Coronavirus Update & COVID-19 FAQs - March 19, 2020

***State and federal laws, administrative guidance and regulations are rapidly changing in response to the coronavirus pandemic; the rules change daily as the government, employers, unions and employees react to this unprecedented situation. We will stay on top of these developments and update you as we are able.*
***Also, the guidance and rules that do exist are industry and fact specific. The discussion herein refers to workplaces, generally.*

We have received many questions over the last week about the coronavirus (or COVID-19) and its impact on jobsites, work, and employees' health and safety. In an effort to convey as much information as possible to our clients, we've developed this sheet of answers to frequently asked questions.

1. Can Employers ask employees about where they've traveled or require employees to stay home because of where the employee has traveled?

Ordinarily, no. Employers generally have no right to regulate employees' off duty activity unless it has a substantial relationship to work. As a practical matter, though, employers do have an obligation to keep employees safe on the job site. Under the current circumstances which include the declaration of COVID-19 as a pandemic by the World Health Organization, the obligation to ensure jobsite safety requires that employers take some action to protect employees from unnecessary exposure to the virus. In light of the new Centers for Disease Control ("CDC") and Occupational Safety & Health Agency ("OSHA") guidance on this subject, preventing unnecessary exposure tends to mean preventing individuals who traveled to certain international "hot zones" like Italy or China and other countries or who have known exposure to the virus from working until they've undergone a quarantine period. These guidelines have not changed, yet, though, in relation to domestic air travel.

2. Can an employer implement new work rules?

As noted above, and with the understanding of the employer's obligations regarding exposure in mind, employers still cannot institute new testing requirements or work rules except to the extent they are permitted by the CBA and/or its management rights clause. Employers looking to implement questionnaires or new rules in response to the coronavirus pandemic still have the same general duty to bargain and should reach out to the appropriate union personnel

about the policies to discuss them.

3. Can employers ask employees about how they are feeling of if they have a fever?

Since the onset of coronavirus in the United States in early March, employers have begun requiring that employees have their temperature taken or answer health questionnaires – presumably so the employer can determine if the employee should be permitted to continue working. Generally, the Americans with Disabilities Act prohibits employers from inquiring into whether individuals have disabilities and from discriminating against individuals on the basis of disability; it also prohibits certain medical exams – such as taking employees' temperatures. These rules change when a pandemic becomes widespread and community transmission is occurring – as it is in Dane, Kenosha, and Milwaukee counties as of this writing, and will likely soon be in other counties, and employers have more flexibility to inquire into employees' health and off-duty activities to the extent they relate to the safety of the worksite and are not discriminatory.

Therefore, an employer may not ask broad, general questions like "do you have a fever" or "do you have a cough or shortness of breath" as these symptoms may be indicative of an existing disability rather than coronavirus. An employer should not be asking broad questions about medical conditions that could easily be attributed to other disabling conditions, however, it is probably okay if they ask whether an employee has developed an unexplained or new fever, sore through, or cough.

4. Can employees be required to provide a medical certification that he or she is NOT sick or may "return to work"?

If an employee is off work due at the advice of a physician because of a suspected or positive COVID-19 test, an employer who ordinarily requires that employees provide return to work certifications can continue to require them on the same terms.

An employer who simply believes that an employee who "looks sick" should prove that he or she isn't currently is not entitled to demand that an employee provide a medical certification. Such a demand would violate the ADA. However, this analysis changes under two circumstances. First, if the employer has reasonable cause to believe that the employee was directly exposed to someone who tested positive for the virus (for instance, an employee's

family member is a known exposure) in light of the CDC, Wisconsin DHS and local health departments' quarantine requirements and such an individual's ability to work may fairly be determined by a physician or health professional. Second, the "reasonable suspicion" test applied to on-the-job impairment is likely to come into play in workplaces where employees (or employees' immediate family members) have tested positive for COVID-19 or where there is widespread community transmission. In such a case, the medical clearance or evaluation requirement may be reasonably related to the safe operation of the workplace.

Whether because the employee was off work at the recommendation/requirement of medical professionals or the health department, or the employer will not be able to require mployers who demand that employees who were taken off work but never tested for COVID-19 will NOT be able to practically demand a negative COVID-19 test to return the employee to work. Testing is simply not available in such cases and is likely outside of the employer's ordinary return to work rules under the relevant collective bargaining agreement or employee handbook.

5. What if the employee does not want to work due to fear of COVID-19?

There is no law or exception that allows employees to choose to not work because the virus exists, while protecting the employee's job. Where a CBA does not address voluntary layoff or leaves of absence, an employee handbook should be consulted. And, if an employee raises concerns to his or her union about exposure to the virus due to the nature of their work, the union can and should talk to the employer about how to address the situation to obtain some flexibility related to otherwise healthy employees' fears and needs.

In the case of an employee who has a chronic medical condition that makes him or her immunocompromised and thus particularly vulnerable to COVID-19, the employee may consider seeking reasonable accommodations under the ADA that would enable him or her to continue to work. In such a case, the employee would want to speak to his or her treating physician about the risk and, if the physician deems certain changes to work advisable, notify the employer and ask whether those accommodations can be made. The employer is only required to make reasonable accommodations that do not cause a substantial hardship to its operations. What is reasonable will depend on the job but may include increased cleaning and sanitation or masks and gloves, increased spacing between workstations or a private, enclosed workstation, avoiding call outs and house calls or interaction with the public to avoid or minimize exposure.

6. What if employees are laid off due to the coronavirus or related considerations?

On March 12, 2020, the United States Department of Labor urged states to amend their unemployment laws to provide benefits during and because of the COVID-19 pandemic. On March 18, 2020, Governor Tony Evers issued an Emergency Order to waive the work search requirements and the one week waiting period for benefits so that workers who become unemployed due to coronavirus. This is a temporary stop gap. Gov. Evers had called the legislature to convene to formally amend the unemployment law. Laid off employees can and should immediately apply for unemployment benefits with the State of Wisconsin. Additional information is available at https://dwd.wisconsin.gov/covid19/public/ui.htm.

7. What if the employee is not able to work because of quarantine or other coronavirus-related consequences?

If an employer remains operating but employees are not able to work because they have been mandated to quarantine themselves or someone in their family, or if the employee or a family member they care for becomes ill, or if the employee cannot work because his or her child's school or child care center is closed, there are new legal protections available.

The need for paid time off and income replacement in light of widespread school and daycare closures, as well as in order to ensure the effectiveness of self-isolation and quarantine requirements, and to ensure that individuals who do not feel well do not report to work for fear of losing their job, was addressed this week when Congress and the U.S. Senate passed the **Families First Coronavirus Response Act** to address the economic impact of the coronavirus (COVID-19) and related isolation and quarantine requirements will have on workers and their families.

This legislation is designed to curb the spread of the virus by providing up to 12 weeks of protected, partially paid leave from work if an employee cannot work because he or she subject to self-isolation or quarantine requirements or guidelines even though not actually ill (or to care for a covered family member subject to the guidelines, whether ill or not); is ill or suspects that he or she is ill and needs to obtain treatment -or assist a covered family member in obtaining treatment; or to care for the employee's child/children who do not have other care due to coronavirus-related school or daycare center closures. With the exception of an employee experiencing an active illness or caring for someone with an active illness, these reasons are not protected by previously existing U.S. law, and FMLA leave even for illness is unpaid.

The Families First Act provides two different types of partially paid leave for employees who must miss work related to the coronavirus. It also makes employees eligible for emergency leave benefits even though they have not met the traditional FMLA minimum employer-service requirement of one year of service and 1,000 hours of work; the new requirement is 30 days. The new benefits provided for in the law are not meant to take the place of collectively bargained benefits if the collectively bargained benefits are better. Although a number of practical details still must be worked out., you can see a summary of the law, below:

Families First Coronavirus Response Act Summary

Covered Employers	Employers with less than 500 employees[1]; Possible exclusions for health care industry and small employers of less than 50 upon a showing of hardship
Covered employees	Employees are eligible after 30 days of service with the employer
Emergency Family Leave Benefit	Provides up to 12 weeks job-protected and partially paid leave so that an employee can care for his/her child if child's school/day care is closed or unavailable due to a coronavirus - First 10 days unpaid, then paid at 2/3 employee's regular rate of pay - May substitute paid leave under employer's policy or use emergency days, below - Capped $200/day ($10,000 total) per employee
Emergency Paid Sick Leave Benefit	Covered employers provide up to 2 weeks paid emergency leave (80 hours for full time employees, prorated for part time employees) Fully paid (up to $511/day or $5,110 total) for leave due to: o Employee's own quarantine ▪ COVID symptoms ▪ Seek COVID diagnosis Partially paid (2/3 of regular rate, up to $200/day) for leave due to: o Care for another individual in quarantine because of illness o Child's school or childcare closure

1 It is not clear how 500 employees will be counted, and whether multiple worksites will be aggregated or not, in addition, there are some exclusions for certain health care workers.

FMLA - Specifically, for the duration of 2020, the law expands the coverage of the Family Medical Leave Act ("FMLA"). FMLA ordinarily provides certain covered employees of covered employers with up to twelve weeks of unpaid leave for their own or to care for a family member with a serious health condition.

The new law expands the protections of FMLA. While the FMLA ordinarily requires that employees be employed by an employer for 1,000 hours and 12 months before they can receive FMLA leave, coverage under the Act for COVID-19 related purposes begins after 30 days of employment. The Act also extends 12 week of job protected leave for covered employees (those with 30 days of service who work for employers with less than 500 employees and not a small, exempted employer) in the event the employee needs to self-isolate because they or a family member are diagnosed with COVID-19, if they need to obtain medical care because of symptoms, or if they are complying with the recommendation or order of a health care department or health official to self-isolate due to exposures or symptoms. Finally, and importantly, the expanded FMLA protections are available if the employee needs to care of a child if the child's school or childcare center is closed because of COVID-19.

Emergency Paid Sick Days - In addition, covered full time employees will receive up to two weeks (80 hours) of paid (or partially paid) emergency/COVID-19 sick leave which is for leave in addition to sick days or PTO already available under an employer's existing policies. The leave is to be paid at the employee's regular wage rate if he/she is absent due to his/her own medical condition, and at 2/3 of the employee's regular rate – capped at $200 per day and $10,000 total – if he/she is absent to care for his/her children who do not have care due to school or daycare closures.[2] An employer may not require an employee to use other paid time off (vacation, PTO, personal or sick days) before using the emergency paid sick days provided for by this Act.

Multiemployer Bargaining Agreements - The Act intends that employees who work under the terms of a multiemployer CBAs be provided similar benefits to those described above. The Act requires that employers – consistent with their obligations under the CBAs, make contributions to a fund, plan or program based on the paid leave each of its employees is entitled to in the Act.

The specific details on how these provisions will work in practice have yet to be worked out, but the idea is that employees will receive these paid sick days or paid FMLA as they would ordinary paid time off from the appropriate plan or fund.

2 Unused days cannot be paid out.

If your jobsite closes:

- Apply for unemployment right away, even if you're not sure about your eligibility. You can apply online through the Department of Workforce Development website:
    - Wisconsin: https://dwd.wisconsin.gov/uiben/apply/
    - Michigan: https://miwam.unemployment.state.mi.us/ClmMiWAM/_/#1
- Please let your business representative know:
    - Of any jobsites that are closed
    - If you are currently unemployed

If you're an apprentice:

- You will be asked to provide your work history for the past 18 months.
    - This information is used to calculate your unemployment benefits payments.
- When you apply for unemployment you will be asked a series of questions, including, "Are you a student?" You are NOT a student even if you attend any classes.

Governor Evers is working to waive the one-week waiting period for WI Unemployment applicants but it has NOT been finalized in the Wisconsin Legislature! Wisconsin Republicans NEED TO ACT!

Contact your assembly representatives to support waiving the one-week waiting period.

- To find your legislators visit: https://legis.wisconsin.gov
    - Under Who Are My Legislators? enter your address