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LABOR & EMPLOYMENT ALERT

Government Agency Guidance on the COVID-19 Pandemic

Over the past few months, government agencies have issued regulations and guidance documents in an effort to provide clarity to employers on compliance with federal law and regulations in light of the impact of the COVID-19 pandemic on the workplace.

The following is a summary of those regulations and guidance documents.

Department of Labor

The U.S. Department of Labor (DOL) recently issued regulations related to leave under the Families First Coronavirus Response Act (FFCRA). Under FFCRA, employers with less than 500 employees are required to provide leave to employees under two schemes: the Emergency Family and Medical Leave Act Expansion and Emergency Paid Sick Leave. The requirements of both schemes are summarized below.

Emergency Family and Medical Leave Act Expansion:

- **Eligible Employees**: Employees who have been employed with the company for at least 30 calendar days.
- **Basis for Leave**: Employers must provide up to 12 weeks of job-protected FMLA leave when the employee is unable to work (or telework) due to a need for leave to care for the employee's child (under the age of 18) if the child's elementary or secondary school or place of care is closed or the child's child care provider is unavailable due to an emergency declared by a federal, state, or local authority with respect to COVID-19.
- **Calculating Paid Leave**: The first 10 days of the leave may be unpaid. The employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for the unpaid leave. After the first 10 days of unpaid leave, the remaining time must be paid at no less than two-thirds of the employee's regular rate of pay. For hourly employees, the regular rate is calculated based on the number of hours the employee would normally be scheduled to work. Paid leave is capped at $200 per day and $12,000 in the aggregate per employee. The Act contains additional provisions for calculating the rate of pay for part-time employees or employees who work irregular schedules.
- **Restoration to Position**: Generally, eligible employees who take emergency paid leave must be restored to the position they held when the leave

commenced or be placed in an equivalent position. The Act provides an exception to the job restoration rule for employers with less than 25 employees if the employee's job position no longer exists following the leave due to economic or other operational conditions of the employer that are caused by the public health crisis during the leave. To fall within this exception, the employer must still make reasonable efforts to return the employee to an equivalent job position for up to a year.

Emergency Paid Sick Leave Act:

- Eligible Employees: All employees, regardless of when they started working for the company.
- Reason for Sick Leave: An employee is entitled to paid sick leave if the employee is unable to work (or telework) due to a COVID-19 related reason such as (1) the employee is under or is caring for someone who is under a government-issued quarantine/isolation order; (2) the employee has been or is caring for someone who has been advised by a health care provider to self-quarantine; (3) the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis; (4) the employee is caring for his or her child because the child's school or place of care has been closed or is unavailable due to COVID-19 precautions; or (5) the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.
- Length of Paid Sick Leave: Full-time employees are entitled to 80 hours of paid sick leave. Part-time employees are entitled to the number of hours the employee works, on average, over a two-week period.
- Rate of Pay for Sick Leave:
    - Employees who take paid sick leave for the employee's own illness or quarantine are entitled to be paid at their regular rate of pay or at the federal, state or local minimum wage, whichever is greater. Pay is capped at $511 per day and $5,110 total.
    - Employees who take paid sick leave for any other allowable reason are entitled to be paid at two-thirds their regular rate of pay or at the federal, state or local minimum wage, whichever is greater. Pay is capped at $200 per day or $2,000 total.

Prohibitions: The Act prohibits employers from: (1) requiring an employee to take other employer-provided sick leave before using the paid sick leave provided under the Act; (2) requiring the employee to find a replacement worker to cover the hours during which the employee is using paid sick leave; and (3) retaliating against an employee who takes paid sick leave. Failure to pay required sick leave will be treated as a failure to pay minimum wages and will subject the employer to the same penalties set forth in the Fair Labor Standards Act.

Employees Who Work Part-Time or Irregular Schedules: The Act contains additional provisions for calculating the regular rate of pay for part-time employees or employees who work irregular schedules.

Exclusions: Employers of an employee who is a health care provider or an

emergency responder may elect to exclude such employee from the paid sick leave requirements.

Notices: Employers must post, in conspicuous places, notice of the paid sick leave requirements. The DOL's model notice is available here.

Occupational Safety and Health Administration

The DOL's Occupational Safety and Health Administration (OSHA) is responsible for setting and enforcing safety and health standards in the workplace. OSHA released guidance with recommendations for employers on keeping workers safe from COVID-19.

OSHA and the Department of Health and Human Services issued joint guidance for all employers on preparing workplaces for COVID-19 (see Guidance on Preparing Workplaces for COVID-19). OSHA recommends that all employers:

- Develop an infectious disease preparedness and response plan;
- Prepare to implement basic infection prevention measures;
- Develop policies and procedures for prompt identification and isolation of sick people;
- Develop, implement, and communicate about workplace flexibilities and protections;
- Monitor public health communications about COVID-19 recommendations and ensure that workers have access to that information; and
- Collaborate with workers to designate effective means of communicating important COVID-19 information.

The guidance contains additional recommendations for workplaces in which workers have a greater risk of exposure to COVID-19, such as those involving frequent interaction with the general public.

OSHA has also issued interim guidance for employers in certain industries, including manufacturing, construction, retail, and healthcare (see OSHA's Interim Guidance by Industry). For employers in the manufacturing industry, OSHA and the CDC issued a joint guidance document that recommends creating a COVID-19 assessment and control plan (see Interim Guidance for Manufacturing Workers and Employers). The guidance contains detailed recommendations for items that employers in the manufacturing industry should include in their plan.

OSHA Reporting Requirements: OSHA rules require covered employers to report serious work-related injuries and illnesses. In response to COVID-19, on April 10, 2020, OSHA issued a guidance memorandum stating that, for most employers, confirmed cases of COVID-19 did not have to be included as recordable incidents for OSHA recordkeeping purposes unless there is objective evidence available to the employer that the cases are work-related. However, on May 19, 2020, OSHA rescinded that guidance. Accordingly, beginning on May 26, 2020, employers are responsible for recording cases of COVID-19 that are work-related. To determine if a COVID-19 infection is work-related, OSHA recommends that

employers (1) ask the infected employee how they believe they contracted COVID-19; (2) while respecting the employee's privacy, inquire about the employee's activities both in and out of the workplace that may have led to the COVID-19 infection; and (3) assess the employee's work environment to determine potential exposure to the virus. If the employer determines that a COVID-19 illness is more likely than not work-related, the employer should record the case as a "respiratory illness" on the OSHA Form 300.

California Specific Requirements: California's Department of Industrial Relations' (DIR) Division of Occupational Safety and Health has state specific requirements covering COVID-19. In general, California employers are required to establish and implement an Injury and Illness Prevention Program (IIPP) to protect employees from workplace hazards, including infectious diseases. The new rule requires California employers to determine if COVID-19 is a hazard in their workplace. If so, the employer must amend its IIPP to include COVID-19 measures. According to the DIR, adopting changes to their IIPP is mandatory for most California employers since COVID-19 is widespread in the state. A detailed list of measures that must be included is available on the DIR's website (Cal/OSHA Interim General Guidelines on Protecting Workers from COVID-19) under "Establish Infection Prevention Measures."

Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing various anti-discrimination in employment laws, has issued guidance related to COVID-19.

On March 21, 2020, the EEOC updated its 2009 "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act" guidance to include specific guidance related to COVID-19. This guidance confirmed that the COVID-19 pandemic meets the direct threat standard under the Americans with Disabilities Act (ADA). As such, the EEOC explained, employers can inquire about whether an employee has COVID-19 or any symptoms of COVID-19. In addition, employers may measure employees' body temperatures before they enter the workplace. Employers can prohibit employees with COVID-19 or COVID-19 symptoms from entering the workplace. As with all medical information, the fact that an employee had a fever or other COVID-19 symptoms is subject to ADA confidentiality requirements.

In addition, the EEOC recognized that "the rapid spread of COVID-19 has disrupted normal work routines and may have resulted in unexpected or increased requests for reasonable accommodation." The EEOC recommends that employers address reasonable accommodation requests as soon as possible but, where it is not possible, the EEOC encourages employers to use interim solutions to enable employees to continue working as much as possible.

Finally, the guidance indicates that employers may screen job applicants for COVID-19. An employer can delay the start date of an applicant experiencing COVID-19 symptoms. Further, an employer may withdraw an offer where the employer needs the applicant to start immediately and the applicant, because of COVID-19, cannot safely enter the workplace.

On May 7, 2020, the EEOC issued a COVID-19 specific guidance on employers' obligations surrounding the pandemic under various laws enforced by the EEOC. This guidance expands upon the EEOC's earlier general pandemic guidance (i.e., permissible medical inquiries into COVID-19 related-issues, as discussed above) and addresses some additional issues such as reasonable accommodation requests due to COVID-19 and how employers should treat employees with underlying medical conditions that the CDC has identified as placing them at higher risk for severe illness if they were to contract COVID-19.

With regard to reasonable accommodations, the EEOC confirmed that it is still the employee's obligation to inform their employer of the need for an accommodation due to a COVID-19 related medical condition. As with any accommodation request, the employer must then engage in the interactive process to assess whether the employee has a disability under the ADA and, if so, whether that disability can be reasonably accommodated.

The EEOC reiterated that an employer can prohibit employees with COVID-19 symptoms from entering the workplace because they present a direct threat to coworkers. However, it advised employers that they cannot prohibit an employee (or take any other adverse action against an employee) solely because the employee has a medical condition identified by CDC as potentially placing the employee at "higher risk for severe illness" if he or she contracts COVID-19. Rather, the employer can only take such action if it is determined through an "individualized assessment" that the employee's disability poses a "direct threat" to his or her health that cannot be eliminated or reduced through a reasonable accommodation.

Such individualized assessment must be based on "reasonable medical judgment about this employee's disability - not the disability in general - using the most current medical knowledge and/or on the best available objective evidence." Employers should weigh factors such as the severity of the potential harm to the worker, the likelihood the employee might be exposed to COVID-19, and the potential impact of any protective measures the employer is taking to protect the workforce as a whole. Further, even if the employer determines that the employee poses a direct threat, the employer must then consider whether an accommodation could mitigate the risk. Potential accommodations envisioned by the EEOC include leave, telework, and reassignment to a role where the employee would be less likely to contract the virus.

State Workers' Compensation

Workers' compensation insurance provides medical and wage benefits to workers who are injured or become ill at work. The coverage is mandated by each state and the benefits vary by state. As such, whether an employee who contracts COVID-19 at work will eligible to receive workers' compensation benefits depends on the state where the employee works. In most states, it is not entirely clear whether workers who contract COVID-19 at work will qualify for workers' compensation benefits.

Under Georgia's definition of an "occupational illness," the illness must be unique

to a specific type of employment and not the type of illness that an individual would have substantial exposure to outside of their employment. Therefore, under current Georgia law, workers who contract COVID-19 at work would likely not be eligible to receive workers compensation benefits.

Under Texas law, workers' compensation benefits are not available where the injury or illness is an "ordinary disease of life" to which the general public is exposed outside of employment. An illness or injury is considered an ordinary disease of life if there is no causal connection between the illness/injury and the work, and the disease is not indigenous to the workplace or present at an increased degree with the employment. As such, under Texas law, it is likely that only those employees whose work places them at a higher risk than the general public for contraction of COVID-19 will have viable claims for workers' compensation benefits.

In California, the governor recently issued an executive order specifically including COVID-19 as a compensable illness for workers who contract it at work while California's stay-at-home order is in place. Under the executive order, workers required to work outside their homes during the stay-at-home order are presumed to have contracted the virus at work but employers will have a chance to rebut that presumption.

Under Tennessee law, "occupational illness" is not specifically defined and the Tennessee Department of Labor & Workforce Development has not issued any guidance on the issue. As such, it is likely that COVID-19 would be considered a compensable occupational illness where there is evidence that the employee contracted the disease at work.

For questions regarding COVID-19 issues in the workplace, please do not hesitate to contact us.

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About Chamberlain Hrdlicka

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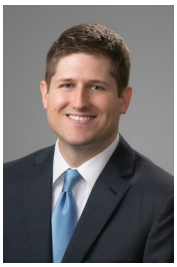

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