

COVID Must Knows for Employers and the Development of a Strategic Response Plan

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Outline of Topics to be Discussed

- Update on COVID protocols including masking, testing, and quarantine
- How to manage employee cases of close contact, symptoms consistent with COVID-19, and positive test results
- Return to work expectations
- OSHA and Worker's Compensation considerations
- Benefit obligations for absent and laid off employees
- The State of Wisconsin's response to the pandemic and additional obligations for employers
- Looking ahead to 2021, what lies behind the curtain as to Families First Coronavirus Response Act and litigation vulnerabilities

History of Executive and Emergency Orders

- March 12: Governor Evers declares Health Emergency
- March 25-April 24: Original Safer at Home Order closing schools and all nonessential businesses
- April 25-May 26: Extension to Safer at Home Order; struck down by Wisconsin Supreme Court on May 13
- August 1-September 28: Original Mask Mandate which was accompanied by a new emergency declaration
- September 22-November 21: Extension of Mask Mandate which was accompanied by a new emergency declaration

History (continued)

- October 6 – DHS Secretary Emergency Order #3 – Limiting Public Gatherings (Oct. 8-Nov. 6)
- November 10: Governor Issues COVID-19 Recommendations
- November 22-January 22: Extension of Mask Mandate with new emergency declaration (Order No. 94)

Supreme Court Challenges

- Three pending cases:
 - Challenge to mask mandate (argued Nov. 16)
 - Challenge to Madison & Dane County Public Health Order closing schools (Oral Argument Dec. 8)
 - Challenge to Emergency Order #3 (Oral Argument Dec. 14)
- Why do we care about all of these cases?
 - Scope of Governor's authority under ch. 323 (declaration of emergency)
 - Scope of DHS Secretary authority under s. 252.02 (communicable disease)
 - Scope of Local Health Officer authority under s. 252.03 (communicable disease)

What If...

- DHS proceeds with the rule-making process
- Legislative COVID Relief Package
 - Limits local authority
 - Limits DHS Secretary authority

Watch for Local Orders

- Many local health departments currently providing “guidance” or “recommendations.”
- May see a shift to local orders.
- Interpretation of quarantine obligations where multiple events arise.
- Latest Dane County Order:
 - Effective November 18-December 16
 - Prohibits any indoor mass gatherings – meetings, trainings and conferences with people who are not from the same household
 - Limits outdoor gatherings to 10 people
 - Requires face coverings
 - Businesses limited to 50% capacity
 - Restaurants limited to 25% of indoor capacity, taverns take out only

BUT... this local order is being challenged in the Supreme Court

Watch for Local Orders (continued)

- Latest Winnebago County Board Action:
 - COVID-19 Ordinance passed 20-16 on November 17
 - Ordinance allows for Individual Order and General Orders by the Winnebago County Health Department – no Order proposed
 - The Ordinance would need to reflect that it is deemed reasonable and necessary to prevent and suppress communicable disease
 - Board approval of Health Department Orders required before effective
 - Penalties: \$100-\$500 per violation, costs, loss of license issued by the Health Department (food safety and recreational license)
 - Ability to authorize “General workplace shutdown” not included in Ordinance

Watch for Local Orders (continued)

- Latest City of Milwaukee status:
 - December 4 new Order issued by Milwaukee Health Department (Order #4.3) – effective until January 15, 2021, revert to #4.2
 - Bars and restaurants required to submit COVID Safety Plan and fill out Risk Assessment tool to continue in-person dining
 - Schools required to obtain approval letter for other than virtual class
 - Mask mandate continues

Current Masking Recommendations

- Under a State or local order, employers are required to comply with Mask Mandates.
 - Executive Order #95 (Nov. 21, 2020) requires masks
 - State and local health departments recommend/require masks
 - CDC recommends masks be worn when around people outside of the household
 - OSHA recommends face coverings but does not consider a cloth face covering to be PPE and does not require employees to wear cloth face coverings

CAUTION: N95 provided by employers requires compliance with fit testing and training.

Guidance on Exposure to COVID-19

- Exposure is based on “close contact” which is defined as:
 - Direct physical contact.
 - Being within 6 feet of the person for more than 15 minutes in a 24 hour period, regardless of masking.
 - Contact with the person’s respiratory droplets (ex. cough, sneeze, shared drinking glass, food, etc.).
- Self-quarantine and self-monitor since last close contact.
 - 10 days without testing; 7 days after receiving a negative test (received on the 5th or later day of exposure).
 - Stay home as much as possible and avoid travel.
 - Monitor symptoms including fever, cough, difficulty breathing (until 14 days after exposure).
- WI Department of Health allows an end to quarantine after completing a 10 day quarantine without testing or after 7 days after a negative test result that was collected within 48 hours of the end of the quarantine.

Guidance on Symptoms Consistent with COVID-19

- Employees experiencing symptoms should immediately be sent home
- Self-quarantine for a minimum of 10 days
 - Unless test negative – 24 hours since last fever without use of medicine and other symptoms improved
- May return to work after 10 days has passed since onset of symptoms AND the employee has been symptom free for 24 hours
- May return to work after two (2) negative tests performed at least 24 hours apart

COVID Symptoms

- Fever (over 100.4°)
- Cough
- Shortness of breath
- Fatigue
- Muscle/body aches
- Headache
- Loss of taste or smell
- Congestion/runny nose
- Nausea/vomiting
- Diarrhea

What is the Legal Significance of “Guidance”

- Failure to follow guidance from the CDC or state/local health departments does not create a private cause of action but it may be used as evidence in a COVID-related lawsuit to establish the standard of care
- Negligence/Wrongful death
- OSHA: unsafe work environment
 - General Duty Clause
 - N95 Respirator Fitting
- ADA: basis for requesting work from home accommodation
- Worker’s Compensation: work related
- Employer Immunity: most proposed bills protect employers who have taken reasonable steps

FAQ Regarding COVID Guidance

- Should employers perform their own contact tracing once they learn of a positive test?
- What is the risk of bringing an employee back earlier than the guidance recommends?
- How can I verify whether an employee actually has been in close contact with someone?
- Can I require an employee get tested during self-quarantine?
- Can I discipline an employee who repeatedly reports close contact or symptoms consistent with COVID-19?

FAQ Regarding COVID Guidance

- Can I require an employee to work from home during self-quarantine?
- Should I tell other employees in the workplace when someone tests positive?
- Do I still have to follow the self-quarantine guidance if the employee is ineligible for FFCRA leave?
- Are all COVID related absences “excused” and immune from discipline?

What Employers Have Heard

1. I do not feel safe and cannot return to work
2. My son has COVID-like symptoms, he is not going to be tested but I need to quarantine – see you in 28 days
3. Yes I tested positive but feel fine, so you cannot count this as FMLA leave

Compensation and Benefits and COVID

- Exempt status and pay continuation obligations
- FMLA concurrency – Is this a serious health condition?
 - Do I have to count as leave under FMLA?
- COBRA obligations
- Employee incentives – perfect attendance
- Retirement plan concerns and COVID
 - Top Heavy Rule
 - Discrimination testing (deferral percentage)
- FFCRA
 - Emergency Paid Sick Leave
 - Extended Family and Medical Leave Expansion Act

COBRA Compliance

COBRA:

1. IRS Deferral of Compliance: May 4, 2020
2. Election of COBRA
 - 60 days after end of National Emergency
3. Paying for coverage
 - Initial payment – 45 days after end of National Emergency
 - Subsequent payments – 30 days after end of National Emergency
4. Pending of coverage/benefits

FFCRA – Part 2?

- FFCRA for EPSL and EFMLEA expires December 31, 2020
- No carryover of unused amounts
- Bills being considered in Congress may extend these benefits into 2021

Vaccinations

- Employer mandate
- Employer provided v. get available provider to distribute
- Requests for COVID absence after vaccination
- Negative reaction to vaccinate – worker's compensation?

OSHA

- No deviation from obligations due to COVID
- Masking – the rules
- Deviation from guidance
- Importance of Policy and Procedures

Worker's Compensation

- Is every COVID exposure reported by an employee either recordable and/or reportable?
- Do I pay benefits until approved?
- Do FFCRA/EPSLA benefits get paid until a decision is issued?

COVID Related Litigation

- Negligence/wrongful death: Failure to follow guidance created unsafe work environment
- Refusal to Accommodate under ADA
 - Enhanced/alternative safety precautions
 - Masking exemptions
 - Remote work
- Leave Denial under FFCRA
 - Lack of documentary support for leave
 - Exempt designation under FFCRA
- Retaliation/ Whistleblower
- Wage and Hour related to remote work

Measures to Help Prevent Litigation

- Implement and enforce reasonable safety measures.
 - Enforce mask policy
 - Limit in-person gatherings
 - Increase sanitation protocol
 - Keep sick employees out of the workplace
- Gather documentation to justify any deviation from recommended self-quarantine protocols.
- Carefully evaluate any request for accommodation under the ADA.
- Telework agreements that address wage and hour issues.

Looking Ahead to 2021

- FFCRA set to expire on December 31, 2020 – expect a new form of job protected paid leave.
- State or federal vaccine protocol.
 - Mandate versus recommendation
 - Prioritize health care employees and elderly
- State or federal orders regarding masking, distancing, travel, occupancy limits, etc.
- Increased testing.
 - Home lab testing is being developed
- Continued litigation related to “unsafe” work environment.

Questions?

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