

Coping with Coronavirus: Fundamentals for Employers

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With the coronavirus pandemic bearing down hard upon us, employers are justifiably concerned, if not on the verge of panic, about the potentially catastrophic impact on their employees and businesses. Make no mistake about it, the coronavirus pandemic is a crisis in every sense of the word: a public health and safety crisis, an economic crisis, a social and psychological crisis, a threat to all we hold dear. In just a few short days, it has brought government agencies, many public services, schools, both public and private, and businesses to a screeching halt and is threatening to devastate the lives of any employer's most valuable asset, its employees. To minimize the impact, it is imperative that employers adopt and implement a plan for crisis management and recovery. And each aspect of your plan must take into account both the practical realities and applicable federal and state labor and employment laws to ensure success and avoid any employment-related lawsuits or agency enforcement actions.

Determine individual crisis management responsibilities. If facing a suspension or curtailment of operations (that's most of us), identify all employees who are essential to each continuing essential business function, determine whether they will be needed on-site or can work remotely, make sure they have the necessary tools and resources if working remotely, and clearly communicate their areas of accountability and responsibility and how to perform their duties effectively.

Communicate with all employees. Communicate with *all* employees, both essential and non-essential, to ensure everyone understands your plan and is informed of their respective rights and responsibilities as well as your expectations. Include the latest and most reliable information about the status of the crisis. Even as things change almost by the hour, try to be consistent in your communications to avoid confusing your employees and increasing their anxiety.

Keep leadership visible. Make sure all employees know who is in charge, and keep those in charge visible and make them heard. Keeping leadership visible will instill confidence and a sense of stability in your employees. The absence of leadership in a crisis creates doubt, fear, and havoc for employees and can lead to attrition after the crisis passes as loyal and valuable employees sense the company is disorganized or is not prepared to handle difficult times. You may (and probably will) make some mistakes, but you'll have a better chance of establishing normalcy after the difficulties pass by keeping your leadership visible and heard and your employees informed.

Be familiar with federal, state, and local laws. Be aware of the federal, state, and local labor and employment laws that can be implicated during and after a public health emergency, including the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), the Worker Adjustment and Retraining Notification (WARN) Act, the Occupational Safety and Health Act (OSHA), and, if you employ H1B workers, the immigration laws. As I write, the [Families First Coronavirus Response Act](#) has been passed into a law and will expand employees' rights under the Family and Medical Leave Act and mandate paid medical leave for many employers.

- The FLSA requires you to pay exempt employees their full salaries even when they work less than a full workweek, whereas nonexempt employees are entitled to pay only for the hours they actually work. State and local laws may have requirements over and above the FLSA. If in doubt as to any state or local wage and hour requirements, please be sure to consult your labor and employment counsel. As indicated above, it may be necessary to allow, or even require, some employees to work remotely. If you allow or require employees to work remotely, be sure to establish a mechanism through which your nonexempt employees can keep track of and report their hours worked. If you lack a proper mechanism to capture time worked remotely by your nonexempt employees, you could be exposed to liability under the FLSA as well as any applicable state or local wage and hour laws. You also should be aware of potential FLSA implications if you request or allow employees to volunteer for work-related or employer-sponsored activities during the coronavirus crisis. The FLSA may require compensation for volunteer time depending on the nature and circumstances of the work performed by volunteer employees. So, again, if calling for “volunteers,” please consult your labor and employment counsel.
- The FMLA entitles qualifying employees to job-protected leave if they are unable to work due to a serious health condition such as coronavirus or are needed to care for an immediate family member infected by or suffering from coronavirus. As previously mentioned, the legislation hurtling through Congress will expand employee rights under the FMLA. So please stay informed.
- The ADA protects employees with serious health conditions, including not only coronavirus related conditions, but also anxiety, depression, or certain other emotional disorders that may result from or be associated with coronavirus related conditions. The ADA may require you to provide reasonable accommodations for such employees unless it would impose an undue hardship on your operations.
- The WARN Act imposes advance notice requirements on certain employers in the event of a plant closing or mass layoff expected to last more than 6 months. The WARN Act includes an exception for closings and layoff due to unforeseen circumstances, but you still must give as much notice to your employees as is “practicable.” Some states and municipalities also impose advance notice requirements on employers in the event of a shutdown or layoff, which may apply regardless of whether the shutdown is mandated. So again, please consult your labor and employment counsel before proceeding with such action.
- OSHA requires employers to protect employees from unsafe working conditions and to report occupational injuries and illnesses. Ensure your workers have the necessary safety or personal protective equipment to work under conditions that may expose them to the coronavirus, especially those with an underlying or preexisting medical condition (like an autoimmune disorder) that might make them more susceptible to coronavirus or make exposure more dangerous for them. And be sure to report any employee coronavirus illness that results from exposure at work. If in doubt, consult your labor and employment counsel. [More details on OSHA and its application to the coronavirus](#) can be found in a blog post earlier this week on our Disaster Prep & Recovery blog.

- If you are contemplating laying off, furloughing, or curtailing the work hours of H1B workers, be aware that federal immigration law requires that they continue to receive their regular pay, and, if working from home, depending on the circumstances, you might have to file a new Labor Condition Application (“LCA”) or even an amended petition. Here is a [link](#) to an excellent article in the *National Law Review* on the subject. Again, this is an area where you would be wise to consult employment immigration counsel.

Train managers and supervisors on how to manage employees coping with the crisis. Your managers and supervisors are the people who deal directly with your employees. Thus, it is imperative that you educate your managers and supervisors about the possible effects of the coronavirus crisis on your employees and how to spot indicators of emotional or behavioral conditions that may need attention. You may need to hire a consultant to train your managers and supervisors. At a minimum, your managers and supervisors should know to refer affected employees to an employee assistance program (EAP), if you have one, or your Human Resources Department to identify sources for professional assistance.

Finally (and perhaps most importantly), cut your employees some slack. While you need not replace order with chaos, treat your employees fairly and with compassion when it comes to getting things back on track. Your employees need to know you care. They need to believe they’re being dealt with fairly. And, after the crisis passes, they likely will need some time to get their personal lives in order. Even if not required by the new emergency legislation, review your leave policies and benefits to determine whether modifications are warranted or needed, if only temporarily until the crisis passes. Keep in mind, though, that all plans and policies should be applied uniformly, no matter how tempting it may be to allow an exception for an employee’s peculiar circumstances. Avoid jumping to conclusions if an employee misses work, makes a mistake, or doesn’t seem to be his or her usual self, and consider EAP referrals or other benefits if an employee appears to be slipping in performance or behavior. It’s important to your employees that you stay steady and keep calm (as much as you can).

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