

MANAGING YOUR WORKFORCE DURING A PANDEMIC

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I. GOALS OF PANDEMIC PLANNING

During a pandemic, an employer may have several goals. It probably will want to try to continue their business to the extent possible, attempt to keep its employees safe and healthy, and do what it can to support its employees during this difficult time.

There are a number of methods that employers can use to try to accomplish these three goals. For instance, in order to...

Continue the business to the extent possible, an employer could...

- Develop a workforce plan for continuing the essential functions of the business with a workforce that is dramatically reduced in size.
- Encourage healthy employees to come to work.
- Minimize costs if employees are not needed.

Keep employees healthy, an employer should...

- Implement social distancing restrictions and other safe and healthy work practices that are designed to reduce the spread of the virus.
- Restrict access to facilities for individuals who are sick or who may have been exposed to the virus.
- Encourage sick or exposed employees to stay home.
- Send healthy employees home if they do not perform critical functions.
- Sequester employees who perform critical functions to reduce the likelihood they may be exposed to the virus.

Support employees, an employer could...

- Provide information about the coronavirus and methods for protecting and preparing their families for a pandemic.
- Provide supplies and possibly medicine.
- Consider continuing pay while an employee or family member is sick.

II. WORKFORCE PLANNING

A pandemic will undoubtedly affect the number of workers companies need to keep their business running. Thus, employers will need to develop a workforce plan that will enable the employer to continue operating the critical parts of its business, without being overstaffed or understaffed. The steps an employer may take to manage its workforce will depend on whether the employer believes it will not have enough employees to perform required tasks or whether it will have more employees than are needed, given the drop in business.

A. Insufficient Employees

If a pandemic occurs and is sufficiently severe, there could be large numbers of absences in the workforce over an extended period of time. If the employer thinks that high absenteeism during a pandemic will mean there may not be enough employees on hand to get the work done, the following are some steps that the employer may take to develop a workforce plan:

1. **Identify core tasks that must be performed to continue the business.**
2. **Develop a plan for carrying out these core tasks during a pandemic.**
Among the things that should be considered are:
 - a. The number of employees needed to perform those core tasks.
 - b. Whether different schedules are needed to accomplish core tasks with reduced workforce and minimizing exposure to others at worksite and during commute. These different schedules might involve:
 - Rotating teams
 - Rotating schedules
 - Extended hours
 - c. Whether there should be alternate locations of work (including telecommuting and sequestering).
3. **Consider how current employees can be allocated to implement the plan.**
 - a. Identify current core and marginal job responsibilities of employees, including:
 - Production workers
 - Key support personnel
 - Management
 - Non-essential workers

- b. Determine how to use current employees to fill the needs identified above:
 - Who has skills needed to perform core tasks.
 - Who could be cross-trained to gain those skills.
 - Whether employees currently performing non-essential jobs could be reallocated to perform essential tasks.
4. **Develop policies needed to effectuate the plan.**
5. **Bargain over the plan with labor union, if necessary.**

B. Too Many Employees

Many businesses will face the opposite problem during a pandemic: a drop in business (whether due to interrupted supply chains or reduced demand) and more employees than it needs to conduct the reduced operations. If an employer thinks that its business will be negatively impacted during a pandemic to the point that it will not be able to continue to employ the same number of workers as it did previously, the employer may need to take the following steps with respect to its workforce planning:

1. **Consider the need for furloughs.** If the business incurs heavy losses during a pandemic, the company may need to implement employee furloughs – laying off employees for a period of time, with an expectation that they will be recalled.
 - a. Note that the Fair Labor Standards Act (FLSA) requires that exempt employees be paid their full salaries for any workweek in which any work is performed. Thus, the safest way to comply with the FLSA is to require exempt employees to take unpaid time off in full-week increments. In contrast, nonexempt employees can be furloughed for full or partial weeks and need only be compensated for hours worked.
 - b. Determine whether furloughs will affect employees' entitlement to benefits.
 - c. If the workforce is unionized, the employer will need to bargain over furloughs.
2. **Consider pay reductions.** An employer may decide to reduce the pay of all or a group of employees, in an effort to avoid furloughs or layoffs. Of course, any pay changes must be prospective and may have to be bargained over. Employers must also ensure that pay cuts do not reduce an employee's pay below minimum wage (or the minimum required to

maintain an exemption). Be sure to look at whether reductions in pay trigger the right to severance under a severance plan or employment agreement.

3. Consider layoffs. If an employer decides to lay off a portion of its workforce, it will need to consider all the issues that are normally involved in such a decision, including:

- Legally defensible methods for selecting employees for layoff
- Severance under plans, policies or employment agreements
- Federal or state WARN Act obligations (although exceptions such as the ones for natural disasters and unforeseeable business circumstances may apply)

III. HR POLICIES AND PRACTICES

In addition to developing a workforce plan, an employer will need to think about how it will need to amend its human resources policies to address issues that will be raised during a pandemic. Both Human Resources and legal counsel will need to be involved in order to ensure that matters are handled consistently throughout the company, in accordance with federal, state and local laws. The following sections outline some of the general issues to consider in developing temporary pandemic-related human resources policies.

A. General Issues Concerning Implementation and Administration of Policies

Some decisions need to be made concerning how the human resources policies that apply during a pandemic will be implemented and administered. Employers need to consider:

- What are the goals that the company is trying to achieve?
- What and who will trigger implementation of temporary policies?
- Will there be different phases of implementation of the policies?
- Should there be different policies for critical and non-essential employees?
- How will temporary employees, leased employees and independent contractors be treated under the policies?
- What medical information is needed to draft the policies, and who can provide it?
- What stakeholders need to be involved in the development or approval of the policies?
- Will the company have to bargain over any changes for union employees?
- How much discretion should be given to managers?
- What is the backup plan for approval on decisions?
- Should policies replace or supplement existing HR policies?

B. Policy Concerning Access to Facilities

During a pandemic, one of the most important issues facing an employer is how to control access to its facilities to reduce the likelihood that employees will contract the virus while at work. It is important to realize that any policy concerning access to facilities must be applied not only to employees, but to anyone who comes to the facilities, including customers, vendors, employees' friends and family, visitors, and building services personnel. When drafting a policy governing access to facilities, an employer should consider the following:

- Under what circumstances will individuals be denied access to Company facilities?
- How will an employer know if an individual has the coronavirus?
- How should an employer define "exposure" to the coronavirus?
- What screening process should an employer use to determine whether individuals have the coronavirus?
- When should screening be conducted?
- How should individuals who have the virus or who have been exposed to the virus be removed from the property?
- When should employees be permitted to return to company property?

C. Policies Encouraging Healthy Employees to Work During A Pandemic

During a pandemic, there are likely to be a number of individuals who would prefer not to come to work and risk contracting the virus. If they can afford to do so, these employees may choose to stay home even if they are healthy. An employer which has the goal of trying to continue its business operations to the extent possible may need those employees to come to work – especially since there will be a number of individuals who are unable to come to work due to illness or exposure to the virus. Employers should consider whether they can encourage healthy employees to come to work by:

- Taking steps to make the workplace as free from the coronavirus as possible, and communicating these efforts to employees.
- Offering financial incentives for coming to work.

- Restricting an employee's ability to use vacation during a pandemic.
- Disciplining employees up to and including termination for failure to come to work.

D. Sick Time Policy

There are two reasons to ensure that employees receive paid sick time for the coronavirus: (1) to support employees financially during a difficult time, and (2) to remove financial considerations from an employee's assessment of whether he or she should come to work if exposed to the virus, thus encouraging sick employees to stay home. Of course, some states and localities require employers to provide paid sick leave to employees who are out due to their own sickness or that of a family member, and an absence due to the coronavirus would trigger the right to such benefits.

There are a number of questions an employer must answer as it determines whether to provide paid sick time (in the event that it is not required), and under what circumstances:

- Will sick time be provided under the employer's existing sick time policy, or will a separate bank of time be created?
- How will the employer require employees to certify or verify that they or their family members are ill with the coronavirus?
- If a separate bank of pandemic sick time is created, how much time off will be given and will it be paid?
- What should trigger the use of pandemic sick time?
- What should be required of employees before they may return to work?

E. Vacation Policy

Employers who choose not to create a separate bank of pandemic sick time or who provide relatively limited sick time to their employees can expect that during a pandemic, employees will use vacation time to receive pay during their illness or the illness of a family member. In addition, employees will likely expect to be able to take vacation if they need time off from work for other pandemic-related issues, such as watching children whose school is closed or volunteering in the community. An employer may want to allow certain employees who do not perform critical functions to stay home, in order to reduce the number of

employees at work who could spread the virus. But it is more likely that employers will need every available employee to come to work to keep the business running in light of the high amounts of absenteeism the virus is expected to cause.

In drafting or revising a vacation policy, employers will need to consider:

- Should an employer require employees who need time off for illness due to the pandemic to use their vacation after all sick time has been exhausted?
- Should an employer consider limiting the use of vacation during a pandemic?

F. Paid Time Off Policy

For employers who have a paid time off policy (which provides a single bank of time to be used for sicknesses, vacation and other reasons), the same issues arise as are addressed above with respect to a Sick Time Policy and a Vacation Policy. However, the fact that there is a single bank of time means that it is even more likely that an employee will use up all accrued PTO in a pandemic situation, leaving no time for other issues after the pandemic is over.

G. Attendance Policy

Employers who have a very rigid or no-fault attendance policy may want to consider relaxing attendance requirements during a pandemic, if absences are due to pandemic-related reasons. Employers may also decide not to require a doctor's note for employees who are sick, as it may be difficult for them to obtain (given that the facilities of healthcare providers are likely to be overwhelmed during a pandemic).

Note that states and localities with paid sick leave laws generally prohibit employers from terminating employees or otherwise discriminating against them for taking time off due to a covered sickness. Some states also have laws protecting employees who are subject to a state-ordered quarantine from discrimination while others have laws providing job protection to employees who are deemed a risk to public health or who have a family member who has been deemed a risk to public health.

H. FMLA Policy

Most absences due to the coronavirus will be serious health conditions under the Family and Medical Leave Act (FMLA) and similar state laws. Thus, an employer cannot discipline or terminate an employee for taking time off due to the coronavirus, unless and until the employee has exhausted his or her allotment of

FMLA leave. If an employer has to furlough or lay off employees due to business reasons, the employer can still take that action even if the employee is on leave. However, the employer must be careful to show that all employees in a job group are affected or there is some non-leave-related reason for the selection of an employee on leave for the furlough or leave.

I. Bereavement Leave Policy

Most employers have bereavement leave policies, but little attention is often paid to these policies because employees rarely need to use the policy, and when they do, the employer is usually in a position to be flexible in granting the employee the needed time off to deal with issues relating to the death. However, during a severe pandemic, more employees may need time off for the death or funeral of one or more people to whom they are close. In drafting or revising a bereavement policy to address a pandemic situation, employers need to consider:

- Will time off be provided just for family members, or also for close friends?
- How will “family member” be defined?
- How much time off will be provided?
- Will all employees be provided time off with pay, or only full-time, regular employees?
- Will employees be required to provide some sort of certification that they have had a death in the family?

J. Holidays Policy

During the peak of a pandemic, an employer may need all healthy employees to work whenever they are available, which may include holidays. Employers should check their holidays policies to ensure that that contingency is anticipated and might consider stating in the pandemic policy that employees may be required to work on holidays and describing how those employees will be compensated.

K. Work Assignments, Scheduling and Locations Policy

During a pandemic, an employer may need employees to perform different (or no) work assignments, work different schedules and/or work in different locations. The employer should develop policies to notify employees of that possibility and set forth how employees will be compensated in such situations.

Of course, an employer with a unionized workforce may have to bargain with the union over how employees will be compensated.

1. **Different Work Assignments.** Management may need to reassign employees who usually perform non-essential functions to some of the essential functions. One issue to consider is whether those employees will continue to be paid at their usual rate of pay, or whether they will be paid at a rate commensurate with their temporary responsibilities.
2. **No Work Assignments.** Some employers may decide to send employees home during a portion of the pandemic because they are not needed to perform the critical functions and they will be less likely to catch (and spread) the virus at home. Issues to consider include:
 - Will the employer continue to pay such employees for some or all of their non-productive time? Note differences in requirements between requirements for payment of exempt and non-exempt employees.
 - Will it be full pay or pay at some lesser percentage?
3. **Different Work Schedules.** During a pandemic, employers are almost certainly going to need employees to work different schedules. Issues to consider include:
 - If employees are required to work more than their usual workweek, will they be compensated for that time?
4. **Sequestering.** Management may determine that in order to ensure that critical operations are maintained during a pandemic, certain designated employees must be sequestered in an isolated area of the facility, separated from others who are not sequestered for a certain length of time. If this approach is taken, the employer should consider:
 - Where will sequestering occur?
 - For how long will employees be sequestered?
 - How will sequestered employees' basic needs be provided for (food, shelter, entertainment)?
 - How will sequestered employees interact with the outside world?

- What sort of transitional isolation will employees be required to undergo to ensure that they are free from the virus?
- How will employees be paid during sequestration and transitional isolation?

5. **Telecommuting.** One way that employers can minimize the spread of the coronavirus among their employees is to physically separate them by requiring or allowing them to work from home (i.e. telecommute). In many jobs, telecommuting will involve the employee connecting to the employer’s computer system from home and/or taking calls from home, which will require increased IT capabilities. Unfortunately, some experts believe that during a severe pandemic, the telecommunications infrastructure will be severely strained and may fail due to vastly increased demands. Nevertheless, an employer should plan to increase IT capabilities to allow for telecommuting to the extent that the telecommunications systems are available.

Employers should also review their telecommuting policies to ensure that they are adequate to address the increased telecommuting needs during a pandemic and adopt a telecommuting policy if they do not have one. A telecommuting policy should address:

- Employee requests and approval process
- Compensation
- Performance, communication and availability expectations
- Equipment
- Safety and health requirements

L. **Social Distancing and Other Work Practices Policy**

An infected person will shed the coronavirus by coughing and sneezing – possibly even before he or she is showing symptoms. According to the CDC, the coronavirus will usually be contracted by being in immediate vicinity (within about 6 feet) of an infected person who sheds the virus, but it also may be contracted by coming into contact with an object that has been touched by an infected person. An employer should adopt policies concerning the following issues to help reduce the spreading of the virus:

- Travel

- Meetings
- Commuting
- Hygiene

M. Discipline Policy

During a pandemic, there are likely to be a number of employees who are scared to come to work – even if they are not sick and have not been exposed to the coronavirus. An employer should think about whether it intends to discipline such employees for attendance or insubordination. In addition, employers should think about whether they intend to discipline employees for policy violations such as coming to work when they are, in fact, sick, but not showing symptoms until they are at work.

N. Hiring Practices / Drug and Alcohol Testing

During a pandemic, an employer will need to be flexible regarding its pre-employment procedures. It may not be feasible to perform drug tests or medical exams, given the increased demands that will be placed on the healthcare system.

O. Safety and Health

Under the Occupational Safety and Health Act (OSHA), employers have a general duty to protect employees from likely, significant risk of harm that could cause death or serious injury. An employer might be cited for violation of this general duty clause if an employee contracts the coronavirus at work, the coronavirus is found to be a “recognized hazard,” and the employer failed to take reasonable steps to abate the risk. Adopting policies restricting access to facilities and instructing employees to engage in social distancing and other healthy work practices should reduce the risk of citation. In addition, if the OSHA promulgates a hazard-specific safety and health standard concerning the coronavirus, employers will need to comply with that standard.

P. Workers’ Compensation

If employees contracted the coronavirus in the course of their employment, an employer may need to pay workers’ compensation. An employer should consider whether the employees’ work requires them to be exposed to persons who are infected (e.g. health care workers). But if an employee incidentally contracts the virus from a coworker, there will likely be no workers’ compensation liability. An employer should contact a competent medical professional on infectious diseases for advice on whether the virus is work-related.

IV. BENEFIT PLAN ISSUES DURING A PANDEMIC

During a pandemic, all entities associated with the healthcare industry will be severely stressed. Some third-party benefit providers are already taking steps to try to exonerate themselves for responsibility if they are not able to provide the required services due to a pandemic. However, there are steps that an employer can take to try to protect its employees from the effect a pandemic will have on their employee benefits.

A. Preparation of Third-Party Benefit Providers

Employers will need to ensure that third-party benefit providers cannot use the onset of a pandemic to excuse their non-performance – especially if they have not taken reasonable steps to prepare for the pandemic, consistent with the standards of the industry. Employers can inquire as to the provider’s pandemic preparedness plan and can limit its exclusions from liability due to a pandemic to certain situations.

B. Access to Health Care and Prescription Medications During a Pandemic

Although it is likely that healthcare providers will be overwhelmed during a pandemic, an employer can try to ensure that its employees will have access to health care during a pandemic. In addition, it may want to work with its insurer to try to ensure that its employees may fill prescriptions for longer than the standard amount of time.

C. Consequences of Workforce Plans under Existing Benefit Plans

Most benefit plans allow employees on leaves of absence to continue to participate in the plan. However, some plans may contain a requirement that the employee must be actively at work at the time a certain event (such as disability) occurs. Employers should examine their benefit plans to determine what effect, if any, its pandemic-related human resources policies will have under those plans.

D. Changes to Matching Contributions under a 401(k) Plan

Previously, sponsors of safe-harbor 401(k) plans had very limited ability to change the plan mid-year without jeopardizing safe-harbor status. However, since 2015, sponsors are allowed to suspend or reduce safe harbor non-elective or matching contributions (as applicable) mid-year if they are operating at an “economic loss.” If an employer is considering suspending its 401(k) match due to poor business conditions, it should consult benefits counsel.