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EMPLOYMENT IN THE TIME OF COVID-19

By: Nancy M. Younan

Navigating COVID-19 as an employer presents many new challenges such as balancing the health of employees and business along with satisfying the needs of customers and keeping track of the constantly changing guidance from the authorities. The federal government has rolled out many initiatives in response to the COVID-19 pandemic including the Family First Coronavirus Response Act which requires employers to provide employees with paid leave for reasons related to COVID-19. Employees are also facing challenges, including the suddenness of the pandemic, coping with changing work situations, and concerns regarding the health and safety of themselves and their families. There is disruption to people's lives and workplaces with no clear timeline for the return to normalcy. Meanwhile, laws that protect employees such as the ADA, FMLA, and other human rights protections are being applied in new ways. The CDC and EEOC have put out guidelines that, at times, fly in the face of an employer's traditional understanding of what can and cannot be regulated or asked about by an employer. The new landscape provides many uncertainties and we are here to help guide you through them. This article provides answers to some questions employers may have as employees are making their way back to the workplace as Minnesota and Wisconsin have been reopening various portions of the economy.

My employees are coming to the workplace, what can I ask them about their health?

The Americans with Disability Act (ADA) prohibits medical examinations unless they are job-related and consistent with business necessity such that it would affect an employee's ability to perform her essential job functions or if the employee will pose a direct threat due to a medical condition. COVID-19 has been classified as a direct threat thereby satisfying this condition. As such, employers can take heightened measures to ensure safety of the workplace but must adhere to the confidentiality requirements of the ADA.

Employers can:

- Take the temperature of employees
- Ask employees if they have symptoms of COVID-19
- Ask employees if they have been in contact with anyone that has been diagnosed with COVID-19
- Send employees home if they present symptoms of COVID-19
- Require a doctor's note verifying the absence of COVID-19 before returning to work
- Inquire about an employee's possible exposure when the employee has returned from travel
- Require employees to work from home
- Require the employee to wear personal protective equipment at the workplace
- Require employees to use infection control practices
- Ask an employee why he or she was absent from work if the employer suspects it may be because of a medical reason
- Notify public health authorities if the employer learns an employee has COVID-19

Notably, an employer *cannot* inquire about an employee's chronic health conditions or medical history, even if an employee may have a condition that weakens their immune system and makes them more vulnerable to complications arising out of a COVID-19 infection. An employer also cannot disclose medical knowledge about employees to other employees, even if an individual has been infected with COVID-19.

What if my employee has COVID-19?

If an employee is suspected or confirmed to have COVID-19, it is advised to wait about 24 hours before disinfecting any workspace they occupied to minimize exposure to the

employee's droplets. It is important to increase circulation in the area where this employee worked by opening doors and windows. Employers should inform other employees that may have been exposed to the virus, while maintaining confidentiality. The EEOC advises that all screening, inquiries and communication regarding employees and COVID are to be performed in a consistent manner to all employees.

Employers should not require a COVID-19 test or doctor's note to validate an employee's illness or qualify for sick leave.

Further, the Family First Coronavirus Response Act (FFCRA) requires that covered employers provide employees with paid leave for reasons related to COVID-19. Covered employers include public employers and private employers with 50 to 500 employees. All employees are eligible for paid sick leave unless they are able to telework. The FFCRA provides various amounts of paid leave based on an employee's situation. Employees are eligible for two weeks or up to 80 hours of paid leave at the employee's regular pay in two situations: (1) the employee is quarantined with COVID-19 or experiencing COVID-19 symptoms and seeking medical diagnosis, or (2) the employee is unable to work because of a bona fide need to care for an individual subject to quarantine or for a child whose school or child care provider is unavailable for reasons related to COVID-19. An employee is eligible for up to ten additional weeks of paid expanded family and medical leave at two-thirds the employee's regular rate of pay if the employee has been employed for at least thirty days and is unable to work due to the need to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

It is important to note that the Family and Medical Leave Act is not negated by the FFCRA.

When can someone who had COVID-19 return to work?

That depends! If the employee tested positive for COVID-19 but did not experience symptoms, they must wait ten days after the date of the positive test and still have no symptoms since the test. If the employee tested positive and did have symptoms, the employee must wait until they no longer have a fever without medicine, his respiratory symptoms have improved, and he has received two negative COVID-19 tests in a row, at least 24 hours apart. Finally, for an employee that never took a COVID-19 test, they can return to work after 72 hours has passed since their last fever without the use of medicine, improvement of respiratory symptoms, and at least ten days have passed since the symptoms first appeared.

How can I minimize transmission in the workplace?

The CDC advises employers to implement preventative measures in order to slow the spread of COVID-19. These preventative measures include actively encouraging sick employees to stay home, including fostering a culture that prioritizes the health of the employees so that employees are comfortable enough to stay home if they feel sick. In a departure from typical inquiries that are allowed by the ADA, the CDC recommends that employers conduct daily health checks which can include temperature checks and symptom screening. Be sure to keep this information confidential in compliance with the ADA. Employers should also think through where and how employees are most likely to be exposed to COVID-19 and implement policies to minimize that risk as much as possible. Employers should appoint a point person for coordination of infection control, including the provision of personal protective equipment, hand sanitizer and other disinfectants to keep the workplace as clean as possible.

I am hiring during the pandemic, can I ask anything about health or COVID-19?

Because the CDC has indicated that employees with COVID-19 are a "direct threat" due to the severity of the disease, employers are allowed to make COVID-related inquiries to job applicants after a conditional offer has been made, as long as all prospective employees are subject to the same inquiry and examination. The ADA generally prohibits employers from making any disability -related inquiry and conducting medical examinations for a job applicant before a conditional offer of employment is made. Inquiries are to be limited to the ability of an applicant to perform job-related functions. This same standard applies even during the pandemic. An employer can screen applicants for symptoms of COVID-19 or conduct a temperature check only *after* a conditional offer has been made. Employers cannot inquire about medical history, including whether or not the applicant has contracted COVID-19 at some point in the past. Employers can delay an applicant's start date if he has COVID-19 or symptoms associated with the disease. As such, an employer is able to withdraw an offer when the employer needs the applicant to start immediately but the individual has COVID-19 or symptoms of it. It is important to note that employers cannot rescind job offers upon finding that an individual has an underlying condition and may be more susceptible to severe injury if he or she were to contract COVID-19.

Can I tell my pregnant employee to stay home because of their increased risk?

No, not even if your intent is to protect the employee. Under the ADA, an employer must provide accommodations for a pregnancy-related condition, this is unchanged during a pandemic. Pursuant to the Pregnancy Discrimination Act, pregnant women are entitled to job modifications such as teleworking or other modifications such as changes in their schedules or assignment to the extent that these are provided for other employees who are similar in their ability or inability to work. This protection is also unchanged by the pandemic.

Can my employee refuse to work?

Yes, employees have the right to refuse to work under conditions where they reasonably believe there to be an imminent danger of death or serious physical harm, including a serious illness. According to the Minnesota Department of Human Rights, COVID-19 is considered a serious illness that could qualify as an imminent danger to employees. Accordingly, an employer cannot fire an employee for refusing to work in conditions that are deemed unsafe due to the risk of contracting COVID-19. It is the employer's responsibility to correct the hazardous condition or assign the employee to other work. As always, an employer cannot retaliate against an employee for reporting health and safety concerns at work, including concerns related to COVID-19.

Do you have more questions?

COVID-19 is presenting many new and unique situations for employers which vary based on each specific industry and workplace. If you have questions, please feel free to contact any one of the attorneys in our employment law practice group.

Case Law Summary

On June 15, 2020 the Supreme Court by a vote of 6-3 held that an employer who fires an individual merely for being gay or transgender violated Title VII of the Civil Rights Act of 1964 in a ruling that decided three cases. Two of the cases (*Bostock v. Clayton County; Georgia and Altitude Express Inc. v. Zarda*) alleged discrimination based on sexual orientation, while the third (*R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*) involved gender identity. In its opinion, the Court based its decision on the text of Title VII explaining that the prohibition on discrimination based on "sex" includes sexual orientation and transgender status, even if congress did not consider those issues when it enacted the law over fifty years ago. Justice Neil Gorsuch wrote the opinion and explained that generally the Supreme Court interprets a law by looking at how the public would have understood the law when it was passed: "the ordinary public meaning" of the law. The Court analyzed that, under the plain terms of Title VII, "sex" means either male or female. Accordingly, an employer violates Title VII "when it intentionally fires an individual employee based in part on sex," even if "other factors besides the plaintiff's sex contributed to the decision" and even if "the employer treated women as a group the same when compared to men as a group." In other words, if an employer terminates a male employee for having a relationship with another male, or terminates a female employee for having a relationship with another female, then the employer is clearly firing employees for engaging in activities that would be condoned, but for their gender.

The Court rejected multiple arguments including the employers' assertion that because Congress did not address sexual orientation or transgender status specifically in Title VII that Title VII does not protect against this discrimination. Among other rejected arguments, the Court was unconvinced by the contention that Congress had considered, but not passed, bills that would clarify that Title VII applies to LGBT employees and refused to speculate as to why such bills did not pass.

This decision is a major victory for LGBT employees because fewer than half of the 50 states currently ban employment discrimination based on gender identity or sexual orientation. Wisconsin was the first state in the country to ban discrimination based on sexual orientation in employment, housing, education, and public accommodations in 1982. Minnesota outlawed discrimination based on sexual orientation and gender identity in 1993 which provided protection for the LGBT community in employment, housing and public accommodations. The people of Minnesota and Wisconsin will now have a federal cause of action along with the already existing state causes of action when faced with discrimination based on sexual orientation or gender identity.

2020 Legislative Update

By: Elle M. Lannon

This year has been nothing short of unusual, including Minnesota's 2020 Legislative Session. Amid the coronavirus pandemic, Lawmakers and Governor Tim Walz have not been able to agree on much this session. However, below is a summary of the most significant legislation that has been signed into law this session.

Insulin Affordability

The Alex Smith Emergency Insulin Act was passed and requires a 30-day emergency supply of insulin be available for a co-pay of no more than $35. The Act also allows for an additional 30-day emergency supply of insulin if necessary and creates a long-term program for individuals under certain income limits who do not have insurance or have insurance with larger co-pays. Under the Act, insulin manufacturers in the state are required to participate in the program and face steep penalties for non-compliance.

Tobacco Age Raised

On May 16, 2020, Governor Walz signed a bill into law that aligns Minnesota with federal law by raising the purchasing age for tobacco from 18 to 21. This new law enforces the federal Tobacco 21 law signed in December of 2019.

Prescription Drug Transparency

SF 1098 requires pharmaceutical companies to submit a range of pricing information to the Minnesota Department of Health when prices for prescription drugs exceed specified thresholds. Following the review, the Minnesota Department of Health is required to post the information publicly. Companies that fail to comply with this law face significant fines.

COVID-19

MN HF105 provides COVID-19 relief in many forms, including providing an extension for certain waivers and modifications to human services programs, preserving health care coverage for Medical Assistance and MinnesotaCare, implementing federal changes to the Supplemental Nutrition Assistance Program, eliminating cost-sharing for COVID-19 diagnosis and treatment, and modifying the eligibility period for the federally funded Refugee Social Services and Cash Assistance Programs. This new law also extends telemedicine services, flexibility in housing licensing requirements, and expands the remote home and community-based services waiver. Additionally, the law includes a 60-day period to transition affected programs off waivers and modifications following the expiration of the peacetime emergency.

COVID-19 Relief for Small Businesses

MN HF5 provides $62.5 million for emergency small business grants and loans to help combat the financial impacts of COVID-19, including reimbursement of the Minnesota 21st century mineral fund, adjustments to the budget reserve forecast calculation, and changes to the small business loan repayment receiving fund.

North Branch Changes

MN SF3020 permits the City of North Branch to increase membership of the City's Public Utilities Commission to five members, and no more than two members may also serve as City Council members. Moreover, terms for additional members shall be staggered and set in accordance with the bylaws governing the Public Utilities Commission.

Health Care

MN SF3204 modifies health care services utilization review and prior authorization requirements, in addition to creating continuity of care for prior authorization within Chapter 62M. Some modifications include requiring notification of an adverse determination, which must be provided within five business days after receiving the request to the attending health care professional and hospital or physician office. Beginning April 2, 2022, this law also requires a health plan company to annually post on its public website for each commercial product.

Definition of Peace Officer

MN SF3258 modifies the definition of a peace officer. Specifically, the new law defines a peace officer as a state patrol officer, a university of Minnesota peace officer, a police officer of any municipality, including towns having powers under section 368.01 or county, and a state conservation officer. The law also modifies the corrections provisions, the criminal justice data communications network use, provides temporary changes to the grant programs, and permits criminal penalties. Refer to Minnesota Statute section 169A.03 for specific changes.

Conclusion

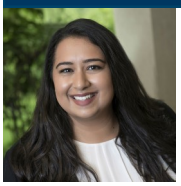
Despite the unexpected challenges faced by the Minnesota Lawmakers and Governor Walz in 2020, many bills were still signed into law. However, many issues were left unresolved during Minnesota's Regular Legislative Session, including a bonding bill, a tax bill, and CARES act funding for local government. In addition to these unresolved issues, police and public safety reform has become a top priority for many members of the Legislature in 2020. To be reconsidered, these bills will have to be reintroduced in the second special session, as bills introduced during the regular session or the first special session do not carry over. Check back for more legislative updates as they unfold.

Firm Announcement

Congratulations **Joseph E. Flynn**, **Vicki A. Hruby**, and **Tessa M. McEllistrem** who were named to the *2020 list of Minnesota Super Lawyers and Rising Stars.*

Super Lawyers is a Thomson Reuters business that provides a rating service of outstanding lawyers from more than 70 practice areas, who have attained a high-degree of peer recognition and professional achievement. The selection process is multi-phased and includes independent research, peer nominations and peer evaluations. Rising Stars selections undergo the same selection process as Super Lawyers but recognizes attorneys who are 40 years old or younger, or have been practicing for 10 years or less. No more than 2.5% of lawyers in Minnesota are named to the Rising Stars list.

About the Authors



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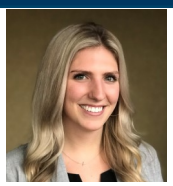

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About the Firm

Jardine, Logan & O'Brien, P.L.L.P., is a mid-sized civil litigation law firm that has handled some of the region's largest and most difficult disputes with outstanding results for clients. Litigation has always been our primary focus. With trial attorneys admitted in Minnesota, Wisconsin, North Dakota, South Dakota, and Iowa our firm has the ability and expertise to manage cases of any size or complexity. We are trial lawyers dedicated to finding litigation solutions for our clients. View our website at www.jlolaw.com to obtain additional information. Please call us to discuss a specific topic.

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