19 covered by worker's compensation?

Maybe. COVID-19 infection may be an accidental or occupational injury. The injury must be proximately caused within the *course and scope of the job* to be compensable. With the exception of healthcare/service workers and business travelers, where contracting COVID-19 may be directly associated with performing one's job, acquiring COVID-19 may not be within the scope of most employees' jobs. Also, COVID-19 is a health risk common to the entire population and an employee could have equal exposure outside of work, i.e., not a "work hazard."

Employer may file a First Report of Injury for an employee claiming illness was acquired on the job; illness may not be compensable. **Employer may not derive the immunity from personal injury claims provided by workers' compensation statute.**

Review your insurance coverages to ensure gap coverage between workers' compensation and commercial general liability, such as employer's liability coverage.

Don't discriminate!

There have been some anecdotal reports of bias toward Asian persons since COVID-19 originated in China.

Title VII of the Civil Rights Act of 1964 (Title VII) and state law prohibit employment discrimination, including harassment, based on race and national origin/ancestry. Employers must address any claim of mistreatment on the basis of one's race, Asian, or national origin, Chinese, Italian or Iranian (areas of highest concentration of COVID-19 cases), including an applicant's or employee's association with protected persons or groups.

Really, don't discriminate!

COVID-19 may not be a disability under the Americans with Disabilities Act (ADA) and state law

Employers may not make probing inquiries into an employee's health condition unless the inquiry is job-related and consistent with business necessity. The nature of the job, and potential exposure to others, should guide the extent of any necessary medical inquiry.

- Can ask employees if they are experiencing symptoms of COVID-19
- Recommend against taking employees' temperatures at work, may be viewed as an unlawful medical exam under the ADA
- Must maintain all medical information in confidence

Avoid regarding any employee as disabled or taking any adverse action based on speculative fears of illness

Fitness for duty exam before the ill employee can return?

Yes. Generally, employers may require fitness for duty examinations and releases for ill/injured employees under the ADA if applied uniformly and related to business necessity.

Presently, the CDC recommends that employers temporarily suspend a requirement that ill employees provide releases to return to work in order to avoid taking health professionals away from a growing number of sick patients. An employer should be flexible about what it will require, e.g., test result, e-mail, etc., to certify an employee saw doctor, does not have the coronavirus.

If you have a union . . .

Employees may have greater protections under a collective bargaining agreement (CBA), particularly regarding time off, use of sick leave, additional health and welfare benefits and notice of any changes in work demands or schedules

Employers must review the terms of a current CBA and communicate with union representatives regarding any potential changes the terms and conditions of employees' work

Is the federal government going to provide help?

On March 18, 2020, President Trump signed the Families First Coronavirus Response Act (FFCRA); law goes into effect on **April 2, 2020**

- **Emergency Family and Medical Leave Expansion Act (Sunsets 12/31/2020)**
 - Expands 12 weeks' FMLA coverage to all employers with < 500 employees and all public agencies; all employees employed > 30 calendar days eligible
 - Only applies to an employee unable to work (or telework) due to a need to care for a minor child if the child's school or place of child care has been closed or is unavailable due to a public health emergency
 - First 10 days of E-FMLA leave can be unpaid (unless eligible for emergency sick leave); employee can also opt to substitute accrued paid leaves during this time, but an employer may not require an employee to do so
 - Remaining 10 weeks of FMLA leave required to be paid, generally at 2/3 employee's regular rate, for the number of hours the employee would otherwise be scheduled to work. Limits required pay for leave to no more than \$200 per day and \$10,000 total

Is the federal government going to provide help?

Emergency Family and Medical Leave Expansion Act (continued)

- Restoration to same/equivalent position may be denied by employers with < 25 employees if employee's position no longer exists due to public health emergency and employer makes reasonable effort to reinstate/offers equivalent position within 1 year
- Employee must provide notice as practicable
- Employers may exclude employees who are health care providers or emergency responders from E-FMLA entitlement
- Allows Secretary of Labor to exempt small businesses (< 50 employees) if the required leave would jeopardize the viability of their business (Clarifying rules expected from DOL)
- Also excludes employers with < 50 employees in a 75-mile radius from civil FMLA damages in an employee-initiated lawsuit
- Tax credits available to employers for equivalent amount of payments to employees

Is the federal government going to provide help?

Emergency Paid Sick Leave Act (Sunsets 12/31/2020)

- Covers public employers with < 500 employees and **all** public employers
- All employees are eligible immediately (no 30-day requirement like E-FMLA)
- Requires **paid sick leave** to an employee who is unable to work (or telework) because employee is:
 - (1) subject to a federal, state, or local quarantine or isolation order related to COVID-19;
 - (2) advised by a health care provider to self-quarantine because of COVID-19;
 - (3) experiencing symptoms of COVID-19 and seeking a medical diagnosis;
 - (4) caring for an individual subject or advised to quarantine or self-isolate;
 - (5) caring for a son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 precautions; or
 - (6) is experiencing substantially similar conditions as specified by DHHS, in consultation with the Secretaries of Labor and Treasury.

Is the federal government going to provide help?

Emergency Paid Sick Leave Act (continued)

- **Limits paid sick leave to 10 days** (80 hours FT; proportionate amount for PT) regular rate of pay up to \$511 per day (\$5,110 total) where leave is taken for reasons (1), (2), and (3) above (employee's own illness or quarantine); and \$200 per day (\$2,000 total) where leave is taken for reasons (4), (5), or (6) (care for others or school closures)
- May not require substitution of other paid leaves before use of emergency paid sick leave
- Same exclusions as E-FMLA for health care providers and emergency responders and small businesses with < 50 employees if leave jeopardizes the viability of a business as a going concern
- Employers must post a notice to employees
- No discrimination or retaliation against employees exercising rights
- Enforced by DOL like a wage/hour complaint

Things to consider right now

Suspend or limit work travel; conversely, listen and address whether fears by employees of travel/exposure are reasonable

Consider ANY request for accommodation related to COVID-19

Provide all available leave in accordance with FMLA or company policies AND consider additional time off as either a reasonable accommodation under the ADA

Consider telework or remote working arrangements and select participants in a reasonable, work-related, non-discriminatory manner

Barring evidence of a “direct threat” to the workplace, limit probing medical inquiries or medical examinations of employees

Follow CDC and state health guidance

Questions?

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