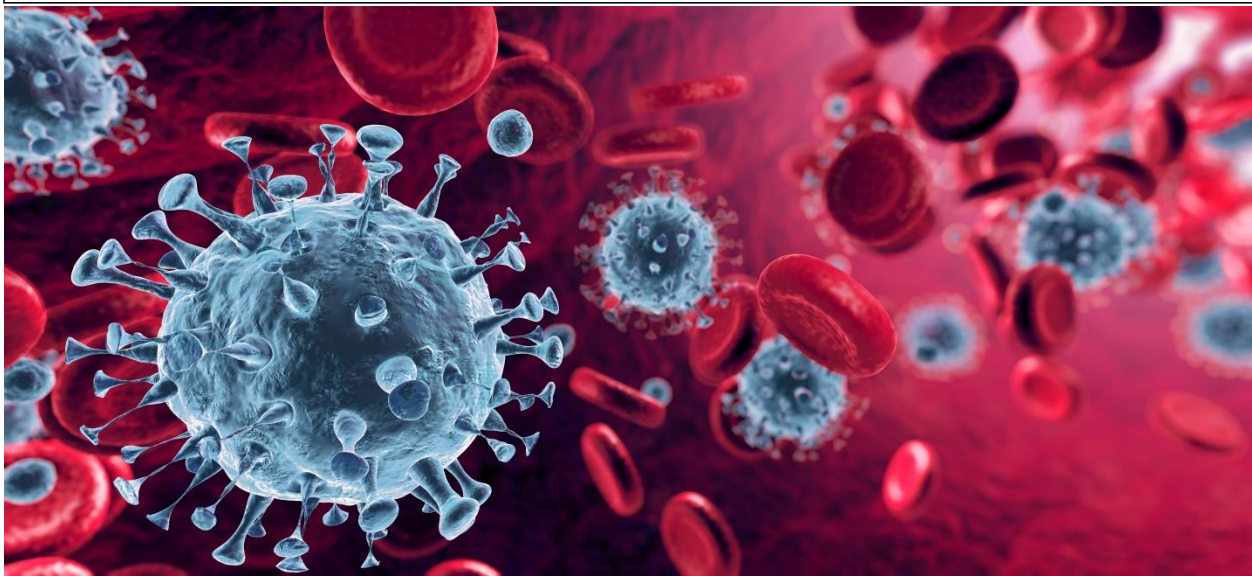


**March 16, 2020**

## **CLIENT ALERT**



### **Responding to the Coronavirus: Practical & Legal Considerations**

By [John Vering](#) and [Mark Opara](#)

COVID-19 (“Coronavirus”) presents a number of challenging labor and employment issues for employers. With the spread of the virus becoming more widespread, now is the time to prepare for the potential consequences. Therefore, we are providing our clients and friends with potential strategies and suggestions for dealing with the Coronavirus and the risks it poses to employers. Please bear in mind that the situation is changing on a daily basis, for example, many cities and states are declaring a State of Emergency because of the Coronavirus, and the CDC continues to issue new [Guidance on Planning for a Coronavirus Pandemic](#). Thus, new legal strategies may need to be employed in the future.

To begin with, we encourage all employers to keep updated on the latest developments being provided by federal, state and local medical authorities including but not limited to the Centers for Disease Control and Prevention (CDC) and the United States Department of State. **Regularly review [cdc.gov](#), [coronavirus.gov](#) and the CDC’s [Interim Guidance for Businesses and Employers](#).**

### **Establish Point(s) of Contact and Stay Up to Date**

Assigning an individual or small team to monitor the latest developments, report to management and keep employees informed is critical to an effective response to the Coronavirus. Keep in mind that advice from health experts is changing on a daily basis so having someone assigned to regularly monitor developments including the above referenced resources is critical.

### **Consider Implementing Action Plans and Policies**

Employers should consider establishing a written action plan and policies specifically tailored to their own needs and a system for communicating internal policies related to the Coronavirus to employees. Such a plan needs to be flexible and modifiable while allowing for more consistent treatment of similarly situated employees.

### **Ensure Workplace Safety Issues are Addressed**

Under the Occupational Safety and Health Act (“OSHA”), employers are required to furnish a place of employment that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm.” **On March 9, 2020, OSHA issued a 32 page document available on its website entitled [Guidance on Preparing Workplaces for COVID-19](#).**

According to the most recent guidance from the CDC, the Coronavirus is thought to spread mainly person-to-person in close contact situations (up to 6 feet), through respiratory droplets produced when an infected person coughs or sneezes, which can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs. According to the CDC, it is currently unknown whether the Coronavirus can be contracted by touching a surface or object that has the virus on it and then touching one’s own mouth, nose, or possibly eyes, although that may be possible. The CDC’s current recommendations for precautionary measures to prevent transmission of the Coronavirus in the workplace provide that employers should adopt include, among other measures:

- Actively encourage sick employees to stay home and seek prompt medical attention.
- Send employees home immediately if they exhibit signs of acute respiratory illness such as cough or shortness of breath.
- Educate employees about the employer’s sick leave policy as well as respiratory and hand hygiene.
- Provide tissues and no-touch disposal receptacles for use by employees.
- Instruct employees to clean their hands often with an alcohol-based hand sanitizer that contains at least 60-95% alcohol, or wash their hands with soap and water for at least 20 seconds. Soap and water should be used preferentially if hands are visibly dirty. Provide soap and water and alcohol-based hand rubs in the workplace, and place hand rubs in multiple locations or conference rooms.
- Perform environmental cleaning such as routinely cleaning all frequently touched surfaces such as workstations, countertops, and doorknobs and provide disposable wipes for employees’ use. At this time the CDC does not recommend any enhanced cleaning methods.
- The CDC currently does not recommend that people who are well wear a facemask, however, it does recommend that the following persons wear masks: (1) those who are infected with Coronavirus or showing symptoms; (2) those who are caring for someone who

is infected with Coronavirus; (3) health workers; or (4) those who are recommended to do so by a healthcare professional.

In taking any actions, unionized employers should consider whether they have any obligation to notify or bargain with their unions over their planned actions.

Note also that, unlike the common cold and flu, OSHA has determined that the Coronavirus is a recordable illness when a worker is infected on the job, and OSHA recordkeeping requirements apply. Many states and localities impose similar or additional safety requirements that may also apply to the Coronavirus.

If an employee contracts the Coronavirus at work or during a work-related activity (such as business travel), the employer should notify its workers' compensation carrier immediately. Workers' compensation may provide coverage for employees, but bear in mind that unpaid interns, volunteers, independent contractors, and third-party vendors are typically not covered by workers' compensation and may present greater liability risks.

### **Consider Travel and Event Restrictions**

Employers should consider prohibiting or strictly limiting business travel to high-risk areas such as China, Iran, Italy and South Korea. Employers should also consider discouraging employees from personal travel to countries and areas where there are coronavirus outbreaks. Employers should advise employees that if they travel to one of the high risk countries identified by the CDC, they are required to advise HR and stay home in self quarantine for a period of 14 days from the time they left such a country. The CDC advises that during this 14 day period of quarantine, it is important for the employee to monitor his/her health and practice social distancing by doing the following:

- o Take your temperature with a thermometer two times a day and monitor for fever. Also watch for cough or trouble breathing.
- o Stay home and avoid contact with others. Do not go to work or school for this 14-day period. Discuss your work situation with the Company before returning to work.
- o Do not take public transportation, taxis, or ride-shares during the time you are practicing social distancing.
- o Avoid crowded places (such as shopping centers and movie theaters) and limit your activities in public.
- o Keep your distance from others (about 6 feet or 2 meters).

The CDC also advises that employees who are well but who have a family member at home with the Coronavirus should contact their supervisor and refer to the CDC's guidance on how to conduct a risk assessment of their potential exposure.

Also, consider whether in-person conferences or similar events in all locations should be postponed or conducted via teleconference or videoconference. Employers are increasingly postponing such events since attendees may be reluctant to travel in the current environment, and to avoid risks associated with potential Coronavirus exposures.

Although employers can restrict work-related travel and can generally require employees to stay away from work if they have traveled to an area of high risk of being infected by COVID-19, prohibiting personal travel to certain area is problematic and is illegal in some states. Employers should also bear in mind that for-cause termination provisions in union or other contracts or policies

may be implicated if an employee is terminated for not following a personal travel restriction. However, employers should consider requiring employees to advise HR if they or a member of their household has traveled to a country or area where COVID-19 is widespread.

### **Consider Adjusting Work from Home Policies**

Employers should review their work from home policies and modify them if appropriate. Employers should at least plan for the possibility that certain offices or facilities might be closed or forced to operate with reduced staff and should plan ahead if employees may be required to work from home. For example, do employers and employees have the hardware and software necessary if large numbers of employees are required to work remotely or can same be acquired on short notice? If non-exempt employees work from home, employers must have in place a system to track all hours worked. If employees are working remotely and transmitting trade secret or other confidential information, consult legal counsel for advice regarding how to protect that information from unauthorized or inadvertent disclosure.

### **Consider Wages, Leave Policies and Benefits**

How will employees be compensated during a Coronavirus outbreak if they are not working? The answer to this question will depend on, among other things, whether employees are considered exempt or non-exempt under the Fair Labor Standards Act (“FLSA”), applicable state or local laws, and employer policies or contracts (including collective bargaining agreements if any).

- Nonexempt employees generally need not be paid for time not worked for Coronavirus-related or other absences.
- Exempt employees generally must receive their full weekly pay for any week in which they perform more than a de minimis amount of work (although depending on the specific facts, state laws, and employment policies, it may be permissible to deduct paid time off for time not worked because of sickness). However, as a general rule, if an exempt employee has exhausted his or her PTO days, that employee’s pay cannot be docked unless the employee is absent for a full day because of illness, disability, or personal reasons. Moreover, an exempt employee need not be paid for a full week absence.

In addition to FLSA requirements, employers need to follow any policies, contracts (including collective bargaining agreements) and any state and local laws that may apply. Employers need to consider that some employees may not be able to afford to go for any length of time without a paycheck. Therefore, consideration needs to be given to whether some modification of current policies on paid leave need to be instituted, at least on a temporary basis to prevent a sick employee from coming to work and infecting co-workers. If the government allows employees to collect unemployment benefits if they are absent from work for illness caused by the Coronavirus or because they are caring for a sick family member suffering from this virus, consider coordinating company benefits with any available government or short term disability benefits in order to discourage such employees from coming to work and infecting others in your workforce.

Now is a good time to remind employees of current policies related to paid and unpaid leave. Coronavirus-related absences, both for employees who are sick and employees caring for sick family members, may qualify as “serious health conditions” triggering the FMLA and similar state or local laws guaranteeing unpaid leave. Some jurisdictions such as California, New York, and (starting in July 2020) the District of Columbia have paid sick leave laws that may cover absences for the illness of an employee or family member, and may also cover absences due to closures of an employee’s child’s school or daycare facility.

If nonexempt employees are permitted to work from home, special care should be taken to ensure that they are accurately tracking their hours worked, are paid for all hours worked, are complying with the employer's policies including meal and rest break policies, and understand whether they need to seek authorization before working overtime.

### **The ADA, Medical Inquiries, and Privacy**

A Coronavirus infection may not constitute a disability under the Americans with Disabilities Act ("ADA") or similar state or local laws because of its temporary nature, but the ADA also protects employees who are "regarded as" disabled, which may come into play based on perceptions of employees who have been exposed to the Coronavirus or are thought to have been exposed, or as discussed below, who have disabling conditions that make them more vulnerable to the Coronavirus. Thus, employers must be careful and should seek legal advice before taking any adverse action against an employee who the employer believes has been exposed to or contracted the Coronavirus.

A common question is whether employers must "accommodate" employees who do not want to report to work because they are concerned about contracting the Coronavirus. The answer: it depends. In considering such requests, the employer should focus on, among other things, whether the employee is seeking accommodation for some other condition that makes them particularly vulnerable to COVID-19, or because of a diagnosed anxiety or other mental or emotional issue triggered by concern over the Coronavirus. Such preexisting conditions may themselves be disabilities for which potential accommodation may be required. If the request is not due to some other underlying condition, the employer should treat the request within the parameters of its existing policies, including any new policies developed especially for addressing the Coronavirus, taking care to ensure that those policies are consistently enforced.

As a general rule, employers are permitted to send home employees who come to work visibly sick, whether from Coronavirus or any other contagious illness, and the CDC recommends that they do so. However, when sending an employee home, employers should keep in mind that some states have laws which require paying non-exempt employees reporting time pay. It may be useful to train supervisors on how to detect the illness and deal with sending an employee home. Notably, employers should remember that the ADA generally does not permit employers to make inquiries about a current employee's medical information or status or ask employees to submit to medical examinations except in narrow circumstances, such as when an employer has a reasonable belief, based on objective evidence, that the employee poses a "direct threat due to a medical condition" to themselves or others. According to pandemic preparedness guidelines issued by the Equal Employment Opportunity Commission ("EEOC") in 2009 following an outbreak of the H1N1 influenza virus, such a "direct threat" might exist if the Coronavirus is officially declared to be a pandemic and is deemed severe by federal, state, or local authorities. In that event, the EEOC's guidance states that employers may make certain medical inquiries or take employees' temperatures (considered a medical exam by the EEOC) to determine if they have fevers. Check with legal counsel before making medical inquiries or taking employees' temperatures.

Any information that an employer does obtain from an employee or the employee's health provider about an employee being infected with the Coronavirus must be kept confidential and apart from the employee's personnel file, and the employer should not distribute information beyond those who have a need-to-know this information. Employers may tell other employees that they may have been exposed to the Coronavirus and thus should seek medical attention, but may not reveal the name of the employee who has already contracted the virus. It is not unlawful to tell an employee that he or she may voluntarily reveal to others in the workplace that he or she has contracted Coronavirus.

## **Avoiding Discrimination, Retaliation, and Whistleblower Claims**

Although an employer may send an employee home based on a reasonable belief that the employee has been in contact with the Coronavirus, it is important to treat all similarly-situated employees equally. For example, employers must not treat individuals of a particular national origin (or who are associated with someone of a particular natural origin) any differently than other employees. Employers should also take care to follow existing policies when employees request leave or report workplace safety issues related to the Coronavirus to reduce exposure to potential retaliation claims under OSHA, the FMLA, or other applicable laws. In fact, employers should consider proactively reminding its workforce, and, in particular, its supervisors, about obligations to refrain from Coronavirus-related discrimination or harassment, and to report instances of same. [Click here for a copy of the EEOC guidance on Coronavirus.](#)

No one approach is best for all employers, and addressing issues related to the Coronavirus will require considering circumstances specific to your industry, the nature of your workforce, the location(s) where you operate, your contractual obligations to your employees, and your own risk/benefit analysis.

*This article is general in nature and does not constitute legal advice. Readers with legal questions should consult the authors, John Vering ([jvering@sb-kc.com](mailto:jvering@sb-kc.com)) or Mark Opara ([mopara@sb-kc.com](mailto:mopara@sb-kc.com)), or any other shareholders in Seigfreid Bingham's Employment Law Group, including: John Neyens, Brenda Hamilton, Shannon Johnson, or your regular contact at Seigfreid Bingham at 816-421-4460.*