To: HR Policy Members

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RE: COVID-19 U.S. Labor & Employment Checklist

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As the outbreak of COVID-19 (coronavirus) continues to spread within the United States, employers should review their obligations under various federal and state labor laws to ensure they are providing a safe working environment that both mitigates any effects the virus could have in their workplace and is in compliance with the law. Both employers and employees alike have rights and obligations under our nation's labor laws regarding the issues presented by COVID-19. Outlined below is a U.S. labor and employment checklist for employers to consider when formulating their responses to the coronavirus situation.

I. U.S. Labor & Employment Checklist

A. National Labor Relations Act ("NLRA")

1. Private sector (excluding rail and airway employees) nonsupervisory employees are covered by the NLRA even if a union is not present.
    a. Such employees have broad rights to refuse to work in an unsafe environment, particularly if they are engaged in protected concerted activity.
2. "Concerted activity" protected
    a. Employees can individually or as a group raise workplace safety issues and are generally protected by the NLRA if they have an objective basis to support their safety related concerns.
    b. An employer could violate the Act by retaliating against groups of employees – unionized or otherwise – who refuse to work if they have an objective basis to consider a work area unsafe.
        i. E.g., presence of infected employees in the workplace, refusal of employer to furnish gloves, or other necessary

safety equipment, requirement that employees travel to a geographic area with high rate of infection.

3. Unionized workplaces
    a. Employers should review obligations under their collective bargaining agreements to ensure compliance associated with the virus outbreak.
    b. Employers should consider whether their responses to COVID-19 concerns constitute prohibited unilateral changes in existing working conditions - which could trigger unfair labor practice charges and contract violations.
    c. Unions could take advantage of these types of situations and attempt to inflict reputational damage on an employer.

B. Occupational Safety and Health Act ("OSHA")

1. Personal Protective Equipment Standards
    a. Require using gloves, eye and face protection, and respiratory protection where and when necessary
        i. When respirators are necessary to protect workers, employers must implement a comprehensive protection program in accordance with the Respiratory Protection standard

2. General Duty Clause
    a. Requires employers to furnish to each worker "employment and a place of employment, which are free from recognized hazards that are causing or likely to cause death or serious physical harm"
        i. Employers are obligated to mitigate all recognizable risks of contracting COVID-19 in the workplace

3. Employee Protections
    a. Section 11(c) of OSHA prohibits employers from retaliating against workers for raising concerns about safety and health conditions

b. Employees are generally only entitled to refuse to work if they believe they are in "imminent danger"
c. An employee's right to refuse to do a task is protected if all of the following conditions are met:
    i. Where possible, the employee has asked the employer to eliminate the danger, and the employer failed to do so;
    ii. The employee refused to work in "good faith" – this means that the employee must genuinely believe that an imminent danger exists;
    iii. A reasonable person would agree that there is a real danger of death or serious injury; and
    iv. There isn't enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels

4. Employer Issues to Consider
    a. Whether an employer can require employees to wear masks (as part of providing a safe work environment), become vaccinated, travel to certain locations, come into work, work from home, not work at all, or use leave time paid or unpaid
    b. Whether employees can insist on wearing masks
        i. In general, an employer can refuse an employee's request to wear a medical mask or respirator
        ii. WHO to date has stated that only those treating someone who is infected need to wear masks

C. Fair Labor Standards Act ("FLSA")

1. An employer is required to continue to pay exempt employees their full salary for each work week irrespective of the amount of work they do
2. There is generally no requirement to pay non-exempt employees except for hours actually worked
    a. Employers should have systems in place to ensure non-exempt employees' hours worked are accurately tracked in the event they are forced to work from home/remotely

3. Employers may encourage or require employees to telework as an infection-control or prevention strategy

D. Americans with Disabilities Act ("ADA")

1. It is illegal for employers to discriminate against employees because they have a disability or are perceived as having a disability
2. COVID-19 could be considered "perceived as" disability under ADA
    a. Employers could be liable under the ADA for employment actions based on an employee's contraction of the virus or perceived contraction
3. "Direct threat" – significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation
    a. Employees posing such a "direct threat" are not protected by the ADA
    b. By the EEOC's own admission, it is unclear whether COVID-19 outbreak rises to the level of a "direct threat"
        i. Employers should rely on CDC and state or local public health assessments
4. Employers generally are prohibited from asking employees to disclose if they have compromised immune systems or a chronic health condition that would make them more susceptible to COVID-19 unless "direct threat" exception is applicable which could be the case with this virus
5. Employers are prohibited from making employee disability-related inquiries or medical examinations unless they are job-related and consistent with business necessity
    a. Requiring an employee to take their temperature at work is generally considered a "medical examination" under the ADA
        i. However, the EEOC has released guidance permitting employers to measure employees' body temperature – such temperature taking during the pandemic will not be considered a "medical examination" under the ADA

b. Job-related and consistent with business necessity where employer has reasonable belief based on objective evidence that an employee's ability to perform essential job functions will be impaired by a medical condition

6. Pursuant to EEOC guidance, employers may:
   a. Screen applicants for symptoms of COVID-19
   b. Take an applicant's temperature as part of a post-offer, pre-employment medical exam
   c. Delay the start date of an applicant who has COVID-19 or symptoms associated with it
   d. Withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it
   e. Require employees to stay home if they have COVID-19 symptoms
   f. Ask employees who call in sick if they are experiencing COVID-19 symptoms – all such information gathered must be kept confidential

E. Family and Medical Leave Act ("FMLA")

1. Employees have leave rights to care for themselves and family members affected by COVID-19
2. Generally, employees are not entitled to take FMLA leave to stay at home to avoid getting sick
   a. This has been reaffirmed in guidance recently released by the Wage and Hour Division
3. Generally, for an employee to invoke their 12 weeks of unpaid FMLA leave, he or she must have a "serious health condition" (or be taking care of a qualifying family member with a "serious health condition")
   a. No clear guidance yet from federal agencies as to whether COVID-19 would qualify as "serious health condition"

b. An employee with COVID-19 or taking care of a family member with COVID-19 may be permitted to take FMLA leave depending on whether it qualifies as a "serious health condition"

F. Worker Adjustment and Retraining Notification Act ("WARN Act")

1. Imposes a notice implication on those with 100 or more full-time employees who implement a "plant closing" or "mass layoff"
   a. In general, employers are required to provide at least 60 days' notice
   b. Exception where layoffs occur due to unforeseeable business circumstances
      i. Could apply to COVID-19
   c. Employers should further ensure that they are in compliance with state and local WARN Act-like laws, many of which impose more stringent requirements
      i. E.g. New Jersey's SB3170, slated to go into effect in July, adds a severance pay requirement to WARN Act-like obligations for employers doing business in the State
   d. On March 17, California "suspended" its statewide version of the WARN Act
      i. Specifically, Gov. Newsom suspended the 60-day notice, liability for damages, and liability for civil penalties portions of the law provided the employer:
         i. Orders a mass layoff because of unforeseeable COVID-19 related consequences
         ii. Gives as much notice as practicable of the layoffs
         iii. Includes a statement (exact language provided by Gov. Newsom's executive order) notifying employees that they may be eligible for unemployment insurance

G. Health Insurance Portability and Accountability Act ("HIPAA")

1. Employers may have a duty to protect employees' medical information and keep such information confidential
2. Department of Health and Human Services recently issued a bulletin reminding that all employers, and particularly those involved in providing health care, to comply with the HIPAA protections during the COVID-19 outbreak

H. State and Local Scheduling Laws

1. A small but increasing number of states and localities have adopted predictive scheduling laws
2. Employers doing business in such states must ensure compliance with predictive scheduling laws in light of schedule disruptions caused by the COVID-19 outbreak

I. State and Local Leave Laws

1. In addition to FMLA, as noted above, employers should take care to check the various state and local leave laws for the states and localities in which they do business to ensure they are in compliance with such laws

J. Federal Contractor Paid Sick Leave Requirements

1. Under EO 13076, employees of federal contractors accrue 1 hour of paid sick leave for every 30 hours worked on or in connection with a covered contract, up to 56 hours a year
    a. Employees may use this paid sick leave for their own care or to care for a close family relative/association

K. Title VII

1. Employers may not discriminate against employees on the basis of national origin, and must ensure that their employees are not discriminating in the same manner against other employees on the basis of such

L. State Workers' Compensation Statutes

1.Employees may be eligible for state workers' compensation if they contract the virus while at work

M. Families First Coronavirus Response Act (H.R. 6201)

1. Employers with fewer than 500 employees are now required to:
    a. Immediately provide 80 hours of paid sick leave to full-time employees, while part-time employees are entitled to the usual number of hours they work in a typical two-week period
        i. Paid sick leave taken for personal use is capped at $511 per day and $5,110 in total
        ii. Paid leave taken to care for a sick family member is capped at $200 per day and $2,000 in total
    b. Provide 10 weeks of paid family leave only to care for a child whose school or daycare is closed due to the coronavirus
        i. Paid family leave is capped at $200 per day and $10,000 total
    c. A payroll tax credit, up to certain dollar amounts, will help offset the cost of the mandated benefits for small employers
    d. Both leave mandates are effective April 2, 2020, and will sunset on Dec. 31, 2020
    e. To date, it is unclear how "fewer than 500 employees" will be counted for purposes of determining covered employers.