



Coronavirus: Pressing HR Questions Answered

Part II

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General Information

Below are some useful informational links about the Coronavirus in general, CDD guidance for travelers, and a link to Frequently Asked Questions (FAQs) prepared by a team of FP attorneys.

- CDC Coronavirus page: <https://www.cdc.gov/coronavirus/2019-ncov/index.html>
- CDC Travel site: <https://www.cdc.gov/coronavirus/2019-ncov/travelers/index.html>
- World Health Organization “Myth Busters:” <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public/myth-busters>
- Guidance for Ohio employers: www.coronavirus.ohio.gov

General Information

- **FMLA considerations:** Is COVID-19 a FMLA-qualifying condition? Most likely. Remember, FMLA applies to employee, spouse, child and parent. Require the certifications but grant tentative.
- **Americans With Disabilities Act:** Is COVID-19 a disability?
- **Wage Hour Issues:** Non-exempt employees must be paid for hours worked and must accurately record hours.

General Information

Families First Coronavirus Response Act Overview

- Passes House on 03/14/2020; House changes made late 03/16/2020 for “technical corrections”
- Not yet passed by Senate, which may pass it today or later this week.
- **Paid and Unpaid Leave for Coronavirus-Related Reasons**
 - Emergency Paid Sick Leave
 - Emergency Family and Medical Leave Act (Expand FMLA)
- **Emergency Unemployment Insurance Stabilization And Access Act of 2020**
 - Unemployment Insurance Funding
- **Reimbursement to Employers as Tax Credits**

OSHA – General Duty Clause, Section 5(a)(1)

The OSHA **general duty clause**, Section 5(a)(1) of the Occupational Safety and Health Act, requires that each employer furnish to each of its employees a workplace that is free from recognized hazards that are causing or likely to cause death or serious physical harm.

OSHA – Additional Enforcement Provisions

- OSHA's Personal Protective Equipment (PPE) standards, which require using gloves, eye and face protection, and respiratory protection.
 - When respirators are necessary to protect workers, employers must implement a comprehensive respiratory protection program in accordance with the Respiratory Protection standard.
- OSHA's Bloodborne Pathogens standard applies to occupational exposure to human blood and other potentially infectious materials that typically do not include respiratory secretions that may transmit COVID-19.

OSHA – Additional Issues

- Develop an Infectious Disease Preparedness and Response plan.
- Prepare basic preventative measures:
 - Promote Hand washing;
 - Workers should stay home if sick;
 - Encourage covering of mouth and nose while coughing or sneezing;
 - Develop Work at Home policies if possible;
 - Maintain regular housekeeping practices.
 - Develop policies to identify and isolate the ill.

OSHA – Additional Issues

- Implement Workplace Controls
 - Engineering controls
 - Install high efficiency air filters
 - Increase ventilation
 - Installing barriers like sneeze guards
 - Administrative controls
 - Encourage Sick workers to stay at home
 - Establish alternate days or shifts to reduce total number of workers' that could be exposed
 - Discontinue non-essential travel
 - Personal Protective Equipment
 - Examples:
 - Gloves
 - Goggles
 - Face shields
 - Face masks
 - Respiratory protections

OSHA – Recordability

COVID-19 can be a recordable illness if a worker is infected as a result of performing their work-related duties. However, employers are only responsible for recording cases of COVID-19 if all of the following are met:

- The case is a confirmed case of COVID-19;
- “If an event or exposure in the work environment either caused or contributed to the resulting condition...”
- Work environment is defined as “the establishment and other locations where one or more employees are working or are present as a condition of their employment:
 - Employers premises;
 - Conferences
 - Client sites

OSHA – Recordability

COVID-19 can be a recordable illness if a worker is infected as a result of performing their work-related duties.

However, employers are only responsible for recording cases of COVID-19 if all of the following are met:

- Infectious diseases are work-related if infected at work-employer must make a “reasonable inquiry.”
- The case involves one or more of the general recording criteria (e.g. medical treatment beyond first-aid, days away from work).

Workers' Compensation

- Health care worker or first responders there is a presumption that any communicable disease contracted by such a worker is the result of their employment.
- Contracting the COVID-19 would not be compensable as an injury however it could be compensable as an “occupational disease.” To be an occupational disease you must show:
 1. The illness or disease was contracted in the course of employment, meaning that the illness or disease was proximately caused by employment;
 2. The illness or disease must arise out of employment through conditions that are peculiar to the work *or* from a hazard that distinguishes the employment from employment generally; and
 3. The employment creates a risk of contracting the disease in a greater degree and in a different manner than in the public generally.

Workers' Compensation

Update as of 03-17-20

- The Industrial Commission of Ohio has cancelled all in-person hearings;
- Starting 3-18-20 all hearings will be conducted telephonically;
- Hearings will be restricted to certain issues:
 - Permanent total disability;
 - Temporary total disability or the termination of temporary total disability;
 - Wage loss;
 - Allowance; and
 - Additional allowance.

All other issues will addressed at some point in the future.

Unemployment Compensation

Governor DeWine and Executive Order 2020-03D

- Unemployed workers will include individuals requested by a medical professional, local health authority, or employer to be isolated or quarantined as a consequence of COVID-19 even if not actually diagnosed with COV-19; and
- Individuals totally or partially unemployed, or who are participating in the SharedWork Ohio Program will not be required to serve a waiting period before receiving unemployment insurance or SharedWork benefits; and
- Any benefit paid on these unemployment claims shall not be charged to the account of the employer who otherwise would have been charged but instead shall be charged to the mutualized account, except reimbursing employers; and

Unemployment Compensation

Governor DeWine and Executive Order 2020-03D

- Waiver of work search requirements shall include those individuals requested by a medical professional, local health authority or employer to be isolated or quarantined as a consequence of COVID-19 even if not actually diagnosed with COV-19; and
- Penalties for late reporting and payments will be waived for employers affected by COVID-19.

Unemployment Compensation

- Unemployment Compensation may be available to employees in the event of a shutdown of your business or furlough of employees.
- Each state's unemployment insurance agency will determine eligibility.

Questions – Medical Information

- Can you ask employees to stay at home if they exhibit symptoms of coronavirus or the flu?
 - Yes. Ask them to seek medical attention and get tested for COVID-19.
- Can you ask an employee why he or she missed work?
 - Yes.
- Can you ask them to leave work?
 - Yes, under most circumstances.

Questions – Store Closing/Layoff Issues

- **Can a dealership require employees to take a pay reduction to help avoid layoffs or store closings?**
 - Yes – if no employment contract or CBA
 - Define the plan – how much, how long, who will be affected
 - Non-discriminatory criteria
 - Be careful if tie pay reduction to reduction in hours for salaried exempt employees

- **If we are required to close our dealership, are our employees terminated or laid off?**
 - If you intend to recall them, they are laid off.
 - Check CBA, handbooks and policies for layoff processes, especially “max” layoff definitions
 - Watch federal and state laws regarding closures (e.g., California waived its mini-WARN notice requirements)

Questions – Store Closing/Layoff Issues

- **Do we have to provide WARN Act notices if we are forced to suspend operations?**
 - Maybe.
 - 100+ full-time employees;
 - You implement a “Plant Closing” or “Mass Layoff;”
 - Employees suffer an “employment loss”
 - No employment loss if layoff is less than 6 months (in situations like this, it’s hard to know so providing notice probably best practice);
 - 60-day notice normally required;
 - WARN Act provides a specific exception when layoffs occur due to unforeseeable business circumstances - may apply to the COVID-19 coronavirus.
 - Exception is limited - once you evaluate immediate impact of outbreak, must provide specific notice to “affected employees.” Must also provide statement explaining failure to provide more extensive notice (i.e., unforeseeable nature of the outbreak and its aftermath).
 - WARN Act requires notice to employees, unions and certain government entities.

Questions – Store Closing/Layoff Issues

- **What happens to insurance benefits if employees are laid off? Depends on answers to two questions:**
 1. What is the nature of the employment action?
 2. What does the plan say regarding eligibility?
 - If termination of employment, COBRA should be offered.
 - If temporary layoff or furlough, look at plan document re: how long coverage lasts when an employee is providing no service.
 - Dealers that use the “monthly measurement method” can likely terminate coverage at the end of the month.
 - Dealers that use the “look-back” measurement / stability period method might have an obligation to provide access to coverage for an inactive employee for the rest of the stability period (typically the plan year or the calendar year).
 - Dealers that want to provide something beyond what documents allow need to seek input of the carrier/insurer.

Questions – Workplace Safety Issues

- **Can employer require a medical examination?**
 - Generally, no, unless job-related and consistent with business necessity.
 - Under pandemic, may be able to take temperatures of employees. See advice re: temperature taking considerations.
 - See advice re: how to respond to employees who test positive or show symptoms.

Temperature Taking Considerations

- Temperature taking is considered a medical exam under the ADA so for it to be a lawful exam, it must be consistent with business necessity to conduct, or there is a direct threat to the health and safety of others. Below is guidance the EEOC put out in 2009 when we had the H1N1 issue.
 - If pandemic influenza symptoms become more severe than the seasonal flu or the H1N1 virus in the spring/summer of 2009, or if pandemic influenza becomes widespread in the community as assessed by state or local health authorities or the CDC, then employers may measure employees' body temperature. However, be aware that some people with influenza, including the 2009 H1N1 virus, do not have a fever.
- The COVID-19 pandemic arguably much more serious than that as we are under a national state of emergency. Following this guidance, we believe that employers have a strong argument that they may take temperatures.
- Since employees may have COVID-19 even without a fever, we suggest you also have the employees complete a short questionnaire when they are having their temp taken to indicate if they have other symptoms (see the link below with a list of symptoms, which you could use to create a very short and easy questionnaire. Keep the questionnaire with other confidential medical information (not in the personnel file);
- Advise employees in advance that the testing will be done and the reasons for it;
- Encourage employees to take their own temperatures at home and stay home if they have a fever;
- Do not line employees up in military style; instead, conduct the temperature-taking in private;
- Do not have front-line supervisors conduct the tests; instead, have the HR manager or office manager, who understand that the information must be kept confidential (including not stating the temperature to the employee loud enough so others within ear shot can hear it);
- Assure employees *and follow through by ensuring* that the information will be treated as confidential medical information.

Questions – Workplace Safety Issues

- **How long should an employee remain home if quarantined?**
 - Employees who are suffering from symptoms should be directed to remain at home until they are symptom-free for at least 24 hours.
 - See CDC advice about returning employees if they are confirmed positive (72 hours symptom free or 2 negative tests)

Questions – Workplace Safety Issues

- **Salesperson Confirmed Positive for COVID-19 – what do you do?**
 - Ask employee to provide names of all employees s/he came in contact with in the prior 14 days
 - Advise employees in writing that an **unnamed** employee tested positive, advise they contact healthcare provider and request to be tested (model notice sent/available). Quarantine the employees for 14 days (can apply for UC benefits in Ohio)
 - Advise all employees that an **unnamed** employee tested positive, that employees who were in contact with that person have been advised and sent home to seek care and self-quarantine and they need to watch for symptoms. No need to self-quarantine unless symptoms appear.
 - Close and clean the areas of the dealership where positive employee worked.

Questions – Workplace Safety Issues

- **Can an employee simply refuse to work?**
 - An employee’s right to refuse to do a task is protected if all of the following conditions are met:
 - Where possible, employee asked the employer to eliminate the danger, and the employer failed to do so; and
 - Employee refused to work in “good faith.” This means employee must genuinely believe that an imminent danger exists; and
 - A reasonable person would agree that there is a real danger of death or serious injury; and
 - There isn’t enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.

Questions - Absence Recordkeeping

- **Should employees be required to complete a form indicating reason for absence?**
 - Look at your normal absence recordkeeping practices.
 - Employers have the right to ask why employees are absent.
 - Forms are helpful but not required.
- **Should dealership be keeping a record of reasons for absence?**
 - Yes. For UC reporting, coverage under the emergency FMLA and paid sick day bill, short-term disability, etc.

Questions - Absence Recordkeeping

- **Should we require return-to-work medical documentation?**
 - May follow normal process for providing doctor's notes (e.g., after 3 consecutive days of absence for your own illness)
 - May require fitness-for-duty certification in accordance with your normal policy – if FMLA applies, must follow requirements
 - If don't have policy, consider ADA (job-related and consistent with business necessity) and issue a policy now
 - Employees may not be able to obtain RTW notes – healthcare system overloaded right now.
 - Encourage employees to use tele doc services
 - If changing normal practice due to the situation, document that to avoid EEO issues later

Questions – Compensation for Absences

- **Should employees be paid if they are off for coronavirus-related absences?**
 - If the employee's healthcare provider orders the employee to self-quarantine but employee has not been diagnosed with anything, unemployment comp benefits likely will apply (in Ohio, under the Governor's Executive Order, the employee would be eligible);
 - If the Dealership orders an employee to self-quarantine, the employee may be eligible for UC benefits (the employee would be eligible in Ohio); if no UC benefits are available, it's up to the Company if you want to pay the employee. You don't have to pay but may choose to – just be ready to pay a lot of people though. You could require employees to use paid time off or vacation.
 - Keep in mind the Senate is considering the Families First bill now – would provide for emergency FMLA as well as paid sick days ... stay tuned.
 - Since there may be benefits available to employees, have someone accurately recording reasons for absences – will help if additional benefits become available (also will help if you need to challenge employees who later provide different reasons for the absence in an attempt to collect benefits).

Questions – Partial Unemployment

- **If we were to cut hours and split shifts in our service department, would our techs qualify for partial unemployment? If so, how does this work?**
 - Short answer is yes:
 - Most people who collect unemployment are out of work, but partial unemployment benefits allow those who are still working to claim aid as well. If your hours have been reduced or you are working part-time and cannot find additional work, you may be eligible for partial unemployment benefits.
 - To collect you must earn less than your weekly benefit amount and work less than full-time hours. Since your weekly benefit amount is a result of your wages during the 18 months before your claim, partial unemployment benefits tend to apply to those who lost a full-time job and could only find a replacement with less pay or hours. It also can cover situations where your boss decreases your work hours or pay significantly.
 - To apply for UC Benefits, an unemployed worker can call toll-free 1-877-644-6562, between the hours of 8:00 a.m. and 5:00 p.m., Monday through Friday or go to <https://unemployment.ohio.gov/PublicSelfServiceChoice.html>

Questions

- Is time off due to the Coronavirus considered FMLA-qualifying?
- Do we have to allow employees to work from home?
- Can employees self-quarantine?

Questions

- What if an employee cannot work because the schools are shut down for 3 weeks?
 - Do I have to pay them?
 - Should I pay them?
 - Can I force the employees to use PTO or vacation?
 - Is it FMLA-qualifying?
 - What are some creative ways to deal with this?

Thank You Questions?

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