



Coronavirus/COVID-19 Update

As new issues and concerns surrounding Coronavirus/COVID-19 appear by the hour, employers must be prepared to address this deadly pandemic as it relates to the health and safety of their workforce. Kirschenbaum & Kirschenbaum, P.C. has assembled a team of experts ready to address all your employment related concerns.

The recent outbreak of respiratory disease (COVID-19) caused by coronavirus presents many issues for employers. In their preparations, employers should be mindful of various employment laws when determining how they will manage workplace concerns about the coronavirus and plan for continuing operations in the event that employees have been exposed to the coronavirus.

All employers have a duty to provide "employment and a place of employment which are free from recognized hazards that are causing or likely to cause the death or serious physical harm to employees" under OSHA's General Duty Clause¹. Employees also have the legal right to refuse to perform work if they have a good faith belief that they will be exposed to imminent danger². Employers should keep this in mind as they navigate the health and safety risks posed to employees by COVID-19.

Below we will provide answers to some commonly asked questions by employers based on the information we have at this time.

Can an employee refuse to come to work for fear of being exposed to the coronavirus?

Many companies are being flexible with their work-from-home policies and some are even encouraging employees to work remotely. However, not everyone is allowed to work from home, and it's possible you can be fired if you are not sick and you fail to come into work because you're concerned about being exposed. Many employees are considered "at will," meaning they can be terminated at any time as long as the reason isn't illegal.

¹ 29 U.S.C. § 654, 5(a)1

² Id.

CONTACT K&K

For assistance with all employment and labor matters regarding the Coronavirus/COVID-19 Pandemic, contact Kirschenbaum & Kirschenbaum, P.C.

- Jennifer Kirschenbaum, Esq. may be reached at (516) 747-6700 x.302 jennifer@kirschenbaummesq.com
- Michael Foster, Esq. may be reached at (516) 747-6700 x.308 mfoster@kirschenbaummesq.com
- Kieran X. Bastible, Esq. may be reached at (516) 747-6700 x.315 Kbastible@kirschenbaummesq.com

Employers should be taking all concerns seriously, and should never take action against an employee just for raising a concern.

Can we ask employees to stay home if we suspect they may have the coronavirus or have been exposed to the coronavirus?

Generally, employers are obligated to protect their employees from known hazards, which may include the coronavirus. To contain the spread of the coronavirus, you should actively encourage sick employees to stay home and remind sick employees of any rights that they may have to paid time off when they are sick or caring for an ill family member. If employees have symptoms of an acute respiratory illness (*e.g.*, fever, cough, shortness of breath), you can ask them not to return to work until they no longer have a fever for at least 24 hours.

If employees recently returned from travel to a country with a coronavirus outbreak, such as China, Iran, Italy, Japan or South Korea, you may ask those employees to complete a self-monitoring quarantine period at home for up to 14 days (the suspected incubation and transmission period) after returning from the country at issue³.

Do we need to pay employees who are being quarantined, self-monitoring at home or are otherwise ill with the coronavirus or caring for a family member with the coronavirus?

It depends. Initially, you would be required to pay employees who are absent from work for these reasons if they have accrued paid time off pursuant to any paid safe/sick leave law⁴. Additionally, employees may be entitled to paid leave benefits pursuant to state or local leave laws if the employees are caring for a family member with the coronavirus. However, after employees exhaust any paid safe/sick leave, the obligation to pay them depends on whether they are classified as exempt or non-exempt employees and whether you are requiring them to be absent from work⁵.

Generally, you are only required to pay non-exempt employees for the actual hours that they work. Therefore, legally, you do not have to pay these employees if they are unable to return to work after they exhaust any applicable paid leave entitlement. As for exempt employees, you are required to pay them their full weekly salary if they perform any work during a given week⁶. If the employer closes operations due to an emergency or other disaster for less than a full workweek, then the employer must pay an exempt employee “the full salary for any week in which the employee performs any work without regard to the number of days or hours worked,” because “deductions may not be made for time when work is not available⁷.” Moreover, if you are requiring them to be absent from work—such as to self-monitor for the coronavirus at

³ <https://www.cdc.gov/mmwr/volumes/69/wr/mm6908e1.htm>

⁴ <https://www.dol.gov/agencies/whd/government-contracts/sick-leave/faq>

⁵ *Id.*

⁶ 29 C.F.R. § 541.602(a)(1).

⁷ See 29 C.F.R. § 541.602(a); see also Wage & Hour Div., U.S. Dep’t of Labor, Administrator Op. Lt. FLSA 2005-46 (Oct. 28, 2005)

home—you must pay them their full weekly salary. On the other hand, if they are diagnosed with the coronavirus and unable to work due to their medical condition, then you likely would not have to compensate them after they exhaust any applicable paid leave entitlement. However, granting such employees an unpaid leave of absence is advisable.

What are the New York State and Local Laws for paid safe/sick leave?

You may need to take time off from work if you are sick or if a family member is sick. Your employer may have a sick leave policy that provides you with paid sick days or you may have paid sick days if you are union member. If your employer does not have a policy or contract guaranteeing you paid sick leave, you may still have protections under certain laws.

- If you work in New York City and your employer has five or more employees, you earn five days of paid leave that you can use if you have a health condition or to care for a family member with a health condition. If your employer has less than five employees, you earn five days of unpaid leave. Under the NYC Paid Safe and Sick Leave law, employees can use the leave 120 days after first day of employment. For every 30 hours worked, a person is entitled to one hour of leave⁸. It maxes out at 40 hours per year, so for most employees, it would only cover a week's worth of sick time⁹. That's a problem given current guidance that those infected with coronavirus should quarantine for 14 days. Your employer cannot retaliate against you for requesting or using safe and sick leave. Retaliation includes any threat, discipline, discharge, demotion, suspension, or reduction in your hours, or any other adverse employment action against you for exercising or attempting to exercise any right guaranteed under the law¹⁰.
- Workers in New York State have up to 10 weeks of paid leave to care for a family member with a serious health condition¹¹. This leave may not be used for your own health condition and you must have been employed for 26 weeks¹².
- The Family and Medical Leave Act (FMLA) provides for up to 12 weeks of unpaid leave if you have a serious health condition or are caring for a family member with a serious health condition¹³. You must have worked for your employer for a year and your employer must have 50 or more employees¹⁴.
- If the FMLA doesn't apply, an employee could try to argue that their job should be protected under the Americans with Disabilities Act (ADA), which bars discrimination

⁸ N.Y.C. Admin. Code § 20-913

⁹ Id.

¹⁰ N.Y.C. Admin. Code § 20-918

¹¹ NY Work Comp L § 203 (2018)

¹² Id.

¹³ 29 U.S. Code § 2612

¹⁴ Id.

against a worker with disabilities¹⁵. However the likelihood is slim that this would be upheld, without a positive test for the virus. If an employee's Coronavirus infection qualifies as a disability under the ADA, they cannot be fired simply because they are infected. As long as there's a reasonable accommodation that doesn't impose an undue hardship on the employer, such as working from home, then the employee probably can't be fired because of the fact that the employee is in isolation¹⁶. If, for some reason, the ADA doesn't apply to the employee's situation, there's a chance that the employee could be fired if they are unable to do their job while in isolation. Depending on the circumstances, a leave of absence could qualify as a reasonable accommodation. An employer may require the employee to provide a doctor's note clearing them to return to work¹⁷.

- Under federal law, employers have no obligation to provide employees with leave (whether paid or unpaid) to remain home with children during an extended school closure, except to the extent provided for in the employer's leave or paid time off policies. However, New York City mandates that employers provide employees with leave necessitated by the "employee's need to care for a child whose school or childcare provider has been closed by order of a public official due to a public health emergency¹⁸."

What policies/steps should we put in place for dealing with the coronavirus?

As an initial matter, employers should take the following steps:

1. Educate employees on the virus and transmission.
2. Instruct employees in a verbal or written communication to:
 - a. wash their hands frequently and avoid touching their own eyes, nose and mouth;
 - b. cover their mouth and nose with a flexed elbow or tissue when coughing and sneezing;
 - c. discard tissues in a garbage can and clean their hands after coughing and sneezing;
 - d. maintain at least a 3-to-6 foot distance from people;
 - e. disinfect frequently touched objects and surfaces;
 - f. stay home if they're sick, and seek medical care early when showing symptoms; and
 - g. restrict or limit nonessential travel to affected regions.
3. Provide employees and others entering the workplace tissues, trash receptacles, hand sanitizer and a place to wash their hands.
4. Communicate available employee health services and encourage employees to obtain the seasonal influenza vaccine.
5. Maintain and improve workplace cleaning/maintenance routines, including providing supplies to clean employee work surfaces and electronic equipment.

¹⁵ See 49 U.S.C. § 41713(b)

¹⁶ Id.

¹⁷ Id.

¹⁸ N.Y.C. Admin. Code § 20-913

6. Evaluate existing leave of absence/sick leave policies to determine how to address the various leave scenarios that may arise.
7. Encourage ill employees to stay home without fear of job loss or reprisal.

For assistance with all employment and labor matters regarding the Coronavirus/COVID-19 Pandemic, contact Kirschenbaum & Kirschenbaum, P.C.

- Jennifer Kirschenbaum, Esq. may be reached at (516) 747-6700 x.302
jennifer@kirschenbaumesq.com
- Michael Foster, Esq. may be reached at (516) 747-6700 x.308
mfooster@kirschenbaumesq.com
- Kieran X. Bastible may be reached at (516) 747-6700 x.315
Kbastible@kirschenbaumesq.com

Disclaimer: This Coronavirus/COVID-19 Update is subject to modification as more information becomes available. We will continue to monitor Coronavirus/COVID-19 as it develops and provide new updates for employers as the situation evolves.