EMPLOYMENT ALERT
Steps Employers Should Consider Taking in Response to the Coronavirus

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The coronavirus pandemic has reached Oklahoma. At this time, patients in the following counties have tested positive: Oklahoma, Tulsa, Cleveland, Payne and Jackson. Many others are likely positive but have not yet been tested or have not yet received confirmation from the Centers for Disease Control. Federal, state, and local authorities are requiring that steps be taken to minimize the spread of the virus. This Client Alert highlights important steps employers should consider taking now if you haven't already.

Maintain a Safe and Healthy Workplace in Compliance with the OSH Act

The General Duty Clause of the Occupational Safety and Health Act, 29 U.S.C. § 654(a)(1), requires employers to furnish to each worker "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." OSHA has recently published helpful guidance for employers to follow in response to COVID-19, and employers should consult this resource promptly. Some steps OSHA urges employers to take include:

- Implement and communicate good hygiene and infection control practices, such as:
  - Promote frequent and thorough hand washing.
  - Provide alcohol-based hand rubs containing at least 60% alcohol.
  - Encourage employees to stay home if they are sick.
  - Encourage respiratory etiquette, including covering coughs and sneezes.
  - Consider flexible work arrangements, such as telecommuting and flexible work hours (e.g., staggered shifts) to increase the distance among employees and others.
  - Discourage employees from using others' phones, desks, offices, or other work tools and equipment, when possible.

- Maintain or increase regular housekeeping practices, including routine cleaning and disinfecting of surfaces, equipment, and other elements of the work environment.

- **Communicate expectations for protecting employees from sick individuals**
  - Suspend non-essential business travel, particularly to high-risk locations.
  - Discourage employees who have traveled to high-risk locations from reporting to work for at least 14 days.
  - Encourage employees to self-monitor for signs and symptoms of COVID-19 (fever, cough, shortness of breath).
  - Require employees to promptly report in confidence when they are experiencing symptoms of COVID-19 and to refrain from reporting to work under such conditions.
  - Move potentially infectious people to a location away from employees, customers, and other visitors until potentially sick people can be removed from the workplace.
  - Identify uniquely vulnerable employees, such as the immuno-compromised or elderly, who may require special protection in a manner compliant with ADA.

- **Use OSHA's "Risk Zones" to determine job-specific precautions to be taken.**
  - Very High Exposure Risk: Jobs with high potential exposure to high concentrations of known or suspected sources of the pandemic. This would typically include healthcare employees treating known or suspected cornonavirus patients.
  - High Exposure Risk: Jobs with high potential exposure to known or suspected coronavirus patients (i.e. employees transporting or interacting with suspected coronavirus patients).
  - Medium Exposure Risk: Jobs requiring frequent, close contact (within 6 feet) to known or suspected coronavirus victims. This would include jobs that require frequent interaction with customers or the general public.
  - Lower Exposure Risk: Jobs not requiring contact with known patients or the public. OSHA cautions that even employers of lower risk employees should be cautious and develop a preparedness plan to mitigate their risk of exposure.

Pay Employees Properly Pursuant to Federal, State, and Local Wage Laws

Absences and workplace closures due to COVID-19 require careful adherence to federal, state, and local wage and hour laws. Under the Fair Labor Standards Act, how you handle leaves and closures can vary based on whether employees are classified as exempt or non-exempt under the FLSA.

- Exempt Employees
  - Generally, must be paid their full salary if they work at all during a seven-day workweek regardless of the number of hours or days they work.
  - Deductions may be made for full-day absences for personal reasons, sickness, or disability if the workplace is open for work and if you have policies governing such absences.

    - For workplace closures when no telecommuting or other work occurs, must be paid the full salary unless the employee performs no work for the entire workweek.
- Non-Exempt Employees
    - Generally, non-exempt employees are paid by the hour and need not be paid for any time when they are not performing work.
    - Need not be paid for time missed for personal reasons, sickness, or disability.
    - For workplace closures when no telecommuting or other work occurs, need not be paid.
    - All time worked should be tracked accurately, documented, and paid.

Of course, employers may elect to pay employees when not otherwise required by the FLSA or state or local law. But careful attention should also be given to any unique state or local laws depending on the jurisdictions where you operate.

Allow Employees to Exercise Their FMLA Rights

Interference with an employee's rights under the Family and Medical Leave Act not only can result in liability for the employer, but also it can result in ***personal liability*** for individual managers and supervisors. Care must therefore be exercised in being alert to the FMLA rights of your employees if you have 50 or more employees within a 75-mile radius or otherwise grant FMLA rights to your employees.

Generally, the flu or flu-like symptoms are not considered serious health conditions covered by the FMLA. But COVID-19 could give rise to coverage under current FMLA law when:

- It becomes a "serious health condition," which is an illness, injury, impairment, or physical or mental condition involving either:
    - An overnight stay at a medical care facility, or
    - Continuing treatment by a healthcare provider. "Continuing treatment" includes:
        - A period of incapacity of more than 3 full, consecutive calendar days combined with at least two treatments by a healthcare provider within the first 30 days or one treatment followed by a regimen of continuing treatment;
        - A period of incapacity due to a chronic condition that may be episodic in nature and that requires treatment at least twice per year;
        - A period of incapacity that is permanent or long-term while under the continuing supervision of a healthcare provider; or
        - Conditions requiring multiple treatments that will result in periods of incapacity.
- An employee needs leave to care for a child, spouse, or parent with a "serious health condition."

Be Prepared to Comply with Emergency Federal Legislation

All employers with fewer than 500 employees—even some employers with less than 50 employees who previously weren't subject to the FMLA—should be prepared to revise or enact policies providing leave and paid sick time to employees in accordance with the pending

Emergency Family and Medical Leave Expansion Act and the *Families First Coronavirus Response Act*, should they be enacted. For a detailed synopsis of what this legislation will require of employers, click here to access GableGotwals' recent Labor & Employment Alert: The Families First Coronavirus Response Act.

Remind Managers and Supervisors About ADA Compliance Obligations

Managing a host of work-related issues associated with COVID-19 raises risks of violating the Americans with Disabilities Act. Employers should remind managers and supervisors of important ADA compliance obligations, such as:

- Generally, the ADA prohibits employers from making disability-related inquiries and conducting medical examinations of employees.
- Employers may not ask an employee to disclose if he or she has a compromised immune system or health condition that would make them uniquely vulnerable to the coronavirus.
- Employers may send home employees who are experiencing symptoms of the coronavirus.
- If an employee discloses an underlying condition that makes the employee more vulnerable to the coronavirus, the employer must keep that information confidential.
- Employers may not take an employee's temperature to determine if the employee has a fever.
- Employers must still provide reasonable accommodations for qualified individuals with disabilities during a pandemic.
- If an employee asks a manager or supervisor for a work-related accommodation due to a physical or mental impairment, the manager or supervisor should ask the employee, "how can I help you," and should direct the employee immediately to Human Resources in confidence. The manager or supervisor should never respond by telling an employee that the request cannot be granted. That is a decision to made in collaboration with HR, top management, and counsel.
- Be prepared to consider the possibility of offering tele-working options and consult legal counsel to avoid risks.

There are many factors to consider under the ADA depending on the disability at issue, the nature of the employer's workplace, and the health and safety of others. Consult an attorney to ensure your coronavirus response plan does not violate the ADA.

Federal and State WARN Acts

The federal Worker Adjustment and Retraining Act and similar state laws require employers with 100 or more employees to provide advance notice of mass layoffs, plant closures, or furloughs longer than six months. Temporary layoffs or shorter furloughs may also require notice, depending on the circumstances.

It is not known how long the United States will be affected by the coronavirus. Experts indicate that the measures the country has taken, along with medical developments and warmer conditions will reduce the number of new infections and lead to a quicker recovery. However, that prediction is far from certain. The virus has also had a severe economic impact that could

potentially lead to significant layoffs or the closing of entire facilities. Before employers are forced to do so, they may be required to provide sufficient notice to the employees that will be affected.

Avoid the Appearance of Retaliation

Most federal and state employment laws include anti-retaliation prohibitions. When taking any action against an employee that could be potentially adverse—termination, demotion, placement on unpaid leave—be cognizant of circumstances that create risk of potential retaliation claims. Consider whether the employee has recently engaged in legally protected activity, such as exercising protected rights (e.g., requesting or taking FMLA, asking for a reasonable job accommodation, engaging in concerted protected activity with other employees, filing a charge of discrimination or unfair labor practice charge) or opposing any employment practices that the employee reasonably believes to be unlawful (making internal complaint about safety practices or hazards, complaining of discrimination or harassment, complaining of unlawful pay practices, filing a workers' compensation claim due to an alleged workplace exposure). Take steps to ensure you have carefully documented the legitimate, non-retaliatory reasons for any potentially adverse employment action.

Click here to view a checklist on How Should Employers Handle the Coronavirus

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