

## Employer Rights/Obligations in the Coronavirus Pandemic

We recommend that employers carefully follow all orders and recommendations of the U.S. Centers for Disease Control and Prevention (CDC), the Ohio Department of Health, Ohio Governor Mike DeWine and other federal and state authorities. These orders include travel restrictions, quarantines, and limitations on mass gatherings. Employers should review their work rules or policies to comply with all state and federal orders regarding Coronavirus. Further, employers must use best practices regarding remote work and dealing with sick employees.

Employers should consider implementing social distancing protocol, where possible. This may include remote work, separate work locations, or alternative work schedules. Employers should also consider avoiding non-essential activities where employees might come into close contact with other employees. All unnecessary travel should be canceled or postponed during the pandemic. Employers should also designate an individual within their organization to monitor employee absences and prepare for any reassignments of essential functions during employee absences. Employers should also consider cross-training personnel to perform essential functions so that the workplace is able to operate even if key staff members are absent due to illness or quarantine.

Many employers, both public and private, will have specific questions regarding their Coronavirus response. We have outlined some of the legal issues below.

It's important to remember that the Coronavirus pandemic is creating new challenges for employers, but that employers can successfully navigate these challenges while complying with the law and regulatory guidelines; when in doubt regarding the appropriate employment action related to the pandemic, please consult legal counsel. If you have any questions about Coronavirus or any other employment law matter, please contact Marc Fishel at 614.221.1216 or by e-mail at [MFishel@fisheldowney.com](mailto:MFishel@fisheldowney.com).

### **Coronavirus and the FLSA, FMLA, and Sick Leave**

In the event of a general quarantine period, or when an employee has contracted or is suspected of having contracted Coronavirus, the employer may require the employee to not report to work.

Many employers already offer some sort of paid leave (such as sick leave, vacation leave, or paid time off). Employers should be generous with approving available employee leave during the pandemic. The Fair Labor Standards Act (FLSA) does not require employers to pay non-exempt employees (e.g. hourly workers) for time away from work. This includes situations where the employer is forced to close their business for a period of time. Exempt



employees must generally be paid their regular weekly salary for any week in which they do any work on behalf of the employer.

Public employees are eligible to use accumulated sick leave for Coronavirus contracted by themselves or an immediate family member. Public employees can use sick leave for time spent in quarantine under R.C. 124.38(C). These employees can also use other forms of paid leave like vacation leave. If public employees have exhausted paid leave, public employers should consider granting their employees paid administrative leave if they are sick or subject to quarantine, but should generally refer to county or municipal policy manuals for guidance on granting this type of leave. Public employers with employees in a bargaining unit should work with union representatives to draft a Memorandum of Understanding (MOU) regarding the granting of non-precedent setting employee leave. Additionally, all employers should consider relaxing the requirement that a health provider's note be provided to validate an employee's illness.

All employees may be eligible to use Family Medical Leave for leave relating to the Coronavirus *if they or a family member are ill*. If the employee and employer satisfy FMLA eligibility and coverage requirements (1,250 work hours during the prior full 12-month period for an employer with 50 or more employees in a 75-mile radius), the employee may be entitled to FMLA protections for the Coronavirus related absence. Employers should follow their FMLA policies to determine whether the leave is FMLA-qualifying and to designate qualifying leave. Employees on FMLA leave may still be required to utilize paid leave concurrent with the use of FMLA pursuant to company policy. Note that an employee who stays home from work or is required to stay home from work by their employer to *avoid exposure* to Coronavirus is not eligible for FMLA leave for that time.

### **Coronavirus and the Americans with Disabilities Act**

In general, employees who have contracted Coronavirus must be treated the same as non-infected employees, so long as they can perform their essential job functions without posing a direct threat to the health and safety of others. If an employee poses a direct threat (e.g. they arrive for work showing symptoms of Coronavirus), they may be placed on leave and required to undergo a medical examination. The employer may send an employee home if they become ill with symptoms of influenza-like illness at work.

Employers are restricted from asking health-related questions under most circumstances. However, during a pandemic, employers are granted more latitude in asking about the health of their employees. . Employers may ask employees who report feeling ill at work or who call in sick if they are experiencing influenza-like symptoms, such as fever or chills and a cough or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA. Because Coronavirus poses a direct threat to employee health and safety, the presence of observable symptoms may provide objective evidence for a disability-related inquiry or medical examination.

## **Coronavirus and Workers' Compensation**

Ohio Courts have been reluctant to extend workers' compensation coverage to illnesses to which the general public is exposed, even if the worker has weakened resistance to infection, but they are not absolutely excluded. Workers' Compensation does not provide general health insurance. It provides compensation for injuries or occupational diseases sustained in the course of and arising out of employment. To receive workers' compensation for an illness, a worker would ordinarily have to show an "occupational disease" by proving: (1) The disease was contracted in the course of employment; (2) the disease is peculiar to the employment, or the conditions of the employment result in a hazard which distinguishes it from employment generally; and (3) the employment creates a risk of contracting the disease in a greater degree and in a different manner than in the public generally. An employer's adherence to U.S. Centers for Disease Control and Prevention safe workplace guidelines, and the Occupational Health and Safety Administration (OSHA) Guidance on Preparing Workplaces for COVID-19, will help employers reduce instances of exposure at work and potential workers' compensation claims. Note that OSHA has categorized certain jobs depending on their potential for exposure to known or suspected sources of COVID-19, as a Very High Exposure Risk, High Exposure Risk, Medium Exposure Risk and Low Exposure Risk.

As more employees work away from the office or job site, we are likely to see an increase in workers' compensation claims for at-home injuries (i.e. alleged injuries incurred while remotely working at home). Injuries which are not related to work, such as injuries while doing household chores during the workday, are not compensable. If you have specific questions, contact Marc Fishel at Fishel Downey Albrecht & Riepenhoff LLP at 614-221-1216 or by e-mail [MFishel@fisheldowney.com](mailto:MFishel@fisheldowney.com).