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EPL Issues During The COVID-19 Pandemic

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Privacy Rights of Employees Employers Need To Be Aware Of In the Wake of COVID-19 and the Re-Opening of the Country

The sudden onset of COVID-19 has and will continue to result in a massive increase in data collection on employees by employers with potential repercussions on individual privacy rights. Almost every employer in the Country will face the question of how to handle information relating to their employee's exposure and/or testing positive to COVID-19. From implementing measures such as taking the temperature of their employees or asking questions about COVID-19 symptoms, employers will struggle with what information may be collected from their employees, and what liability to the employer may result for sharing and/or for not sharing the information. Therefore, employers need to be mindful of their employees' privacy rights to delicately balance the safety of their workforce and the privacy rights of their employees.

American privacy laws provide employers with little to no guidance on how private information should be handled. Unlike Europe, where member states are subject to the European Union's General Data Protection Regulation ("GDPR") or Canada's Personal Information Protection and Electronic Document Act, the lack of a standardized governing law regulating private information creates a conundrum for employers. Generally, private health information related to an employee group is protected by the Health Insurance Portability and Accountability Act ("HIPAA"). However, employers are not subject to HIPAA, and information resulting from COVID-19 related inquiries does not implicate HIPAA. Similarly, health information privacy laws at the state level do not generally extend to employers, which opens the door for these issues being litigated under common law. For example, see *Cal. Civ. Code* sec. (s) 56-57.37; and sec. (s) 56.20-56.25.

In the absence of applicable state laws, employers can rely on basic privacy law standards, such as transparency, notice, choice and fairness, and procedures in applying the Americans with Disabilities Act ("ADA") and the Family and Medical Leave Act ("FMLA"), which provide guidance on what information an employer may request, and how to handle sensitive employee information related to COVID-19. In California for example, employers must provide California resident employees a privacy notice at or before collecting private and/or health related information, under the California Consumer Privacy Act ("CCPA"). However, CCPA does not restrict the use of such information. New York is in the process of enacting Senate Bill S5642, which is similar to the CCPA and would provide a private right of action for any violation of the law. Other states that are in the process of enacting privacy laws modeled on the CCPA include Massachusetts, Hawaii, Maryland and North Dakota.

It is essential that an employer advise an employee testing positive for COVID-19 of his/her rights and responsibilities, advise of the need to make disclosures and provide the employee a reasonable choice whether to permit such disclosures. Doing so will minimize future liability and allow the employer to play their part in limiting the spread of the virus. Note that California requires written authorization for some disclosures. *Cal. Civ. Code* sec. 56.20.

Who May Be Notified That An Employee Has Tested Positive for COVID-19?

An employer may disclose generally to other employees that an employee or a visitor has tested positive for COVID-19. However, the employee's identity may not be revealed. However, the EEOC indicated that an employer may disclose the sick, employee's name to the public health agency. (1)

What Information About the Employee's Condition Can Be Revealed?

An employer may not disclose information related to an employee's medical condition and/or their symptoms to other employees. However, under the ADA (specifically, 42. U.S.C sec. 12221(d)(3)(b) and sec. 12112(d)(4)), information obtained from an employee as part of an inquiry into their disability is confidential, but it may be disclosed to specific individuals in certain circumstances. Similarly, an employee's medical history related to their request and/or eligibility for a leave under the FMLA 29 C.F.R. sec. 825.500(g) is protected. The EEOC and some courts have held that any information related to an employee's medical condition is protected under the ADA and/or FMLA.

(1) The scope of an employer's ability to disclose to a third-party that an employee has COVID-19 should be considered on an individualized, fact-intensive inquiry. For example, a temporary staffing agency contractor may notify a third-party employer and disclose the name of the infected employee to determine if the employee had contact with anyone in the workplace.

What Information Can An Employer Seek To Obtain From An Employee?

Upon consent to disclosure by the employee, an employer may inquire into COVID-19 symptoms or a positive COVID-19 test. Further, the employee can always offer this information. However, the employer should not exert any pressure on the employee to do so, and such disclosure should be entirely voluntary. It may also be advisable and good practice to obtain written consent from all employees regarding their disclosure.

Once this information is disclosed, the employer may inquire into the names of individuals who came in contact with the employee within the last 14 days at the workplace and locations visited by the employee while at work. This information may be disclosed to other employees for their protection; however, the name of the employee should not be disclosed unless the employee consents. Any disclosure of the employee's identity should only be made after obtaining the employee's consent and notifying the employee that the disclosure may be necessary.

What Disclosures May Be Necessary?

In order to protect the health and safety of its employees and avoid potential liability, an employer should disclose to other employees, staff, clients and vendors, etc. that a person they came in contact with in the last 14 days tested positive for COVID-19. This disclosure may be made even if prior consent has not been obtained from the affected employee.

What Added Protections Is An Employee Entitled To Under the ADA?

Employers need to consider the ADA when creating their reopening plans to mitigate legal risks related to COVID-19. 42 U.S.C. § 12112(d)(4)(A); *Conroy v. New York State Dep't of Corr. Servs*., 333 F.3d 88, 94-95 (2d Cir. 2003); *Fredenburg v. Contra Costa County Dep't of Health Servs.,* 172 F. 3d 1176, 1182 (9th Cir. 1999). The ADA prohibits employers from discriminating against a qualified individual with a disability or perceived disability. 42 U.S.C. § 12112(a). The ADA extends to protect individuals an employer perceives is disabled, even if that individual is not, indeed, disabled.

When employers reopen their companies during and after a pandemic, it is important to protect themselves, their employees, and customers. To this end, since COVID-19 is a direct threat to the safety and health of everyone, employers may ask employees if they are experiencing symptoms of COVID-19. *See* 42 U.S.C. § 12112(d); Equal Employment Opportunity Comm'n, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act, § B of "General Principles" (2000), https://www.eeoc.gov/policy/docs/guidance-inquiries.html#4 . Specifically, such symptoms include fever, chills, cough, shortness of breath, and sore throat. This list may expand, or contract, as medical professionals learn more information. As further discussed above, information learned through this inquiry must remain confidential and the employee's privacy must be paramount. This generally requires employee's medical information to be kept separately from the employee's personnel file, to ensure confidentiality. *See* 29 C.F.R. §§ 1630.14(b)(1)(i)–(iii), (c)(1)(i)–(iii); 29 C.F.R. pt. 1630 app. § 1630.14(b).

If it is discovered that an employee has contracted COVID-19, the employer is allowed to require that employee to stay home. 29 C.F.R. § 1630.2(r); 29 C.F.R. pt. 1630 app. § 1630.2(r). Prior to that employee returning to work, the employer may require a doctor's note certifying that the employee is healthy and no longer has COVID-19.

It is important to note that when bringing employees back to work, generally, employers must not enact guidelines that improperly discriminate against individuals over the age of 65, or other "at risk" people, nor should they enact policies that appear to exclude or be adverse to certain classes of individuals. Such guidelines could be preventing older or "at-risk" employees from returning to the office when it is their choice. Employers must be cautious not to enact polices that appear to exclude or be adverse to certain individuals.

Employers remain obligated to provide employees reasonable accommodations for those individuals with disabilities, absent undue hardship. See 29 C.F.R. pt. 1630 app. § 1630.2(o); see also *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 416 (2002); 42 U.S.C. § 12111(10); 29 C.F.R. § 1630.2(p). More recently, the EEOC opined on the issue of whether employees should be allowed to telework if possible. See Equal Employment Opportunity Comm'n, Enforcement Guidance: Work at Home/Telework as a Reasonable Accommodation, EEOC-NVTA-2003-1, https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation. For those jobs that must be performed at the workplace, the EEOC suggests "low-cost solutions" such as using plexiglass or other barriers to ensure minimum distances, per CDC guidelines.

The existence of COVID-19 does not eliminate the interactive process employers must engage in when they receive a request for accommodation. Employers may ask questions or request medical documentation to evaluate the requested accommodation. The accommodation should be provided unless doing so would pose an undue hardship on the employer. Employers may use the realities of the current economic market to evaluate whether the proposed accommodation poses an undue hardship. The EEOC released guidelines that have lowered the bar of what constitutes an undue burden, acknowledging that employers have lost "some or all of [their] income stream …, which is a relevant consideration."

Employers should take this opportunity to update their policies and procedures and ensure they are applying the accommodation process analysis consistently. It is important not to make it appear that an employer is singling out an individual in any manner.

What Is the Families First Corona Virus Relief Act and Which Employees are Protected?

The Families First Coronavirus Response Act ("FFCRA") was enacted on March 18, 2020 in response to the COVID-19 pandemic. It requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specific reasons related to COVID-19. These provisions apply form April 1, 2020 through December 31, 2020.

The FFCRA provides emergency paid leave under two Acts, 1) The Emergency Paid Sick Leave Act ("EPSLA"); and 2) The Emergency Family and Medical Leave Expansion Act ("EFMLEA"). Under the EPSLA, an employee may be eligible for up to two weeks of paid sick leave if the employee is subject to: 1) Federal, State, or local quarantine or isolation order related to COVID-19; 2)Advised by a health care provider to self-quarantine related to COVID-19; 3)Experiencing COVID-19 symptoms and seeking medical diagnosis; 4) Caring for an individual subject to an order described in (1) or self-quarantine described in (2); 5) Caring for a child whose school or place of care is closed (or child care is unavailable) due to COVID-19 reasons; and 6) Experiencing any other substantially similar condition specified by the U.S. Department of Health and Human Services. Under the EFMLEA, an employee may be entitled to an additional 10 weeks of partially paid leave for category 5.

Which Employers Are Subject to the FFCRA?

Private sector employers with fewer than 500 employees and certain public sector employers are subject to the FFCRA. However, there are certain carve out exceptions for essential businesses and small businesses with less than 50 employees. It is important to note that the small business exception only applies to category (4) above. The small business will still need to provide leave to the employees for all other categories under the act.

What If An Employer Needs To, Or Is Considering Lay Offs? The WARN Act Needs To Be Considered

Employers that need to close a plant or are considering layoffs due to COVID-19 should first evaluate their obligations under the Federal WARN Act. The WARN Act applies to employers that employee 100 or more employees (excluding part-time employees), or those with 100 or more employees, including part-time employees, who in the aggregate work at least 4,000 hours per week, exclusive of overtime. 29 U.S.C. §2101.

Under the WARN Act, an employer is required to give 60-day notice to employees if (1) a plant closes, which results in an employment loss during a 30-day period for 50 or more employees (excluding part-time employees; or (2) 50 or more employees are laid off, which constitutes at least 33% of the active employees (excluding part-time), or 500 or more employees (excluding part-time), regardless of percentage.

The WARN Act does provide several exceptions to the 60-day advance notice requirement. One such exception is the unforeseeable business exception, which allows the requires notice to be given with less than 60-days if the plant closure of mass layoff was caused by business circumstances that were not reasonably foreseeable at the time that notice would have been required. Faltering companies that close a plant are also generally excluded from providing the 60-day advance notice. However, employers remain obligated to provide "as much notice as is practicable."

Several states, including California, Illinois, Wisconsin, New Jersey, and New York have adopted their own WARN Acts. Companies in these states are required to comply with not only the Federal WARN Act, but also their State WARN Act.

Generally, whether a company is excluded from providing the 60-day advance notice is a fact intensive inquiry. Thus, it is typically very difficult to get a WARN Act case dismissed. If liability is found, employers will be required to pay their employees for the 60-day notice period, as well as applicable attorney's fees and costs. Therefore, it is always best to give the 60-day notice.

Employers should also be aware that the WARN Act permits aggregation of two or more layoffs within a 90-day period if it is shown that the reason for the layoffs were similar, and they were done separately to try and evade the requirement of the WARN Act. Therefore, if the employer already initiated layoffs, and subsequent economic conditions results in additional layoffs, it is possible that employees may aggregate the two layoffs together to trigger the WARN Act.

Presently, there is a case presiding in the United States District Court for the Middle District of Florida that could be a watershed case and determine if other WARN Act cases will follow. Styled *Scott v. Hooters III, Inc.*, Case No. 20-cv-00882, the plaintiffs are alleging that Hooters violated the WARN Act when it gave written notice to its nearly 700 employees on March 25, 2020 that they would be terminated effective immediately because of COVID-19. The Complaint was filed on April 16, 2020. Hooters has yet to respond to the Complaint.

Employers in New Jersey recently received some relief from their WARN Act requirements. In early 2020, New Jersey required employers to provide mandatory severance pay to employees affected by a mass transfer, termination of operations or mass layoff. However, recently, New Jersey Governor recently signed Senate Bill S-2353, which excluded employers from this severance requirement by a minimum of 90 days.

Similarly, on March 17, 2020, California's Governor signed an executive order suspending and modifying California's WARN Act.

For more information on how you can protect your organization and be in compliance with changes resulting from the COVID-19 pandemic, please contact a KDV Attorney.

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