COVID-19 Alert: Employment Law Regulations

The Complex Web of Employment Law Regulations Expands: The Latest COVID-19 Considerations for Massachusetts Employers

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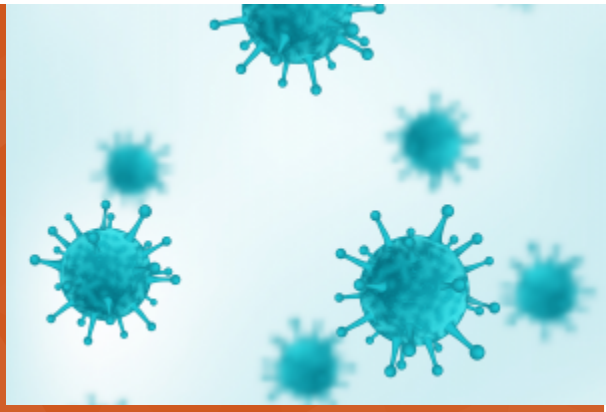

In response to the COVID-19 outbreak, government regulators have created a web of legal requirements intended to promote employee safety and economic stability. The count, scope, issuance rate, and complexity of these new rules are unprecedented.

Compliance with this ever-expanding, and sometimes inconsistent, landscape of COVID-19 regulations is a clear and present challenge for employers.

Below is a summary of the most recent COVID-19 regulations that apply to Massachusetts employers, as of July 2020. It is critical that Massachusetts employers identify, understand, and comply with these standards.

NEW GUIDELINES FOR RESPONDING TO WORKSITE INFECTIONS

The Massachusetts and federal governments have recently revised guidelines related to COVID-19 infections in the workplace (collectively, the "Workplace Infection Guidelines"). These new Workplace Infection Guidelines emphasize a four-step process if an employer is notified of a positive COVID-19 case in the work environment:

- **Remove all individuals suspected of infection from the workplace**. Employees who test positive for COVID-19 (using a viral test, not an antibody test) should be excluded from work and remain in home isolation if they do not need to be hospitalized. Employers should provide education to employees on what to do if they are sick.

- **Notify the local Board of Health in the city or town where the workplace is located, and assist the local Board of Health as reasonably requested to advise likely contacts to isolate and self-quarantine**. Employers should affirmatively work with local health department officials to determine which employees may have had close contact with the employee with COVID-19, and who may need to take additional precautions, including exclusion from work and remaining at home. Testing of other workers may be recommended, consistent with guidance from the local Board of Health.

- **Shut down and disinfect the affected worksite in accordance with federal Centers for Disease Control and Prevention ("CDC") Guidance**. In most cases, the complete shut down an entire facility will not be required. However, employers will need to take steps to close off areas used for prolonged periods of time by the infected employee. CDC cleaning and disinfection recommendations suggest that employers wait 24 hours before cleaning and disinfecting to minimize potential for other employees being exposed to respiratory droplets.

- **Determine which employees may have been exposed to the virus, and take additional precautions**. If an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace, but maintain confidentiality as required by the Americans with Disabilities Act. Most workplaces should follow the Public Health Recommendations for Community-Related Exposure, and instruct potentially exposed employees to stay home for 14 days, telework if possible, and self-monitor for symptoms. Employees may have been exposed if they are a "close contact" of someone who is infected, which is defined as being within about 6 feet of a person with COVID-19 for a prolonged period of time. All other employees should be instructed to self-monitor for symptoms and wear cloth face coverings when in public. Employees should not return to work until they have met the recently revised CDC criteria related to the discontinuation home isolation, and have consulted with a healthcare provider.

The Workplace Infection Guidelines require employers to execute the recommended response steps on an immediate basis. As such, it is recommended that employers pre-establish and adopt contingency plans that are consistent with the Workplace Infection Guidelines.

Federal Return-to-Work Guidelines

On July 20, 2020, the United States Department of Labor (the "DOL") issued three sets of guidelines related to:

- the Fair Labor Standards Act (the "FLSA") – *the federal law that regulates employee wage and hour standards*;
- the Families First Coronavirus Response Act (the "FFCRA") – *the March 2020 federal law that provides for certain paid leave benefits for employees impacted by COVID-19;*
- and the Family and Medical Leave Act (the "FMLA") – *the federal law that provides protections for employees that require time off for medical or family support reasons.*

(the "DOL Guidelines")

These DOL Guidelines explain and clarify regulatory standards related to the FLSA, FFCRA, and FMLA that concern remote workers and workers returning to job sites in the COVID-19 context. The key components of the DOL guidelines are below:

Tracking Hours of Remote Workers

The DOL has clarified that under the FLSA, "*[w]ork performed away from the primary worksite, including at the employee's home, is treated the same as work performed at the primary worksite for purposes of compensability*." As such, an employer must compensate employees for all hours of telework actually performed away from the primary worksite, including overtime work, "*provided that [the employer] knew or had reason to believe the work was performed.*" An employer is not, however, required to compensate employees for unreported hours of telework that the employer had no reason to believe had been performed. To meet these requirements, the DOL recommends that employers adopt "reasonable time-reporting procedures" to track employee work time in remote settings.

Flexible Work Schedules For Remote Workers

The FLSA's wage and hour regulations generally adhere to a "continuous workday" standard – meaning that all time between the performance of the first and last principal activities of a workday is generally compensable work time. However, the DOL has recognized that applying this guidance to teleworking arrangements might discourage needed flexibility during the COVID-19 emergency – for instance, discouraging a policy that permits remote employees to

take time off during regular work hours to care for children. As such, the DOL has taken the position that "*an employer that allows employees to telework with flexible hours during the COVID-19 emergency does not need to count as hours worked all the time between an employee's first and last principal activities in a workday*." Rather, under this standard, an employer is permitted to count only the hours actually worked for compensation purposes.

Reinstatement After FFCRA Leaves

In general, employees returning from leave taken under the FFCRA must be reinstated to the same or an equivalent position, subject to limited exceptions. However, given the public health emergency, where an employee has had potential exposure to an individual with COVID-19, employers can temporarily reinstate returning employees to equivalent positions which require less interaction with co-workers, or require they telework – provided they take similar measures for similarly affected employees who did not take FFCRA leave. Employers may also require any employee that knows that they have interacted with someone diagnosed with COVID-19 to telework or take leave until they test negative for COVID-19, regardless of whether that employee has taken any kind of leave. Employers may not, however, require employees to telework or be tested for COVID-19 simply because they took leave under the FFCRA.

FFCRA Leave and Furloughs

The DOL Guidance clarifies that if an employee exhausts their paid sick leave under the FFCRA prior to being furloughed, they are not entitled to any additional leave if they ultimately return to work. Employees who use fewer than 80 hours of paid sick leave prior to being furloughed may use any remaining hours after returning to work. The same is true for expanded FMLA leave under the FFCRA: employees may take a portion of their expanded family and medical leave prior to being furloughed and use any remaining leave after returning to work, as the weeks that the employee was furloughed do not count as time on FFCRA leave. Because the reason an employee needs leave may have changed during furlough, the guidance suggests treating a post-furlough request for expanded family and medical leave as a new leave request, and obtain documentation related to the current reason for leave.

COVID-19 Testing and FMLA Leave Unrelated to COVID-19

The guidance notes the FMLA does not prohibit an employer from requiring an employee to get a COVID-19 test prior to returning to the office after non-COVID-19 related FMLA leave, pursuant to a policy requiring all employees obtain such a test, even if the policy was implemented while the employee was out on FMLA leave. However, other laws may restrict employers from requiring certain testing – namely, the Americans with Disabilities Act ("ADA") requires that any mandatory medical test (including a COVID-19 test) be "job related and consistent with business necessity." As set forth in applicable ADA guidance, employers may take steps to determine if employees entering the workplace have COVID-19 (including the administration of COVID-19 testing) because an individual with the virus will pose a direct threat to the health of others.

Massachusetts Travel Restrictions

On July 24, 2020, Massachusetts Governor Baker issued a strict new Travel Order. Effective August 1, 2020, any individual – including Massachusetts residents – returning to Massachusetts from another state must (1) complete and submit an online "Massachusetts Travel Form" and (2) quarantine for 14 days. "Quarantining" includes separating from all other people; not leaving identified quarters, or having anyone else come into those quarters; and having food delivered.

There are several exceptions to this Travel Order:

- Travelers coming from "lower-risk states" are not required to comply. The current list of such

states are: Connecticut, Hawaii, Maine, New Hampshire, New Jersey, New York, Rhode Island, and Vermont.

- Travelers who have tested negative for COVID-19 based on a sample taken no longer than 72 hours before their arrival in Massachusetts are also exempt. Such individuals must be able to provide proof of the negative test result.

- Workers providing critical infrastructure services, as defined by the Federal Cybersecurity and Infrastructure Security Agency are exempt, though for 14 days they can go only to their place of work and home.

- Individuals passing through Massachusetts to another state (*e.g.*, people with connecting flights or bus connections) are exempt.

- The Travel Order exempts individuals who regularly commute, at least weekly, outside of Massachusetts to a fixed place to attend school or work, or any person who regularly commutes, at least weekly into Massachusetts, to a fixed place to attend school or work; provided that in either case, this exception applies only to and from the person's residence and place of work or school.

- Patients who are traveling to Massachusetts to seek or receive specialized medical care from a physician located in the Commonwealth, and persons accompanying and providing needed support to the patient are exempt.

- Any person who is required to travel to Massachusetts at the order or directive of a Federal or State military authority is exempt.

Although the Travel Order contains no specific prohibition on employee business travel, the Travel Order contains the following recommendation: "***Employers are strongly discouraged from requiring or allowing business-related travel to non-lower-risk states, as indicated in red on the map above. Employers that permit employer-paid or -reimbursed travel to non-lower-risk states should take measures to ensure employees comply with the Travel Order. Employers are also urged to strongly discourage their employees from taking leisure travel to non-lower-risk destinations***."

The Travel Order imposes a $500 fine per day for failure to comply with the Travel Order.

NEW, POTENTIAL FEDERAL BUSINESS RELIEF PROGRAMS

Several of the COVID-19 business relief programs established in the Federal CARES Act are set to expire in the coming weeks. In response, the United States Congress is now assessing an additional, multi-trillion dollar business relief measure.

Although the exact scope of this proposed relief measure has not yet been determined, Congressional discussions appear to be coalescing around several elements:

- **Federal unemployment enhancement**: There appears to be bipartisan recognition of a need to extend the CARES Act's unemployment benefit program (*which presently provides qualified unemployed individuals with a $600 per week payment, in supplement to any state unemployment benefits received by that unemployed worker*) beyond its July 31, 2020 expiration date. Whether the program is extended in its present form and benefit level, or reduced in some way, is the subject of present debate.

- **Liability protections**: Congressional debate appears to be centered on providing some of form of liability protection to employers for claims arising out of workplace infections. The scope of

that potential statutory liability shield is the subject of present debate.

- **Paycheck Protection Program Extension**: There appears to be bipartisan support for some form of an extension of the Paycheck Protection Program ("PPP"). This extension might include elements that permit employers who have already received PPP loans to obtain further, "second-round" loans under the program, upon a demonstration of economic need.

Morse continues to review the evolving employment law landscape related to COVID-19, and is focused on assisting our clients through these unprecedented and challenging times. Please contact the Firm should you have questions concerning this subject, or any other COVID-19 response matters.

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