SHAWE ROSENTHAL LLP

E-UPDATE

January 31, 2020

RECENT DEVELOPMENTS

A New Year Means New Opinion Letters from the U.S. Department of Labor – Bonuses and Per-Project Payments

On January 7, 2020, just days into the new year, the U.S. Department of Labor issued two new opinion letters that address compliance issues related to the Fair Labor Standards Act ("FLSA"). These letters are official, written opinions by the Department's Wage and Hour Division that respond to fact-specific scenarios posed by employers and employees alike, and represent the DOL's official position on that particular issue. Other employers may then look to these opinion letters as general guidance.

The first of these opinion letters, FLSA2020-1, addresses the method for calculating overtime pay for a nondiscretionary lump sum bonus under the FLSA.

> Scenario: Employer informs its non-exempt employees in advance that they are eligible to receive a nondiscretionary, lump sum bonus of $3,000 if they successfully complete ten weeks of training and agree to continue training for an additional eight weeks. Employees are not required to complete the additional 8 weeks of training, however, in order to retain the lump sum bonus. An employee works 40 hours per week during eight weeks of the ten-week training period. In week five, however, the employee works 47 hours, and in week nine, the employee works 48 hours. The question posed was whether, pursuant to 29 C.F.R. §778.209(b), the employer was required to allocate the lump sum bonus equally to each *week* or to each *hour* of the period to which the bonus related.
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> DOL Opinion: As an initial matter, the DOL noted that the lump sum bonus at issue must be included in the employee's regular rate of pay because it is an inducement for the employee to complete the ten-week training period. 29 C.F.R. § 778.211(c). In addition, because the employer pays the lump sum bonus for completing the ten-week training, without requiring the employee to complete the additional training, the lump sum bonus must be allocated to the initial ten-week training period.
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> Under the circumstances presented, the DOL determined it was appropriate for the employer to allocate the lump sum bonus of $3,000 equally to each week of the ten-week training period. In so concluding, the DOL reasoned that each of the ten weeks counted equally in fulfilling the criteria for receiving the lump sum bonus, as missing any week of the ten-week training period (regardless of whether the employee worked overtime) would have disqualified the employee from receiving the bonus. Once the bonus has been allocated, the

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employer must then calculate the additional overtime pay due in those workweeks of the ten-week training period that the employee worked more than 40 hours.

Next, the DOL issued FLSA2020-2, which addresses whether proposed per-project payments to educational consultants constitute payments on a fee or salary basis under Section 13(a)(1) of the FLSA and applicable regulations, as required in order to trigger the exemption from overtime.

> Scenario: A Company employs educational consultants to provide services to schools and school districts throughout the country. The consultants are assigned to projects lasting various periods of time. The Company determines the consultants' compensation on a per-project basis regardless of the amount of time required to complete the project. The Company makes payments for the project in "equal pre-determined installments" bi-weekly or monthly. The total compensation paid to an educational consultant in any particular week or pay period might change several times throughout the year depending on the number of projects to which the consultant is assigned. Additionally, the Company and its customer (i.e., the school or district) may reevaluate and revise the scope of a particular project after it has commenced. On unusual occasions, changes to the scope of a project might be significant enough to cause the Company and customer to renegotiate their agreement. As a result, the total compensation paid to the educational consultant for that project may be changed prospectively, impacting the amount of bi-weekly payments.
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> DOL Opinion: The Company's method of paying the educational consultants on a per-project basis satisfies the salary basis requirement under the FLSA, provided the payments are not subject to reduction because of variations in the quality or quantity of work performed. Moreover, if the consultant is assigned to multiple projects at one time, payment for any project in addition to the original project satisfies the requirements for permissible "extra" compensation under the FLSA regulations and does not violate the salary basis requirement. Any prospective changes to a consultant's bi-weekly payment, due to changes to the scope of the assigned project, would not necessarily defeat the salary basis exemption so long as the revised bi-weekly payment meets the minimum threshold.
>
> However, a consultant's exempt status may be undermined if the Company and customer engage in such frequent revisions to the project that the amount of the consultant's bi-weekly compensation is rarely the same from pay period to pay period and circumstances suggest that the amount of payment is based on the quantity or quality of work performed.

Maryland Court of Special Appeals Issues Decision Involving Joint Employer Standard

The issue of joint employer status is a particularly hot topic at this time and, in an opinion of particular interest to Maryland employers, the Maryland Court of Special Appeals has weighed in on this issue in *Uninsured Employers' Fund v. Tyson Farms, Inc.*, in a manner that generally favors a joint employer finding.

Case Background. The employee raised chickens on a farm owned by his employer ("Farm Owner"). The chickens were owned by Tyson Farms ("Tyson") and were raised by the Farm Owner according to Tyson's guidelines and best practices. The Farm Owner purchased the chicken farm as

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an investment and did not know how to operate it. Because the Farm Owner was considered an "absentee owner," Tyson's contract with the Farm Owner required the employee to be present 24 hours a day, 7 days a week, to ensure proper operation of the farm.

The employee suffered injuries at work and filed a workers' compensation claim against the Farm Owner, who did not have workers' compensation insurance. As a result, the employee and the Uninsured Employers' Fund ("UEF") added Tyson to the claim. The Workers' Compensation Commission held that the Farm Owner and Tyson were joint or co-employers of the employee at the time of his injuries.

The Court's Decision. Under Maryland law, a court reviews five factors to determine whether an employer-employee relationship exists: (1) the power to select and hire the employee, (2) the payment of wages, (3) the power to discharge, (4) the power to control the employee's conduct, and (5) whether the work is part of the regular business of the employer. The Court further stated that the factor of control is the most important and is the only factor that is decisive.

A two-judge majority of the Court panel found that Tyson was intimately involved in nearly every aspect of the work that the employee did at the farm. Tyson directed the employee's tasks at the farm, and it had the power to instruct the employee to alter his performance in doing those tasks to follow Tyson's requirements. The majority also noted that while Tyson did not have the express authority to discharge the employee, it had the power to terminate its contract with the Farm Owner if the employee was not in compliance with Tyson's requirements. Thus, the majority concluded that Tyson was a co-employer of the employee based on the level of control that Tyson had over how and when the employee completed his work.

The dissenting judge, however, would not have found joint employment to exist. He stated that "control of the workplace" is not the same as "control of the worker." He noted that Tyson did not select or hire the employee, did not set wages or work hours, could not fire him, and communicated with the Farm Owner about changes in chicken raising practices. In addition, the Farm Owner had authorized the employee to act on his behalf in running the farm, and the employee's interactions with Tyson were in that capacity. Additionally, the Farm Owner was responsible for taking care of his employees and servicing the contract. Finally, he had the ability to terminate the contract, and thereby had ultimate control over whether the employee would continue to have a job.

It is likely that the case will be appealed, which means that Maryland's highest state court will weigh in on how the evidence should be applied in the joint employer determination. In addition, it is important to note that while Maryland state courts follow the above test, there are different tests that exist for determining joint employer status in other contexts. As we discussed in our January 13, 2020 E-Lert, the Department of Labor issued its Final Rule making it less likely that companies will be deemed joint employers of a single employee under the Fair Labor Standards Act, while Maryland federal courts apply a different, stricter standard. The NLRB and the EEOC plan to issue their own Final Rules on joint employer status as well. What this means is that employers may be subject to multiple standards for determining employee status, and should consult with counsel when faced with making such determinations.

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NLRB Offers Guidance on When Arbitration Agreements Interfere with Access to the Agency

This month, the National Labor Relations Board ("NLRB" or the "Board") issued two decisions addressing whether arbitration agreements unlawfully restricted employees' ability to file charges with the agency or access the agency's processes. The Board reached different outcomes in the cases, providing further clarity as to provisions that unreasonably bar or restrict employee access to the Board.

In *Countrywide Financial Corp.*, the arbitration agreement stated that arbitration was "the exclusive remedy for covered claims" arising out of the employee's employment. The Board reasoned that employees would reasonably interpret this language to restrict the filing of charges with the agency. Additionally, the Board concluded that the agreement's "savings clause," which provided that "[n]othing in this Agreement shall be construed to require arbitration of any claim if an agreement to arbitrate such a claim is prohibited by law" was too vague to salvage the agreement. The Board explained that a reasonable employee is not required to know what is "prohibited by law," stating wryly that "rank-and-file employees do not generally carry law books." Thus, the Board concluded that the arbitration agreement violated Section 8(a)(1) of the NLRA by restricting access to Board processes.

The Board reached a different result in *Bloomingdale's, Inc.* There, the arbitration agreement mandated arbitration for all employment-related legal disputes or "claims arising out of, or relating to, employment…whether under federal, state, or local" law. Three paragraphs later, however, the agreement stated that claims by employees "under the National Labor Relations Act are . . . not subject to Arbitration." The Board concluded that this "savings clause" contained an unconditional and explicit exclusion for NLRA claims, and, thus, employees would not reasonably interpret the agreement to bar or restrict their access to the Board.

The takeaway from these cases is simple: make sure that your arbitration agreement expressly permits the filing of charges with the Board. Vague language that requires workers to ascertain whether they are permitted to file charges with the Board are likely to be found unlawful. Employers should save themselves the frustration (and cost) by simply stating that its arbitration agreement does not foreclose filing charges with the Board.

TAKE NOTE

DOL's Annual Penalty Increase. The Department of Labor has announced its annual penalty increases. Due to the passage of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, federal agencies must issue regulations annually to adjust for inflation the maximum civil penalties that they can impose.

The DOL's announced increases, effective January 15, 2020 include the following:

- **Fair Labor Standards Act.** For repeated or willful violations of the FLSA's minimum wage or overtime requirements, the maximum monetary penalty will increase from $2,014 to $2,050. Penalties for violation of the FLSA's child labor restrictions will increase from a maximum of $12,845 per under-18 worker to $13,072, while violations resulting in the child's death will increase from a maximum of $58,383 to $59,413, which may be doubled for repeated or willful violations.

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- **Employee Polygraph Protection Act.** The penalty for violations of EPPA increases from $21,039 to $21,410.
- **Family and Medical Leave Act.** The penalty for failing to comply with the posting requirement increases from $173 to $176.
- **Occupational Safety and Health Act.** The maximum penalty for posting, other-than-serious, serious, and daily failure-to-abate violations increases from $13,260 to $13,494. The minimum penalty for willful violations increases from $9,472 to $9,639. The maximum penalty for willful and repeat violations increases from $132,598 to $134,937.

Government Contractor Update – Ban the Box, Proposed Rule on Discrimination Resolution Procedures. There were several recent developments of interest to government contractors, as follows.

- **Ban the Box.** As part of the National Defense Authorization Act (NDAA), the Fair Chance to Compete for Jobs Act of 2019 prohibits federal contractors from requesting the criminal history of an applicant for work under a federal contract until after a conditional offer of employment has been made. (The "box" refers to the box on many employment applications, which must be checked if the applicant has a criminal record). There are exceptions where a criminal background check prior to the offer is required by law, where the position is related to law enforcement or national security duties, or where the position has access to classified information. The General Services Administration and Department of Defense must issue implementing regulations within 16 months of enactment, which occurred in December 2019.
- **Proposed Rule on Procedures to Resolve Discrimination.** The Office of Federal Contract Compliance Programs has issued a proposed rule to setting forth procedures for resolving employment discrimination. Among other things, the proposed rule would:
    - Codify procedures for two formal notices that the OFCCP uses when it finds potential violations: the Predetermination Notice (PDN) and the Notice of Violation (NOV)
    - Clarify that contractors have the option of entering directly into a conciliation agreement prior to issuance of a PDN or NOV, thereby expediting the conclusion of a compliance evaluation
    - Clarify the strength of evidence required for the issuance of a PDN or NOV, by setting forth definitions of "statistical evidence" and "nonstatistical evidence."

  The brief public comment period closed on January 29, 2020. Once the OFCCP has reviewed the comments, a final rule will be issued.

Interview Process May Not Have Been "Well-Considered" But Was Not Discriminatory. The U.S. Court of Appeals for the Seventh Circuit confirmed that variations in the interviewing process do not necessarily indicate discrimination.

In *Barnes v. Board of Trustees of the University of Illinois*, the African-American employee claimed race discrimination when a Caucasian candidate was selected for a promotion based on his interview. The employee claimed the interview process was unfair because the hiring manager conducted the interviews by himself, did not ask the same questions of all candidates, and did not document why he selected the successful candidate. Nonetheless, the Seventh Circuit stated, "just

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because interviews are not cookie-cutter does not mean they are discriminatory." It further noted that, although the process may not have been "accurate, wise, or well-considered," the employee could not show that the explanation of the selection based on the interview was a lie, which was required to sustain his discrimination claim.

Although this case emphasizes that employers have discretion in making employment decisions, and the court will not second-guess an employer's legitimate business decisions even if it may not agree with them, it still offers a cautionary note that having more regulated processes and better documentation could help avoid discrimination claims.

Staffing Company Can Assert Section 1981 Race Discrimination Claim Against Host Company. Many companies utilize staffing companies to provide temporary labor. In addition to concerns about whether they can be deemed a joint employer under Title VII for purposes of a race discrimination claim by a staffing company employee, host companies should be aware that they could also be sued by the staffing company for race discrimination under Section 1981.

In *White Glove Staffing, Inc. v. Methodist Hospitals of Dallas*, the hospital allegedly rejected an African-American worker because it wanted only Hispanic workers, and then canceled its agreement for staffing services. The staffing company then sued under Section 1981, which, among other things, prohibits race discrimination in the making of contracts. The trial court dismissed the case, on the basis that a corporation does not have a racial identity.

On appeal, however, the U.S. Court of Appeals for the Fifth Circuit joined several sister Circuits in holding that a corporation has standing to bring a Section 1981 claim as long as it suffers injury from the other party's discriminatory actions. Thus, this case warns host companies that not only could they be subject to individual race discrimination claims under Title VII, but also to Section 1981 claims from the staffing agency if the company engages in discriminatory conduct against staffing agency employees that ultimately harms the staffing agency.

Impact on Outside Job Does Not Make an Accommodation Unreasonable. The U.S. Court of Appeals for the Fifth Circuit found that the employer offered a reasonable accommodation for an employee's religious need, even though he argued the transfer offer was not reasonable.

In *Horvath v. City of Leander*, a firefighter sought an exemption from the required TDAP vaccine on religious grounds. The city offered him two accommodations – either to transfer to a code enforcer position with the same pay and benefits, or to remain in his current position and wear a respirator mask during his shifts, keep a log of his temperature, and submit to additional medical testing. He proposed that he remain in his current position and just wear the mask when in contact with individuals with coughs or communicable illnesses. The city rejected his proposal, and when he refused to accept either of the city's proposed accommodations, he was fired.

The firefighter sued, arguing that the city had failed to provide a reasonable accommodation. Specifically as to the code enforcer position, he argued that the hours were less favorable and would prevent him from working his secondary employment – running a construction company – which would reduce his income by half. The Fifth Circuit, however, noted that the employer was not required to provide the accommodation preferred by the employee. Moreover, it also stated that a transfer that "may indirectly result in the loss of outside income" does not make the accommodation

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unreasonable. In fact, as the Fifth Circuit observed, even a transfer to a position involving a cut in pay can be reasonable, depending on the circumstances.

This case is a nice reminder to employers that they should consider transfers to another position as a reasonable accommodation, but that the transfer does not necessarily have to preserve the employee's level of compensation, whether internal or external, depending on the circumstances.

Major Changes to NJ Laws – Severance Pay Mandate and Worker Misclassification. New Jersey employers are facing expansive and onerous new laws.

- **Expansion of NJ WARN Act.** This law imposes certain requirements on employers during a reduction-in-force. The revised law radically expands the existing requirements as follows:
  - The Act is triggered by the termination of 50 employees within the state, regardless of location and of employees' tenure or hours of work. Previously, only terminations at a single location were counted, part-time employees (working less than 20 hours a week or having less than six months of service) were not counted, and 33% of the workforce had to be affected.
  - The notice period is increased from 60 to 90 days.
  - One week of severance pay for each year of service is required, in addition to providing the 90-day notice period. If the full notice is not given, an additional four weeks of severance pay must be given. (Note that this severance pay cannot be used to support a release of claims – additional pay would be required.)
  - Employers with 100 employees are covered, including part-time employees. Previously, the employees had to be full-time in order to be counted.
  - State or court approval is required in order to waive the right to severance.
- **Protections Against Worker Misclassification.** The Governor signed a legislative package addressing the issue of misclassifying employees as independent contractors. These laws do the following:
  - Require employers to post a workplace notice form to be issued by the Labor Commissioner.
  - Allow the Department of Labor and Workforce Development (LWD) to issue stop-work orders to employers who have failed to comply with state wage laws, including misclassification.
  - Allow the LWD to impose monetary penalties for misclassification: an administrative misclassification penalty up to $250 per employee for a first offense and $1000 for subsequent ones, and another penalty paid to the misclassified worker of up to 5% of the worker's gross earnings over the prior 12 months.
  - Imposes joint liability on labor contractors and individual liability on agents of such entities for misclassification.
  - Requires posting of violators of state wage, tax, or benefits laws on a state website.
  - Allows the Department of Treasury to share otherwise confidential tax information with LWD in order to assist with investigations into violations of state wage, tax, or benefits laws.

Reminder to DC Employers to Provide Paid Family Leave Notice. As the District of Columbia prepares for the start of paid family leave benefits in July 2020, employers must notify employees by February 1, 2020 of their rights to such benefits.

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As we discussed in our December 2016 E-Update, the Act, which covers only private sector workers, guarantees eight weeks of paid time for new parents, six weeks of paid time to care for a family member who is experiencing a serious health condition, and two weeks of paid personal sick time. Employers with employees in D.C. and paying unemployment insurance for those employees are subject to the Act.

The D.C. Department of Employment Services has an Office of Paid Family Leave (OPFL), which has launched a website to assist employers with compliance. The official notice of the Act, which must be posted in all work locations by February 1, 2020, is available there. The notice must be sent to remote employees for posting in their own location. In addition, the notice must be provided: (1) upon hiring; (2) annually thereafter; and (3) when potentially covered leave is requested.

NEWS AND EVENTS

Webinar - The Employment Law Alliance, of which Shawe Rosenthal is the Maryland member, is presenting a free 60-minute webinar, **"Employment Law in the United States: A Year in Review,"** on February 5, 2020 at 1:00 EST. Experts from across the United States will provide an overview of current trends and what you can expect in the coming year on important topics such as immigration, paid sick leave, medical marijuana, equal pay, and more. To register, please click here.

Honor - Fiona W. Ong has once again been recognized by Lexology as its "Legal Influencer" for employment in the U.S. for Q4 of 2019. Lexology publishes in excess of 450 legal articles daily from more than 1,100 leading law firms and service providers worldwide. Lexology instituted its quarterly "Lexology Content Marketing Awards" to recognize one individual within each practice area in each region of the world for consistently providing useful, insightful legal analysis. Fiona previously received this distinction for Q2 and Q3 2019, as well as Q4 2018.

Victory – Chad M. Horton won an arbitration for an alcoholic beverage company. The arbitrator agreed that there was just cause for discharging the employee, in that the Company established that the grievant had falsified Company records that would later be used in government audits.

Media - Chad M. Horton's blog post, The NLRB Provides Two More Gifts – Employers May Restrict Nonbusiness Use of E-Mail, Require Confidentiality During Investigations, was featured on HRSimple.com on January 2, 2020.

Media - Fiona W. Ong was quoted in a January 20, 2020 article on businessinsurance.com by Judy Greenwald, Labor Department's joint employer rule may stem lawsuits.

Media - Fiona W. Ong was quoted in a January 22, 2020 article on mhlnews.com (Material Handling & Logistics) by David Sparkman, Maintaining Legal Pay During Winter Closings.

TOP TIP: Coronavirus in the Workplace: A Practical Guide for Employers

There has been much media attention to the coronavirus outbreak in China and its spread to other countries. At this point, there are only a few confirmed cases in the U.S., but that can be expected to rise. People are beginning to worry about exposure to the virus, including in the workplace. The question of interest to employers is what can they do with regard to protecting the workplace from coronavirus.

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There is no one size fits all answer. The right choice will depend on the type of workplace, the job the employee performs, and the employer's tolerance for legal risks (to name a few of the considerations an employer would take into account).

What is Coronavirus and How Does it Spread? The current outbreak is 2019 Novel Coronavirus (2019-nCoV), which is a new respiratory disease in the coronavirus family, with the source currently unknown. Past coronavirus outbreaks include SARS, which came from civet cats, and MERS, which originated from camels.

Although not confirmed, it is thought that 2019-nCoV can spread person-to-person, likely through exposure to respiratory droplets from coughing and sneezing. SARS and MERS generally occurred between close contacts.

The symptoms of 2019-nCoV can include fever, cough, and shortness of breath. It is thought that the incubation period ranges from 2-14 days after exposure.

Current State in the U.S. In the U.S., the Center for Disease Control is simply monitoring the situation, asserting that the immediate health risk is "low at this time." Nonetheless, the CDC predicts, "Given what has occurred previously with MERS and SARS, it's likely that person-to-person spread will occur, including in the United States." The CDC has issued a Level 3 Travel Health Warning, recommending that U.S. citizens avoid all non-essential travel to China, and a Level 4 warning to avoid Hubei province, the center of the outbreak. The CDC will continue to post information on its 2019-nCoV webpage.

Employer Actions. If 2019-nCoV becomes widespread in the U.S., employers will need to develop plans to protect the workplace. Under the Occupational Safety and Health Act's General Duty clause, employers are required to provide a safe and healthy working environment.

The following suggestions are based on the CDC's prior guidance for SARS and MERS, along with other prior guidance from the Department of Homeland Security:

Employee Education. Just as with past outbreaks, there will likely be some misunderstanding of how 2019-nCoV is transmitted, and where the outbreaks are occurring. Employees should be educated as to the facts, which should calm some of the fears in the workplace.

Prevent Infection in the Workplace. Employees should be trained or reminded to take preventive steps in the workplace to avoid spreading 2019-nCoV as well as other infections, like the flu or a cold. These steps include:

- Washing hands frequently with soap and water for at least 20 seconds at a time.
- Using an alcohol-based hand sanitizer in areas without soap and water.
- Covering the mouth and nose with a tissue or sleeve (not hands) when coughing or sneezing.
- Seek medical treatment immediately if symptoms appear following travel or other exposure to 2019-nCoV. The CDC suggests calling ahead to the medical center or doctor's office before arriving, to allow them to prepare to minimize contact with other patients.

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Business Travel. Certainly, employers should continue to monitor the CDC's travel advisories. In addition, employers may wish to avoid requiring business travel to outbreak areas.

Conversely, if travel to outbreak areas is required but an employee expresses concern about such travel, the employer should consider requests to avoid such travel thoughtfully and agree to reasonable requests. In particular, older employees, those employees with compromised immune systems, and pregnant employees should be accommodated.

A request to avoid all travel, including to non-outbreak areas, would likely not be considered reasonable, however.

Incubation Period Leave. A blanket policy of requiring all employees traveling to the areas of outbreak to remain out of work for the incubation period following their return to the U.S., either with or without pay, and to obtain a medical examination releasing them to return to work at the end of the period would likely be deemed unnecessary, at least with regard to those who were not exposed to 2019-nCoV.

On the other hand, it may be appropriate for workplaces such as hospitals and nursing homes, where the nature of the work and risk of harm to the populations served requires a more stringent standard. Employers that choose this rule should be able to justify the business necessity of adopting it. In addition, placing the employee on paid leave will minimize the risk of liability that might be found under federal anti-discrimination laws.

Combined Leave and Return to Work. A more nuanced approach is to require employees who have been exposed to 2019-nCoV to remain out of work for the incubation period, either with or without pay, but to permit employees not known to have been exposed to the virus in their travels to an area of outbreak, to return to work, subject to self-monitoring. Obviously this contemplates that the employee would know whether he/she was exposed and would provide an honest and educated answer. Depending upon the circumstances, employers may further choose to require such employees to report on self-monitoring, or check the temperatures of the employees during the incubation period.

Another approach, in keeping with past CDC guidelines, is to require employees who have been exposed to 2019-nCoV to be assessed by their doctor, in consultation with public health authorities, in order to determine their risk level and what actions are appropriate. Whether the employee would be permitted to return to work, with self-monitoring, would depend on the doctor's assessment. Employees not exposed to 2019-nCoV would be permitted to return to work with self-monitoring, as set forth in the previous option.

Telecommuting. If an employee is required to remain home for the incubation period, telecommuting may or may not be an option, depending on the type of work performed by the employee. If the employee has not previously telecommuted, there may be logistical issues, such as equipment, confidentiality, access to documents and materials, tracking of time worked, etc. Employers should also keep in mind whether this may set a precedent for other situations.

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Family Members. In addition, employers can require employee to report on whether household members have traveled to such areas, and whether they exhibit any signs of infection. If there are such indications, then the employee can be required to self-monitor or to remain out of work for the incubation period.

Confidentiality. Any information received from employees with regard to 2019-nCoV exposure, symptoms, and medical examinations should be treated as a confidential medical record (meaning that it is kept in a secure file separate from the employee's personnel file). It is not appropriate for the employer to discuss the individual employee's exposure, symptoms or results of medical examinations with the co-workers, or even managers who do not have a business need to know. Employers may and should communicate that they have implemented 2019-nCoV policies and that the policies are being followed with regard to all employees to ensure a safe workplace.

Review and Remind Employees About Sick Leave Policies. Given the increasing proliferation of sick leave laws at the state and local level, employers should ensure that their sick leave policies are compliant with any applicable law. In addition, employees should be kept informed of such policies and any employee assistance policies. In addition, employers may wish to identify a company representative to assist employees who become ill. And employers may require employees who have contracted 2019-nCoV (and other infectious illnesses) to be cleared by a doctor before returning to work.

Consult with Your Attorney. In developing a written policy or protocol, we suggest that you consult with counsel to ensure that, before the proposed policy/protocol is implemented, legal risks have been identified and assessed, and that the policy/protocol is appropriate for your specific workplace. In addition, what the policy/protocol actually contains may need to be modified as the 2019-nCoV situation further develops.

RECENT BLOG POSTS

Please take a moment to enjoy our recent blog posts at laboremploymentreport.com:

- Pronouns and Coworkers and Misgendering (Oh My!) by Elizabeth Torphy-Donzella, January 29, 2020
- A Marriage of Convenience? EEOC Continues to Push Non-Competitive Transfer as Reasonable Accommodation by Fiona W. Ong, January 22, 2020 (Selected as a "noteworthy" blog post by the *Employment Law Daily*)
- DOL Issues Final Joint Employer Rule, Making Such Findings Less Likely by Fiona W. Ong, January 13, 2020
- #MeToo (Et Tu, SEIU?) by Elizabeth Torphy-Donzella, January 9, 2020
- Changes to Wage and Hour Law Took Effect January 1, 2020 by Teresa D. Teare and Alexander Castelli, January 3, 2020

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