

EMPLOYMENT LAW

FROM A DISTANCE

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Agenda

- The New Work Environment
 - COVID-19 Preparedness Plan
 - Medical Screening and Results
- Families First Coronavirus Response Act
- Hypotheticals and Questions

The New Work Environment

- Minnesota's Executive Orders
 - Executive Order 20-20 – Stay at Home Order
 - Executive Order 20-40
 - Industrial and manufacturing businesses
 - Office-based businesses
- **All workers who can work from home must do so.**

But what does “can work from home” mean?

□ Hypotheticals

- EE can get all of her work done but it takes 110% of the time (wages)?
- EE can get all of her work done but it takes 300% of the time (wages)?
- EE can do 90% of her tasks at home but must do 10% at workplace?
- EE says she feels depressed and needs to come to office for her mental health?
- What if there is no definitive reason EE can't work from home but the past month has demonstrated that she won't work effectively from home?
 - We don't know that she “can't” but we certainly know that she hasn't.

But what does “can work from home” mean?

- Ultimate Answer: Best guide is ADA Reasonable Accommodation/Undue Burden analysis.
 - I think you can get where you need to be so long as EE and ER agree.
 - Part of this is the lack of a solid enforcement mechanism
 - What if ER and EE disagree?
 - ER probably has better access to information and is probably a better authority
 - But if you’ve got an angry or fearful EE, you have a threat of a reporter.

But what does “can work from home” mean?

□ Answers

- EE can get all of her work done but it takes 110% of the time (wages)?
 - Probably can work from home
- EE can get all of her work done but it takes 300% of the time (wages)?
 - Probably can't work from home
- EE can do 90% of her tasks at home but must do 10% at workplace?
 - Can't, but what do you do? Lay off?, bring in 100%?, split time? Let 10% not get done?
 - What are the risks of coming/staying/going?
- EE says she feels depressed and needs to come to office for her mental health?
 - I think you can accommodate
- What if there is no definitive reason EE can't work from home but the past month has demonstrated that she won't work effectively from home?
 - We don't know that she “can't” but we certainly know that she hasn't.
 - Bring her in or fire.

The New Work Environment

- COVID-19 Preparedness Plan
 - Practices to promptly identify and isolate sick employees
 - Social distancing
 - Cleaning and disinfecting
 - Other infection prevention measures
 - Method of communication
- Templates by Minnesota Employment and Economic Development
- OSHA Guidance on Preparing Workplaces for COVID-19

The New Work Environment

- Staggering Shifts
- Telework and Remote work agreements
 - Employment at will
 - Flexibility to terminate
 - Reiterate expectation of compliance with all company policies
 - New employment benefit
- Monitoring Productivity (can v. cannot work from home)
- Enforcing Employment Policies

The New Work Environment Questions

□ Health Screening

- What if the employee refuses to participate?
- What if the employee doesn't "pass" the screening?

□ Confidentiality

- Results – need to know only
- Defamation

□ Returning to Work

- Fearful
- Underlying health condition
- School-age children at home

ADA Interactive Process

Reminder

- Review job description with employee
- Review workplace conditions
- Obtain medical authorization from employee
- Prepare questionnaire for medical provider
 - Provide job description
 - Outline workplace conditions
- Request
 - Medical opinion regarding performance under workplace conditions
 - Identification of barriers to performance in the workplace
 - Recommendations for accommodations for performance in the workplace

Families First Coronavirus Response Act

□ Applicability for Employers

- Health care provider / emergency responders
- Small business – Jeopardize the viability of the small business as a going concern (school / care provider leave only)

□ Small Business Exemption

- Expenses and financial obligations > Available revenue, causing business to cease operating at minimal capacity
- Employee(s) departure for leave = Substantial risk to business's finances / operations because of the employee's skills, knowledge, or responsibilities
- Insufficient workforce able, willing, qualified, and available to perform departed employee's work and allow business to operate at minimal capacity

Families First Coronavirus Response Act Reasons

- Emergency Sick Pay Leave Act under FFCRA (80 hours/FT)
 1. Quarantine / Isolation order related to COVID-19
 2. Advised to self-quarantine related to COVID-19 by health care provider
 3. Experiencing COVID-19 symptoms and seeking diagnosis
 4. Caring for an *individual* subject to #1 or #2
 5. Caring for child whose school/provider close or unavailable because of COVID-19 (“Child Care”)
 6. Experiencing any substantially-similar condition specified by US Dep’t of Health & Human Services

Families First Coronavirus Response Act

Reasons

- Emergency Family and Medical Leave Expansion Act under FFCRA (12 weeks)
 - Child care only
 - First 2 weeks – unpaid; employee may elect to take paid leave
 - 10 weeks – paid at 2/3 regular rate of pay; capped at \$200/day and \$12,000 total
- Model Notice and FFCRA Poster

Families First Coronavirus Response Act Documentation

- IRS documentation for reimbursements and credits
- Establish separate form from FMLA documentation
 - Employee statement of qualifying reason for FFCRA leave
 - Documentation evidencing qualifying reason
 - Statement of inability to work or telework
 - Child Care leave – Certification of no other individual caring for child
 - If only child is 14 or older, identification of special circumstances
 - Names, ages, school/provider name
- FMLA forms
- Location

Families First Coronavirus Response Act Questions

- ❑ Intermittent Use of FFCRA leave
 - Employer's choice; Workplace performance – Child Care leave only
- ❑ Subject to Quarantine / Isolation and Stay at Home Orders
- ❑ What if the business closes for a period of time?
- ❑ What if an employee is furloughed?
- ❑ What if the employee's hours are reduced?
- ❑ What if the employee already exhausted his 12 weeks of FMLA leave?
- ❑ What if employee's spouse also works from home?

When the Shelter In Place Order is lifted

- Can an ER be liable for an infection contracted at work?
 - ER negligence?
 - Work Comp?
- EE who was successfully working from home refuses to come back out of fear of infection?
- EE who was successfully working from home can't find child care
 - Does “closed or unavailable” under FFCRA include personal choice of child care provider?
- EE wants to wear a mask but ER doesn't want them to?
 - EE has prescription

When the Shelter In Place Order is lifted

- One year from now, EE who worked from home during the SIPO has disability and requests to work from home.
 - ER has no other EEs working from home and does not want to offer this accommodation.
 - ADA process including RA/UH analysis
 - The fact that you did it in 2020 is some evidence that you can, but that's not the end
- Key To Success:
 - Gather and secure data now
 - What did this cost us?

THANK YOU!

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