

Coronavirus/COVID-19: General Considerations for Employers

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General Considerations for Employers[1]

Every day brings new concerns and challenges for employers who prioritize the health and safety of their employees/communities but remain very mindful of the need to continue to meet their business goals and obligations. Although it is impossible to discuss every situation that can arise, below is a discussion of some common scenarios.

What if...

An employee ...

- Appears to be ill and/or unable to perform any of his/her work duties?

Employers have broad rights to make sure that those who report for work can perform their job duties in a way that is safe for themselves and others. So, if an employer has a reasonable basis to question an employee's ability to safely perform his/her job or be in the workplace, it generally may send the employee home pending further investigation of the circumstances. Such an investigation should focus on the employee's functional capabilities and ability to work in his/her workplace (not the specific medical nature of the employee's condition) and rely on the opinions of medical providers/professionals (not lay assumptions or generalizations).

- States that he/she is unable to work?

It is important to understand the basis of the employee's request.

- Is it due to the employee's own health condition?

Employees who are unable to work due to COVID-19 should be treated the same as employees who are unable to work due to any other health condition. So, whatever plans or leave programs that the employer has established (e.g., FMLA, STD, LTD, sick days, PTO, etc.) should be administered in accordance with their terms and conditions.

- The COVID-19-related health condition of someone else?

These employees should be treated the same as employees who are unable to work because they are caring for someone affected by any health condition. So, whatever plans or leave programs that the employer has established (e.g., FMLA, non-FMLA family leave, sick days, PTO, etc.) should be administered in accordance with their terms and conditions.

- Something else (e.g., an imposed or recommended quarantine, lack of childcare for a child whose school has closed, general anxiety)?

Whatever plans or leave programs that the employer has established to cover absences for personal non-health-condition-related reasons (e.g., personal days, PTO, etc.) should be administered in accordance with their terms and conditions. If an employer wishes to expand its plans and programs given due to the current unprecedented circumstances, it should clearly communicate its plans to employees and seek legal advice if needed.

- Asks to work from home (or for some other accommodation)?

It is important to understand the basis of the employee's request.

- Is it due to the employee's own health condition?

Employers should apply their usual ADA-based analysis for interacting with, understanding and addressing employee's request for health-based requests for any change in their work duties or working conditions. Accordingly, employers should determine: (1) whether the request is due to a condition that meets the ADA's definition of a disability; (2) what duties/conditions the employee can/cannot perform/tolerate; (3) whether the duties that the employee cannot perform are "essential," as defined by the ADA; (4) what accommodations would allow the employee to perform his/her job; (5) whether those accommodations are reasonable, etc.

- Is it due to a reason unrelated to a health condition of the employee?

Generally, employers have no legal obligation to provide non-disability-related accommodation requests unless they have agreed to or said they would do so in employment contracts or policies. So, it is largely up to employers to decide whether they want to, in recognition of the extraordinary circumstances here, voluntarily do so. If so, see the below discussion regarding employees working remotely.

The employer...

- Decides to direct certain employees to work remotely?

Employers typically have broad rights to direct their workforce, including where employees perform their duties. That said, here are some key considerations:

- It is critical that employees are well aware of employers' expectations of them while they are working remotely (e.g., work hours, duties, reporting structure, clocking in/out (especially for non-exempt employees), deliverables, accessibility, etc.). It is absolutely critical that an employer knows/controls at all times who is working and who isn't. (One illustration: generally, salary exempt employees must be paid their full salary for any week in which they perform any work, so an employer who doesn't intend to pay salaries to employees during a long shutdown must make sure that exempt employees perform no work during any week in which they are not paid.)
- If a particular employee's work calls on them to handle confidential or private information in a certain way (e.g., in compliance with HIPAA or other privacy laws), employers must ensure that there are policies and procedures in place to ensure compliance with all legal and contractual requirements.
- Needs to layoff certain employees (for example, those who cannot work remotely or whose jobs are affected by a reduction in demand or business)?

Employers usually have broad rights to layoff or terminate employees for whom it no longer has work, subject of course to any specific contractual or other legal considerations. If an employer wishes, given the current unprecedented circumstances, to provide salary continuation or other benefits that it typically does not, it should clearly communicate its plans to employee and seek legal guidance.

[1] DISCLAIMER: This is a general discussion and, therefore, neither constitutes nor substitutes for specific legal advice that takes into account your organization's specific jurisdiction(s) or circumstances. Please seek legal counsel if you need specific guidance. Feel free to contact Albert S. Lee, Co-Chair of Tucker Arensberg's Labor and Employment Practice Group (at alee@tuckerlaw.com or 412-594-5611) if you have any questions.