

LAW OFFICE OF LORI A. GOLDSTEIN, LLC

Client Bulletin 5/18/20: Pandemic Update – Thoughtful Transition

In this challenging environment, it is heartwarming to hear wonderful stories from my clients about the care, concern and compassion you have for your workers. Paid leave, flexibility and accommodations for illness, care of others and childcare are the norm. Many companies have PPP loans and are using creative ways to keep staff working safely with pay and benefits. Stress and anxiety about working/returning to the worksite is understood. Regular communications through company or department virtual meetings, happy hours and group games are bringing workers closer and providing reassurance. Partial employment is supplemented by state and federal unemployment benefits. Please keep up the good work and this too shall pass.

I. Health and Safety

The Illinois Attorney General's office has been conducting random audits of essential businesses' health and safety protocols. Employees who prove they contracted COVID at the workplace may have workers' compensation claims.

The CDC recently issued new timeline guidance for **isolation of COVID-19 positive** individuals. Based on studies, CDC is now recommending isolation:

- For at least 3 days after recovery (i.e. resolution of fever without the use of fever-reducing medications with progressive improvement or resolution of other symptoms) and
- For at least 10 days after illness onset.

CDC's list of updated symptoms: cough, shortness of breath or difficulty breathing, or at least 2 of the following: fever, chills, repeated shaking with chills, muscle pain, headache, sore throat, and new loss of taste or smell

Employers should obtain and post:

- OSHA poster: "[Ten Steps All Workplaces Can Take to Reduce Risk of Exposure to Coronavirus](#)"
- IL Dept. of Public Workplace Health and Safety Guidance poster: [COVIDIDPHposter](#)

CDC also has free posters to hang around the workplace, including stopping the spread of COVID, proper hand washing, promoting everyday protective measures, and proper wearing of face covering.

Workplace conditions are an appropriate subject of discussion among non-supervisory employees. Employers who discourage/discipline such conduct may be violating the Natl. Labor Relations Act. Workers also have the right to complain about OSHA violations.

II. Disability, Accommodations and Confidentiality

EEOC recently provided more **guidance on the impact of ADA/disability and accommodation** laws on COVID. Some employees may need reasonable accommodations because they have a

medical condition that may put them at higher risk for severe illness from COVID. CDC has identified several such medical conditions.

The employee or medical provider should request the accommodation from the employer – no special form, words or any documentation are necessary. After receiving a request, the employer may ask questions or seek medical documentation to determine if the individual has a disability and if there is a reasonable accommodation that can be provided without undue hardship.

Caution: if you know an employee has one of these conditions, and you are concerned that the employee's health could be jeopardized by working on site, you cannot automatically exclude the employee from working, or take any other adverse action. There must be evidence that the employee's disability poses a "**direct threat**" to his health that cannot be eliminated or reduced by reasonable accommodation. This includes considerations based on the severity of the pandemic in a particular area, and the employee's own health and job duties.

Even with a direct threat, the employer cannot take adverse action unless there is no way to provide a reasonable accommodation (absent undue hardship) and reduce the risk. If there are not accommodations to work on site, then an employer must consider **accommodations such as telework, leave (temporary unpaid), or reassignment**.

Work-site accommodation examples: enhanced protective gowns, masks, gloves; erecting a barrier that provides separation between an employee with a disability and coworkers/the public; temporary modification of work schedules (if that decreases contact with coworkers and/or the public when on duty or commuting) or moving the location of where one performs work (for example, moving a person to the end of a production line for more social distancing).

As with all interactive discussions of reasonable accommodation during this pandemic, employers and employees are encouraged to be creative and flexible.

Remember that ADA/disability laws require employers to maintain **confidentiality of employee medical information**. It is imperative to keep a medical file for each employee separate from his personnel file. Also, while employers may obtain employee temperatures, monitor symptoms and learn if an employee had been infected with COVID and/or exposed others, the **employer cannot disclose the employee's identity** or medical information (other to public health agency.)

III. Wage/Hour and Expense Reimbursement Laws

DOL also continues to offer guidance relating to COVID, including FLSA wage-hour reminders. If an **employer requires salaried, exempt employees to take PTO/vacation or leave without pay** during office closures due to influenza, pandemic, or other public health emergency, this **can impact the employee's exempt status**. Exempt, salaried employees generally must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions. An employee will not be considered paid "on a salary basis" (and exempt from

overtime pay) if deductions are made for absences due to office closure during a week in which the employee performs any work.

Some employers are requiring employees to be **tested for COVID or undergo temperature checks**. Similar to post-offer and periodic physical examinations, fingerprinting and drug testing, the time spent traveling to and from the tests, waiting for and undergoing these tests, or meeting the requirements **should be paid as hours worked**.

With **work from home** the new norm, perhaps permanent for some, businesses should be aware of applicable **expense reimbursement requirements**. Under Illinois' mandatory expense reimbursement law and many similar state laws, employers must cover any additional costs that employees may incur if they work from home (e.g. Internet access, computer, additional phone line, increased use of electricity.) Employers with a compliant written expense reimbursement policy can then deny reimbursement if employee fails to meet conditions.

III. Unemployment Benefits Update

Unemployment benefits are currently very generous, due to relaxed eligibility conditions and federal supplements. For each week an employee is eligible for state unemployment benefits (from 3/29 – 7/31/20), he **receives the state benefits, plus a \$600 federal supplement**. This means many employees are **earning more through unemployment** than their jobs can provide. In some states, like Illinois, employees and contractors can receive partial unemployment benefits if they're working on reduced hours or pay.

Employees discharged for lack of work or other lawful reasons relating to COVID are eligible for unemployment compensation. Similarly, employees who refuse to work based on specific evidence of OSHA violations (i.e. imminent danger) may be considered **constructively discharged** and entitled to unemployment.

Because of the very rich benefits, there is a temptation for workers and even some employers to provide inaccurate information to the agency to qualify for benefits. There must be a true furlough, reduced hours, or layoff/termination for COVID reasons. The **employer and employee can't just agree** that even though there is available work, the employee can refuse (even out of general fear of contracting COVID), stay home and collect unemployment. IDES does not look favorably on fraud and collusion.

PPP loans can be used for bonus/salary increases as incentive to stay at work. If you're having **difficulty with employees who can but won't return to work or telework**, you can give them a deadline to come back to work or they will be considered to have voluntarily resigned. Then they will have neither a job nor unemployment benefits.

V. Preparing for Transition to Reopening

As states begin to reopen and companies plan transition for return to full workplace production, businesses have many aspects to consider. I will send out more information as Illinois gets closer (see Gov. Pritzker's Restore Illinois Plan information below.) Until then, here are some key items employers should be thinking about, while regularly communicating with staff to keep them in the loop.

Illinois' latest Shelter Executive Order (currently effective through May 29) allows nonessential retail stores to reopen for curb-side pickup and delivery. It requires **essential businesses and manufacturers to provide face-coverings** to all employees who are not able to maintain 6 feet social distancing. It also imposes **rules for maximizing social distancing and prioritizing the well-being of employees and customers.**

Gov. Pritzker's 5-phase "Restore Illinois Plan" for Chicago, Cook County and surrounding suburbs is on track to move into Phase 3 at the end of May, subject to specific reductions in COVID infections rates, hospital and ICU admissions. In Phase 3 (Recovery), manufacturing, offices, retail, barbershops and salons can reopen to the public with capacity limits and safety precautions. Gatherings will be limited to 10 people, and masks and social distancing will continue.

When the infection rate and hospital admissions decline further, Phase 4 (Revitalization) will allow groups of 50, restaurants and bars can reopen, travel will resume, and child care and schools can open with guidance from IDPH. Face coverings and social distancing will remain the norm.

Phase 5 (Illinois Restored to full reopening of the economy) awaits a widely available vaccine or highly effective treatment, or the elimination of any new cases over a sustained period. The goal is to not have a second wave of outbreaks before that occurs.

10 important items and protocols to consider for reopening to a “better normal” (many businesses already have some of these in place):

1. **Return to work timeline** and phases (following applicable government timelines); continue to encourage telework with telecommute policies.
2. Carefully consider any **restructure, reduction in force and selection of employees** to be recalled (if less than full staff.) These should be based on legitimate business/operational, non-discriminatory reasons, not based on or adversely impacting protected categories such as disability, age, or national origin. Keep in mind PPP loan forgiveness rules on staff reductions/recall. Follow applicable WARN, employment termination, and final pay laws. Consider severance packages (covered by PPP) and separation and release agreements.
3. Follow **FFCRA sick and family leave mandates** (through 12/31/20), use applicable policies and forms, and track and document the leave. Remember that FMLA still applies (for employers with 50+ employees) to absences for reasons unrelated to COVID, and when FFCRA leave expires if accrued FMLA leave remains.

4. Provide **reasonable accommodations** for individuals with disabilities, COVID-related or otherwise.
5. Attendance policies and discipline for violations should be applied consistently, and should not penalize employees for taking statutory leave.
6. Use **staggered and monitored schedules** to minimize employee contact until all restrictions are lifted. Alternate arrival, departure and break times or provide temporary break areas and restrooms.
7. **Workstation modifications** are another consideration. Redesign office layout to create at least 6 feet between employee workstations.
8. Develop/continue **lawful policies and procedures** for prescreening employees, including onsite temperature checks or employee self-monitoring, exposure, and illness protocols, and isolation of sick employees, including workplace controls, PPE, and guidelines issued by OSHA and CDC. Examples:
 - Contactless drop zones for mail, packages and food deliveries.
 - Assign 1 or 2 employees to process mail and packages.
 - Prohibit nonessential visitors and conduct interviews and meetings virtually.
 - For business-critical visits, require visitors to go directly to assigned work area without interacting with employees, and to practice social distancing and hygiene while on-site.
 - Avoid catering and vending stations. Employees should bring their own food and drinks, and take dishware home nightly for cleaning.
9. **Train workers and supervisors** on anti-discrimination/harassment policies, as well as infectious disease response plan, signs/symptoms of COVID, handwashing, cough and sneeze etiquette, and infection control measures. Post required and applicable posters.
10. **Be flexible** and be prepared to close for a few days if there is a case of COVID at your workplace or longer if cases increase in the local area.

Final thoughts: Consider your employees and clients, and remember the 3 "C"s:

Communications – ongoing and reassuring

Compassion – these are challenging times for all

Commitment – to the well-being of your employees and clients and the stability of your company