COZEN O'CONNOR

After the COVID-19 Pandemic: Planning Now for the Return to Occupancy

Follow-Up Questions and Answers - April 17, 2020

1. Are hotels able to purchase toilet paper and paper towels and other necessary products that are hard to find right now?

We are not aware of any special supply sources for hotels during this crisis. Many hotels have decided to close and may be in a position to sell their surplus stock, depending on their anticipated timeline to reopen. This is an excellent subject to raise with your local hotel association.

2. Since we have laid employees off and are working with a skeleton crew, how do we keep the name of the employee who tests positive confidential? It would be very easy for a very small staff to know who it is.

It may be impossible to prevent the other staff from putting two and two together. Under guidance from the EEOC, an employer is permitted to follow CDC Guidance without violating the Americans with Disabilities Act (ADA). The CDC says:

> "If an employee is confirmed to have COVID-19 infection, 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 (ADA). The employer should instruct fellow employees about how to proceed based on the CDC Public Health Recommendations for Community-Related Exposure."

As a general rule the ADA requires employers to treat any medical information obtained from a disability-related inquiry or medical examination (including medical information from voluntary health or wellness programs, as well as any medical information voluntarily disclosed by an employee, as a confidential medical record. Employers may share such information only in limited circumstances with supervisors, managers, first aid and safety personnel, and government officials investigating compliance with the ADA. 42 U.S.C. §§12112(d)(3)(B), (4)(C)(1994); 29 C.F.R. §1630.14(b)(1)(1998). The Commission also has interpreted the ADA to allow employers to disclose medical information to state workers' compensation offices, state second injury funds, workers' compensation insurance carriers, and to health care professionals when seeking advice in making reasonable accommodation determinations. 29 C.F.R. pt. 1630, app. §1630.14(b)(1998). Employers also may use medical information for insurance purposes.

3. *Can you require an employee showing symptoms to bring a doctor's note? Even if they haven't missed three consecutive says? (Located in AZ)*

As long as the employee is showing symptoms, you can bar that employee from your workplace. Under the ADA, covered employers may require employees who have been away from the workplace during a pandemic to provide a doctor's note certifying fitness to return to work.

4. *Is it necessary to wear mask AND implement social distancing? I was under the impression either or?*

What is necessary will depend on the orders issued by local authorities. Some states require both the wearing of masks and the adoption of social distancing. The CDC has issued guidance applicable to all workplaces generally, but also has issued more specific guidance for particular types of workplaces (e.g. health care employees). Guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety. If your state does not require both social distancing and wearing masks, we are unaware of any prohibition on a private employer requiring both within its facility.

5. *Is there any type of restriction on traveling? Can I as a hotel rent to anyone or can I only rent to "essential" travelers?*

To prevent stigma and discrimination in the workplace and in access to public accommodations, we recommend that hotels use only the guidance from the CDC or local authorities to determine risk of COVID-19 infection. It is important that you not make determinations of risk based on race or country of origin and you should be sure to maintain confidentiality of people with confirmed coronavirus infection. The CDC website provides information concerning people who are returning from international travel. https://www.cdc.gov/coronavirus/2019-ncov/travelers/after-travel-precautions.html. At the current time, foreign nationals who have visited China, Iran, the European Schengen area, the United Kingdom or the Republic of Ireland within the past 14 days may not enter the United States. https://www.cdc.gov/coronavirus/2019-ncov/travelers/from-other-countries.html

6. Can you confirm the keeping of medical information of employees? If someone reports they are positive for COVID, does this apply?

As a general rule the ADA requires employers to treat any medical information obtained from a disability-related inquiry or medical examination (including medical information from voluntary health or wellness programs, as well as any medical information voluntarily disclosed by an employee, as a confidential medical record. Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions as of March 2020, employers may measure employees' body temperature. As with all medical information, the fact that an employee had a fever or other symptoms would be subject to ADA confidentiality requirements. Employers may share such information only in limited circumstances as noted above.

7. I just missed the statement made prior to "employers are not held accountable to the HIPAA rule". How do HIPAA laws factor into all of this?

An employer has a right to make reasonable inquiries about an employee's medical condition under the Americans with Disabilities Act ("ADA") if it is job related and consistent with business necessity. The EEOC's Guidelines for "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act" specifically contemplate such inquiries in the event public health officials declare a pandemic. Further, medical information obtained for purposes of making employment decisions is generally not protected by HIPAA privacy protections. If the information comes from a source other than the company's medical plan, it is not subject to HIPAA.

8. IL passed a regulation yesterday that the employer is responsible to prove that an employee did not contract the virus at work - any guidance here?

This applies to first responders or front line workers who contract COVID-19. Under normal procedures in workers' compensation cases, the employees bear the burden to prove that their injury or illness was directly caused by their duties. An emergency amendment to the rules of evidence before the Illinois Workers' Compensation Commission now creates a presumption that these categories of workers contracted the disease because of the hazards of their jobs and it will be up to the employers to meet the difficult burden of proving otherwise. The amendment applies to "critical personnel" including personnel who work for hotels, motels, residential facilities and shelters, restaurants for consumption off-premises, among many others.

9. If a guest is symptomatic or I have a confirmed case of Covid-19 in the state of Pennsylvania, where do I find if the hotel can turn away a guest?

Businesses generally have wide latitude to deny services to anyone. Think "No shirt, no shoes, no service." But as places of public accommodation , hotels are subject to higher standards in certain areas, including being prohibited from discriminating against individuals with disabilities. While the definitions may differ from state to state about whether COVID-19 qualifies as a disability, the law does not require businesses to serve those who pose a direct threat to the health and safety of others. We recommend that if you refuse to accommodate the guest.

- Ensure management is involved by instructing staff to escalate if they have guests with symptoms checking in.

- Inform guest that you would like to accommodate them, but you have concerns about the health and safety of other guests and staff. Direct them to the nearest medical facility.
- Ensure second staff member present as a witness if deny check in.
- Refund the guest, if the reservation was pre-paid.
- The manager should prepare written statements after-the-fact explaining what happened and why they believed the guest posed a health risk.
- Disinfect the surfaces where the guest might have touched after they leave.

10. What if the employee is scared to come back to work? Can the company terminate their employment? If an employee (housekeeper) requests not to work/clean rooms because there are guests that have tested positive for COVID and this employee's spouse has type II diabetes...could this be considered a voluntary resignation? If we let this person go, are we at risk of a law suit?

Generally an employee may be terminated for refusing to work, but there may be limits under OSHA in rare cases. The OSHA regulation at 29 C.F.R. §1977(b)(2) provides:

> "[O]ccasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition."

11. Is there a recommended Employer form to use for EPSL and EFMLA for employees trying to qualify for these situations, indicating what documentation is needed and by when?

We are not aware of any officially promulgated form by the Department of Labor as was done for the basic leave provisions under the Family and Medical Leave Act. Our office has developed a form that can be used until an official federal form is issued. It is included as an Appendix at the end of this document.

12. Can anyone speak to whether WARN act notification requirements are likely to be enforced in light of the extreme and sudden way in which the bottom fell out of the entire industry.

Under the federal WARN Act, covered employers must provide 60 days' notice before terminating or laying off employees in connection with a plant closing or mass layoff. Two exceptions to the 60 days' notice requirement may be applicable here. The unforeseeable business circumstances will apply if the job loss is caused by a "sudden, dramatic, and unexpected action or condition outside of the employer's control" such as a "dramatic major economic downturn" or "[a] government ordered closing of an employment site that occurs without prior notice." 20 C.F.R. § 639.9(b). Under the faltering businesses doctrine, a company actively seeking capital or new business which would allow it to avoid the closing of a facility or the discontinuation of an operating unit for a reasonable period is excused from providing 60

days' notice if the company also reasonably believes that such notice would preclude its ability to obtain necessary capital or business. 20 C.F.R. § 639.9(a). Employers who are excused from providing the full 60 days' advance notice, must still provide as much notice as possible.

Some states, California and New York being notable examples, will recognize an new exception for job losses due to COVID-19 that parallel the federal law.

13. What is your stance of WARN notices being sent to union members in a temp closed situation?

The WARN Act requires that notices be given to the employees' designated representatives. Whether additional communications should be sent to the employees directly should be decided based upon the general nature of the employee relations covering the bargaining unit.

14. Can you eliminate a job that is not needed anymore if the manager is on injury leave?

Yes, but if the job is later re-established, an employee on an approved FMLA Leave may have a claim that the alleged job elimination was a subterfuge for the purpose of retaliating against the employee.

15. In a Safe Harbor plan, can a furloughed employee who is over 65 cash out his funds or does he have to be terminated?

The fact that the individual is over 65 is relevant for vesting purposes if and when there is a termination of employment. Terminated employees can almost always tap their vested 401(k) plan accounts, the situation is not as clear for furloughed employees, and plan amendments may be needed. Whether a furloughed employee is terminated depends on all the facts and circumstances, especially if the employee is continuing to perform some services while receiving severance or as an independent contractor. We are awaiting clarification from the government on this issue, but are for the moment taking a conservative approach to this issue. There are additional options that may be available to employees, but you will need to check to see if the particular plan allows these options.

- The CARES Act provides two optional provisions. First, a plan could be amended to allow for special withdrawals related to COVID-19, of up to $100,000, without the standard 10% early distribution penalty. This withdrawal is repayable to the plan within 3-years, and with taxation spread over 3 years. Second, a plan could be amended to offer enhanced loans to those affected by COVID-19 up to the lesser of $100,000 or the full vested balance, for an extended term.
- Plans may permit any participant over age 59-1/2 to withdraw from their own salary deferral account, and sometimes from other vested accounts, even if still employed. Availability hinges on whether the plan document permits such distributions.
- Plans may also allow "hardship withdrawals" for participants while employed, but such withdrawals are permissible only if the plan document provides for them. Hardship withdrawals are only allowed for certain defined expenses, some of which could be triggered by a furlough, such as incurring uninsured medical expenses or needing to prevent foreclosure or eviction. Another hardship category that recently became available applies to losses or expenses resulting from a FEMA-declared "major disaster."
- Aside from loans allowed under the CARES Act, plans can also make it easier for participants to take ordinary loans from their account balances such as by relaxing rules on the number of loans that can be taken in a year or be outstanding at any time.

16. For a business that is still open and operating - can they decide to stop matching retirement funds?

Yes. Matching contributions can be stopped even if the business is open and operating, but depending on the plan language an amendment may be required. **Employers can generally amend their plans to reduce or eliminate employer or matching contributions in the middle of the plan year on a prospective basis.** If the plan is a safe harbor plan, contributions may still be suspended if certain requirements are met (special notice is distributed to employees at least 30 day prior to the cessation being effective, plan may need to be amended to provide for current year nondiscrimination testing and elimination of the safe harbor).

17. Is there a "best practice" for returning laid off staff back to work? We've laid off over 125 staff members… When business volumes return, what is the best way to select staff members for return? We currently do not have a written policy. Would it be prudent to create a policy prior to being faced with this question?

Unless there is a union contract which specifies the method in which recalls will be handled, the employer should develop its own policy on what consideration will be given to various factors, including, but not necessarily limited to length of service, experience, skills, education, licensing, and prior job performance reviews. The criteria should be established without regard to particular individuals, but may differ from one job group to another. Care should be taken so that the specific criteria are job related and not likely to have discriminatory results. The "best practice" will be to follow the preselected criteria in making recalls since any deviation will create a greater exposure for claims of discrimination.

18. If we allowed uniforms to be taken home and not pay changing time, and now we are required to have all uniforms supplied and laundered at workplace, do we need to pay changing time?

This depends on what kind of uniform it is. The safest course would be to compensate for changing into a uniform but if the uniform is simply gloves or a mask, that may not be compensable. You also need to check state law for rules on cost of laundering. We advise you to speak with counsel on compensability as this is very fact and state law specific.

19. If I have an employee who doesn't let us know they were feeling sick, went to and got awarded a test. She came back to work for four days, including hosting an all employee meeting. That night, they called to let us know that she had a test and it came back positive. While she was home and just starting her own quarantine, we were forced to close the hotel and quarantine the entire team at the hotel. Do I have just cause to terminate?

This question raises sensitive personnel issues that you need to discuss with counsel based on federal and state laws as well as the terms of any applicable collective bargaining agreement.

20. Any further commentary on the union abrogation piece of the CARES Act? Should Owners/Employers be concerned? Is it true that any hotel processing a PPP loan has to remain neutral as to card check, would like to clarify. I thought that the union neutrality provision in CARES only applied to mid-sized businesses. Does this apply to SBA PPP loans for small businesses as well? Did you say that any hotel that takes a loan under the Cares Act and/or PPP that they are automatically held as part of a neutrality agreement during the life of that loan?

The neutrality obligation applies to mid-size companies (500 to 10,000 employees) that receive direct loans under the Emergency Relief and Taxpayer Protections portion of the CARES Act. Such an employer must make a "good-faith certification" that it will remain "neutral" during a union organizing campaign during the term of the loan. Such an employer must also certify that it will not "abrogate" a collective bargaining agreement during the term of the loan and for two years thereafter.

It is unclear how the term "neutral" will be applied. Under some "neutrality agreements" between employers and unions, an employer's ability to share information about the costs and risks of unionization is sharply curtailed. In other such agreements, the employer is free to share factual information regarding unionization, provided that it does not take a position as to whether employees should join or form a union, or seek to denigrate the union or its officers.

The term "abrogate" is also unclear. Under current law, an employer is already obligated to observe the terms of a collective bargaining agreement until the agreement expires and the parties serve proper notice of intent to re-negotiate. Employers generally abrogate collective bargaining agreements only when permitted to do so by a bankruptcy court.

21. If properties start rolling out slowly, how is that affected with union rules to bring partial staff back onboard?

Many union contracts require the employer to recall laid off employees in seniority order, with the most senior employees being recalled first. But, many of these agreements also say that the employer must recall "qualified" employees in seniority order, or may allow the employer to recall employees only in classifications when, and if, they are needed. So, the collective bargaining agreement may give the employer flexibility as to who to bring back, and when. The employer needs to review the terms of the CBA and think about how it may be applied to it.

22. Are there any violations in [changing] employee roles, having departments like Maintenance and Engineering do cleaning chores and housekeeping activities in the hotel since the hotel laid off all but one housekeeper?

The general rule is that the employer is allowed to assign job duties, unless there is a contract such as a collective bargaining agreement with a union, that limits employees to performing certain defined roles. So, for example, a union contract may limit an employee's seniority and job classification to "building engineer" or "front desk" or "housekeeping." If an employee is recalled to duty in one of those roles, then the employee's role would normally be limited to performing tasks within that classification. However, many union contracts give the employer flexibility as to what tasks to assign employees, and some contracts don't contain any restrictions at all. Especially in a time when employees are being gradually recalled following a pandemic, the employers may have flexibility to assign work. Again, the employer needs to review the terms of the CBA and how it may have been applied in the past.

23. What best practice with signage/communication to mitigate the spread as a business – like for check-in lines (six feet line sticker), elevators, websites, and entry doors.

Best practice is to place signs regarding good hygiene and social distancing (in multiple languages) at any common space frequently used and those areas you identified are good places.

24. In Maryland, we are now required to wear face masks to go to stores to shop or work. Are these restrictions happening country wide? Are hotels enacting this as well?

OSHA is aware more jurisdictions are requiring face masks and has stated it is considering additional guidance on the overlap between local laws and OSHA.

25. Cleaning protocols will be different going forward. Do you foresee higher standards for higher end brands?

So far the recommended cleaning practice is only to use EPA approved cleaning supplies regardless of brand.

26. So what type of masks are appropriate to have as PPE for associates? How can we ensure we have enough at our property?

Please see CDC guidance on use of cloth face masks: https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/diy-cloth-face-coverings.html

27. Do you recommend having plastic shields put up?

Employers need to do a worker exposure risk assessment to determine appropriate PPE. Generally, however, for moderate risk workers plastic shields may be appropriate.

28. Are you aware of the executive orders in Maryland that are requiring masks for workers and shoppers in retail stores? The thought process is this will expand to any open business. What advice would you give hoteliers in those states where this is becoming a reality especially with the PPE shortages?

OSHA is aware many local jurisdictions are passing these measures and we expect some guidance soon about the overlap of these laws and OSHA. However, currently, it would be prudent to permit employees to wear face masks if they wanted to subject to fact specific considerations.

29. How would we be able to require travel information from our guests? As in where they are coming from where have they traveled from?

One possibility is to ask them if they have recently returned from any “hot spot” areas as defined by the CDC before they check in. This is also highly dependent on state and local law issues. We advise you speak with an attorney about these issues as they relate to guests.

30. Hotels have been providing "buffet" breakfasts for years...any thoughts on where that amenity winds up in the long term?

Subject to future information by the CDC, hotels may want to consider moving to a grab and go format in both the short term and for the indefinite future.

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31. APPENDIX: REQUEST FOR LEAVE UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

Employee Name:_____

I am requesting leave because I am unable to work or telework beginning on _____ and continuing through _____ because:

Select one

- □ **I am quarantined pursuant to a government order or on the advice of a health care provider (documentation from healthcare provider required)**
    - Identify the government entity or health care provider that is recommending quarantine _____
    - Date quarantine was recommended _____
- □ **I am experiencing COVID-19 symptoms and am seeking a medical diagnosis (documentation from healthcare provider required)**
- □ **I need to care for an individual subject to a quarantine pursuant to a government order or on the advice of a health care provider (documentation from healthcare provider required)**
    - Name of individual needing care and relationship to me _____
    - Identify the government entity or health care provider that is recommending quarantine for this individual _____
    - Date quarantine was recommended _____
- □ **I am experiencing a substantially similar condition specified by the Secretary of Health and Human Services**
- □ **I need to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19**
    - Name and age of child or children needing care _____
    - Name of school or place of care_____
    - I certify that no other person will be caring for the child or children during this time? □ Yes □ No
    - If my child is over the age of 14, there following special circumstances make it necessary for me to care for the child during daylight hours _____ _____

By signing below, I am certifying that the above information is correct and that I am unable to work or telework during this leave period. I understand that the Company will contact me regarding approval of my leave request and any additional information needed. I understand that I am expected to provide any necessary documentation within **15 days** of this Notice. Should an extension be required, I will let the company know as soon as possible.

_____ _____
Employee Signature Date