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U.S. EMPLOYMENT LAW CONSIDERATIONS FOR COMPANIES RESPONDING TO COVID-19

To Our Clients and Friends:

Whatever industry you are in, you are undoubtedly concerned about preparing your business to face the threat of the novel coronavirus (COVID-19).[1] Both the Centers for Disease Control (“CDC”) and the Occupational Safety and Health Administration (“OSHA”) have recently encouraged employers to develop employee protection plans.[2] OSHA’s guidance in particular cautions that “existing OSHA standards *may* apply to protecting workers from exposure to and infection with” the virus; among other things, the guidance invokes the “General Duty Clause” of the Occupational Safety and Health Act (which imposes certain obligations to protect employees from “recognized hazards”).[3]

Below, we identify some of the key considerations for businesses working to reduce the risk of employee exposure. We also outline key steps to take when an employee tests positive for COVID-19 or must care for someone with the disease.

The government response to the outbreak evolves daily, and we encourage employers to monitor federal, state, and local health department updates; legislative developments; executive actions; and Department of Labor guidance. Among other things, employers should monitor developments regarding paid leave for employees affected by COVID-19;[4] the bill that passed the House late Friday is addressed below.

Options for Reducing the Risk of Employee Exposure to COVID-19

Employers have many options for reducing the risk of employee exposure, and each comes with its own risks that should be managed carefully. The list below is not intended to be exhaustive, and is also focused on managing *employee* exposure to the virus. Additional considerations may apply to customers, vendors, contractors, and others with whom you interact.

Workplace Adjustments: Both OSHA and the CDC recommend that employers promote good hygiene and infection control practices. Employers can promote handwashing by either providing a place for employees to wash their hands thoroughly with soap or, if running water is unavailable, provide alcohol-based hand rubs containing at least 60% alcohol.[5] Both agencies encourage employers to ensure the availability of adequate tissues and trash receptacles (preferably of the “no-touch” variety).[6] Employers who operate set shifts or other fixed work schedules may want to consider (where feasible) added flexibility around employee breaks or other opportunities for employees informally to take time that may be needed to attend to increased hygiene concerns. Housekeeping practices may also need to be adjusted in light of the pandemic.[7] In some workplaces, it may be appropriate to install high-efficiency air filters, increase ventilation rates, or install physical barriers like sneeze guards.[8] OSHA has offered other recommendations depending on the expected level of exposure and hazard assessment

for the particular workplace and job—for example, health care workers obviously are in a different position than office workers and may need additional protection (such as airborne infection isolation rooms).[9]

The CDC also recommends placing posters in the workplace that advocate good hand-washing practices, cough-and-sneeze etiquette, and staying home when sick.[10] Where employers are increasing the availability of telecommuting, it may be helpful to provide this information electronically as well.

Restricting Travel: Many employers are restricting business travel, and the CDC is regularly updating its travel notices.[11] Views regarding the appropriate level of travel restrictions may vary by industry.

Employees may also be exposed to COVID-19 through personal travel. When considering creating guidelines on employees' personal travel, employers should be mindful that some jurisdictions limit employer regulation of off-duty conduct.[12] Rather than restrict personal travel to affected areas, employers may instead elect to require that employees traveling to those areas self-report to Human Resources and, if their travel indicates an elevated risk, excluding them from the workplace for an appropriate period of time.

Restricting or Screening Visitors: Employers may also wish to restrict visitors or screen visitors for exposure to COVID-19. When doing so, employers should take into consideration visitors' potential privacy rights (e.g., by posting clear notices of any screening policies, dealing with screening results discreetly, and storing disclosure forms securely). If employers use any screening tools that capture biometric identifiers, they should also be mindful of enhanced privacy rights under state laws such as the Illinois Biometric Information Privacy Act.[13] Many courthouses and other public buildings have banned entry by persons who have traveled to high-risk countries, are ill, or are quarantined,[14] and many employers, office buildings, and other facilities have implemented parallel restrictions for employees and visitors.

Instituting Work-from-Home/Telecommuting Policies: Where some or all of an employee's work may be performed remotely, employers may consider permitting employees to work from home on a short-term basis.

For many employers, although short-term changes may be feasible in pandemic conditions, permanent changes would pose an undue hardship. Therefore, when implementing a new work-from-home/telecommuting policy or expanding an existing one, employers should take steps to mitigate the risk that these temporary changes create an unworkable precedent for the future.[15] Communicating the short-term and emergency nature of policy changes is one way to limit risk. Furthermore, employers should retain the right to monitor, modify, or withdraw the policy at any time.

Employers should also be mindful that when employees work from home, doing so may raise its own exposure to potential liability for employment law violations. Key considerations include:

- ***Recording hours worked:*** The Fair Labor Standards Act (FLSA) requires that employers maintain records of hours worked by non-exempt employees. If such employees are working

from home, working time may be less clearly demarcated, and employers should ensure that employees accurately record their time spent on work activities.[16]

- *Ensuring meal and rest period compliance:* Even when employees work remotely, employers should ensure that they comply with state laws regarding meal and rest periods.[17]
- *Business expense reimbursements:* For some workers, remote work may result in increased expenses. The FLSA mandates that, if employees pay for certain business-related expenses, those expenses cannot reduce the employees' pay below minimum wage in a given workweek.[18] In addition, some states require that employers cover all reasonable and necessary business expenses, regardless of whether those expenses reduce pay below minimum wage.[19]
- *Fair implementation of policy:* Employers should work to ensure that remote working policies are implemented fairly and consistently, in order to avoid accusations of discrimination.

Employers should separately consider the increased cybersecurity risk of remote work and ensure that their networks are prepared for increased traffic and risk.

Instructing Employees Not to Work:

Where telecommuting is not an option, employers may instruct employees to stay home and not come to work at all.

Some employers may conclude that entire facilities should be temporarily shut down, in which case the primary concern will be the question of payment during the shut-down; that is addressed below. In the event that COVID-19 requires a long term or potentially permanent closure of any facilities or layoffs of workers, employers should consult the Worker Adjustment and Retraining Notification (“WARN”) Act and its state counterparts in order to determine whether advance notice is required (and, if so, whether it is excused by the circumstances). At the federal level, temporary lay-offs, hours reductions, or shut-downs will generally only trigger WARN if they last longer than six months.[20]

Other employers may identify specific people or groups of people who should stay home on a temporary basis. For these employers, additional considerations include:

- *Asking employees about travel and other exposure to COVID-19:* Employers may generally ask employees to disclose that they are returning from travel to affected areas or whether they have been exposed to COVID-19.[21]
- *Asking employees to disclose symptoms of COVID-19:* Many employers may wish to ask employees whether they are experiencing a fever, cough, or other COVID-19 symptoms. In its pandemic influenza guidance, the EEOC advised that, at least as to “employees who report feeling ill at work or who call in sick,” employers may ask employees if they are experiencing symptoms of influenza.[22] Depending on the severity of the pandemic, the EEOC reasoned, inquiries about employees' symptoms are either “not disability-related” or “disability related [but] justified by a reasonable belief based on objective evidence that the severe form of

pandemic [] poses a direct threat.”[23] This same reasoning could support asking such questions even if employees have not affirmatively reported feeling ill; as long as employers are not selective about asking these questions (e.g., asking only older people or people of a specific national origin), asking these questions is likely low-risk under current conditions. However, “all information about employee illness” must be “maintain[ed]. . . as a confidential medical record in compliance with the ADA.”[24] Because COVID-19 is more severe than the seasonal flu, this guidance suggests that, currently, “employers may measure employees’ body temperature.” Furthermore, employers should avoid being selective in asking people whether they are experiencing symptoms; making assumptions about who is most likely to have the disease could increase the risk of discrimination claims.

- *Screening employees based on body temperature:* Taking an employee’s temperature will generally qualify as a medical examination, which the ADA restricts. Nevertheless, because COVID-19 has become widespread and is more severe than seasonal flu, the EEOC suggests that it is likely that employers are justified in taking employees’ temperature.[25] Specifically, in the context of pandemic influenza, the EEOC states that, “If pandemic influenza symptoms become more severe than the seasonal flu or the H1N1 virus in the spring/summer of 2009, or if pandemic influenza becomes widespread in the community as assessed by state or local health authorities or the CDC, then employers may measure employees’ body temperature.”[26] Keep in mind that a regular body temperature does not ensure that a person is free of the virus.
- *Restricting discussions of underlying conditions or comorbidities:* Some populations are more vulnerable to COVID-19. But in the context of pandemic H1N1 and seasonal influenza, the EEOC advised that employers may not ask asymptomatic employees to disclose whether they have a medical condition that could make them more vulnerable to complications.[27] As the COVID-19 pandemic develops, and if contracting it poses a “direct threat,” it is possible that these disability-related inquiries would be permissible, but that question is unsettled.[28] In the event that an employee “voluntarily discloses” a vulnerability to COVID-19, the employer may ask what accommodations the employee needs and should be as flexible as possible in response, but the employer should keep the medical information confidential.[29]
- *Anti-discrimination laws:* As always, employers should avoid taking into account—or appearing to take into account—protected status when deciding who to send home. For example, employers should not affirmatively send home only those who are above a certain age, nor should employers appear to discriminate against people who are or appear to be of Chinese national origin. Any guidelines developed by the employer should be uniformly applied.

Employers will also need to decide whether to pay employees for unexpected time off due to COVID-19. In so doing, employers should be mindful of the following:

- *The likelihood of federal action:* On Friday night, the House of Representatives passed a COVID-19 relief package by a vote of 363-40. The bill creates a complicated paid sick leave program with a matching tax credit. All of the paid leave provisions only apply to employers with fewer than 500 employees.

First, the bill amends the FMLA to require that covered employers provide paid leave for certain COVID-19-related absences (self-quarantining at the direction of a doctor or public health care official, caring for a similarly-affected family member, or caring for a child whose school or daycare has been closed). The paid sick leave under the FMLA kicks in after the first 14 days of absence, although employees may elect to use other forms of paid leave during those first 14 days, but employers may not require this. Employees entitled to this leave must be paid at two-thirds of their usual pay.[30]

Second, in addition to amending the FMLA to add a paid sick leave component, there is a stand-alone Emergency Paid Sick Leave Act, which may be available to employees without the 14-day waiting period. That leave is available for the same reasons as the FMLA leave, as well as other reasons, such as if an employee is experiencing COVID-19 symptoms and needs time to obtain a medical diagnosis or care. Employees entitled to this leave must be paid either at their regular rate if they are directly affected or, in the event that they need to care for a family member, at two-thirds of their regular rate.[31]

Third, the bill creates a payroll tax credit for companies that have to pay for these forms of leave.[32]

We expect that the Senate will act promptly on the bill, and there may be further changes to the bill before it is passed. In the meantime, both the CDC and OSHA encourage employers to explore flexible leave policies in response to this pandemic and many larger employers are considering programs similar to those required for smaller employers under the House bill.[33]

- *Union employees and collective bargaining agreements:* For unionized workforces, collective bargaining agreements (CBAs) may address whether the time off must be paid or may create a requirement to bargain over this issue.
- *FLSA requirements:* As the Department of Labor confirmed in a recent COVID-19 Q&A, for non-exempt employees, the FLSA “generally applies to hours actually worked” and “does not require employers who are unable to provide work to non-exempt employees to pay them for hours the employees would otherwise have worked.”[34] But for overtime-exempt employees, who must be paid on a “salary basis,” the employees “must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions.”[35] Employers who direct employees to use their vacation time for a week with a partial shut-down during the pandemic should ensure that employees without enough vacation time still receive the equivalent of their full salary for that week.[36]

For longer-term schedule reductions, employers may consider reducing salaries of exempt salaried employees, so long as they comply with the salary basis minimums set forth in the FLSA and its implementing regulations.[37]

Employers may also consider across-the-board reductions in hourly or salaried employees’ pay

in order to save jobs. This is generally permissible with advance notice if applied in a nondiscriminatory manner and provided it does not reduce pay below minimum wage for hourly workers or below the salary minimum for exempt employees.

- *Predictive scheduling laws and “show-up” pay:* Although federal law does not require paying hourly workers when facilities are closed or shifts are cancelled, predictive scheduling laws may come into play. Predictive scheduling or “fair scheduling” laws generally require that companies in certain industries—often food or retail, but sometimes other industries as well—provide employees with 10 to 14 days’ notice of their schedules. If employers do not do so, they may need to pay a schedule change premium or “predictability pay.”^[38] Employers should consult all applicable predictive scheduling laws and determine whether premium pay is owed because of COVID-19 closures or cancellations; exigent circumstances may justify failure to make these payments.

If employers send employees home after they have already shown up for the day, they may be required to pay “show up pay” or “reporting pay” under state law, although some of these laws make exceptions for “acts of God.”^[39]

- *State laws and executive orders regarding paid sick leave, paid caregiver or similar leave, disability insurance, and unemployment insurance:* Employers should continue to comply with the growing patchwork of state and local laws governing paid leave for illnesses and other absences. In addition to the many state laws that require sick leave, some state laws specifically provide for limited paid leave in the event of school closures.^[40] Furthermore, some states, like Colorado, have implemented paid sick leave requirements specifically in response to COVID-19; Colorado’s rules require four days of sick leave but cover only specific industries (leisure and hospitality; food services; child care; education; community living facilities; nursing homes; home health).^[41]

Federal contractors should also ensure compliance with Executive Order 13706, which imposed paid leave requirements.

In certain circumstances, state disability insurance or unemployment insurance may cover employee absences. The Department of Labor has issued guidance permitting state unemployment insurance programs significant flexibility in responding to COVID-19.^[42] The pending COVID-19 relief package also makes emergency changes to unemployment insurance funding, and requires the Department of Labor to create a model notice for employers to give employees affected by COVID-19.^[43]

- *Compliance issues with pay advances:* Some employers may be considering pay advances for non-exempt employees. It is critical that any pay advance program be implemented in accordance with federal and state requirements. Among other things, the employee’s agreement to recoupment of the funds should be provided in writing before the advance is made. Furthermore, if the funds are recouped from future earnings, employers need to ensure that the deductions do not decrease a workweek’s total pay below the minimum wage.^[44]

- **Risks of making exceptions to standard policy:** In addition to ordinary vacation, sick pay or other paid time off policies, some employers may elect to provide extra paid leave, permit no-penalty absences, or allow employees to use PTO or sick-pay outside of regular policies on a temporary basis during the pandemic. As with new or expanded telecommuting policies, it will be helpful to communicate both the exceptional nature of these policies and the fact that the pandemic is the motivating factor behind them. Furthermore, these policies should be implemented fairly and consistently.[45]

Staggering Shifts and Split Shifts: Both OSHA and the CDC have suggested that employers consider staggering employee shifts to reduce the number of people on-site at any given time.[46] Employers may also consider splitting shifts, rotating who will come to the office and who will work remotely. When considering this approach, employers should check for applicable state and local laws that affect the timing of meal and rest periods.[47] If the use of staggered shifts results in longer shifts for some employees, employers should also follow state and local laws regarding payment of overtime.[48] And when staggered shifts result in some employees working late at night, employers should also consider OSHA guidance on minimizing fatigue-related injuries and preventing workplace violence.[49]

What to Do If an Employee Tests Positive or Needs to Care for an Ill Family Member:

Contact local health agency and clean affected areas appropriately: In the event your employee tests positive for COVID-19, you may instruct them to go home or avoid the workplace. You should also contact your local health agency. They will need to know about all positive tests in the area, and they may also be able to advise you on your response. In particular, they may have the most up-to-date guidance about what steps you need to take to clean the worksite.

Inform exposed employees: The CDC has advised employers to inform fellow employees of their possible exposure to COVID-19, without disclosing the identity of the person who tested positive.[50] You may also wish to advise customers, vendors, and visitors of their exposure.

Determine whether the employee qualifies for FMLA leave: The Department of Labor has issued informal guidance regarding COVID-19 and the Family and Medical Leave Act (“FMLA”).[51] The FMLA “would not . . . protect[]” an employee staying home “for the purpose of avoiding exposure.” The FMLA would protect an employee who tests positive (or who is caring for a relative who tests positive) if the individual’s COVID-19 becomes a “serious health condition” as defined by the statute and regulations (e.g., if it causes serious complications for the employee or the relevant family member).[52]

Maintain confidentiality: A number of federal laws, including the FMLA, the ADA, and the Genetic Information Nondiscrimination Act (GINA), impose confidentiality requirements that may be relevant to records regarding COVID-19, employees’ symptoms, and co-morbidities. In general, the EEOC has advised that, “[e]mployers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.”[53] Furthermore, employers should avoid involuntary disclosure of confidential information to employees’ supervisors, although employers may share information about the specific accommodations needed by employees.[54]

Record the incident if needed: In recent guidance, OSHA advised that its recordkeeping requirements *may* apply to employee cases of COVID-19.[55] Regulations require employers to record “fatalities, injuries, and illnesses” that are “work-related” and meet certain other criteria.[56] If an employee contracts COVID-19 while on the job, it is possible that the illness would be recordable.[57]

Prepare for workers compensation claims: Workers compensation eligibility varies by state. In the event an employee was exposed to COVID-19 in the workplace, it is possible—though far from guaranteed—that workers compensation would apply.[58]

Manage return-to-work certifications carefully: Generally speaking, an employer may require a doctor’s note or similar certification before allowing a previously-affected employee to return to work.[59] Be aware that the CDC, OSHA, and the EEOC have all advised that, during a pandemic, it may be more difficult for employees to obtain doctor’s notes.[60] Specifically, OSHA and the CDC state, “Do not require a healthcare provider’s note for employees who are sick with acute respiratory illness to validate their illness *or to return to work*, as healthcare provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely way.”[61] (Emphasis added). However, it seems likely that this advice was drafted primarily to address employees needing to absent themselves from work. The EEOC and Department of Labor both acknowledge the likely need for return-to-work certifications, and although CDC and OSHA urge consideration of “alternative” certifications where possible, it is unclear what non-traditional options will actually be available to employers in the coming weeks. Separately, in the event that a COVID-19-affected employee did qualify for FMLA leave or state paid leave, employers should follow the standard procedures for requiring return-to-work certifications under those laws.[62]

Be mindful of discrimination risks: When an employee is ready to return to work, employers should avoid treating them differently on the basis of their prior infection.

Seek counsel before requiring vaccinations: Currently, no vaccine for COVID-19 is available. However, in the event that a vaccine is developed, employers will need to structure any vaccine policy carefully to account for accommodations on the basis of disability or sincerely held religious beliefs.[63]

Gibson Dunn's lawyers are available to assist with any questions you may have regarding developments related to the COVID-19 outbreak. For additional information, please contact any member of the firm's **Coronavirus (COVID-19) Response Team**.

Gibson Dunn attorneys regularly counsel clients on the compliance issues raised by this pandemic, and we are working with many of our clients on their response to COVID-19. Please also feel free to contact the Gibson Dunn attorney with whom you work in the **Labor and Employment Group**, or the following authors:

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[1] We refer throughout to “COVID-19” instead of coronavirus because many of the cited guidance materials are specific to this pandemic.

[2] CDC, *Interim Guidance for Businesses and Employers*, <https://www.cdc.gov/COVID-19/2019-ncov/community/guidance-business-response.html> (Last visited March 12, 2020); OSHA, *Guidance on Preparing Workplaces for COVID-19*, <https://www.osha.gov/Publications/OSHA3990.pdf>. OSHA’s guidance was issued jointly with the Department of Health and Human Services. The CDC has also created a one-pager for employers, available at <https://www.cdc.gov/coronavirus/2019-ncov/downloads/workplace-school-and-home-guidance.pdf>.

[3] *Id.* at p. 17 (emphasis added). OSHA standards on Personal Protective Equipment and Bloodborne Pathogen Programs may also apply. *Id.*

[4] The National Conference of State Legislators is tracking COVID-19 legislation, but this may not cover emergency regulations issued by state labor departments. *See* NCSL, *State Action on Coronavirus (COVID-19)*, <https://www.ncsl.org/research/health/state-action-on-coronavirus-covid-19.aspx>.

[5] *Id.* at 8; CDC, *Interim Guidance for Businesses and Employers*.

[6] *Id.*; OSHA, *Guidance on Preparing Workplaces for COVID-19*, 8-9.

[7] CDC, *Interim Guidance for Businesses and Employers*; OSHA, *Guidance on Preparing Workplaces for COVID-19*, 8-9.

[8] OSHA, *Guidance on Preparing Workplaces for COVID-19*, 12.

[9] *Id.* at 13; OSHA is separately updating industry-specific guidance on its COVID-19 webpage: <https://www.osha.gov/SLTC/covid-19/>.

[10] CDC, *Interim Guidance for Businesses and Employers*.

[11] CDC, *Travel Health Notices*, <https://wwwnc.cdc.gov/travel>. There are currently “Level 3” notices for South Korea, Iran, China, and parts of Europe. “Level 3” means that the CDC is

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encouraging Americans to avoid non-essential travel to these areas. *See also* OSHA, *Guidance on Preparing Workplaces for COVID-19*, 13 (advising companies to discontinue non-essential travel).

[12] *See, e.g.*, N.Y. Labor Law § 201-d (prohibiting discharge on the basis of lawful “recreational activities”); *Reiseck v. Universal Comms. of Miami*, No. 06-0777, 2009 WL 812258, at *4 (S.D.N.Y. Mar. 26, 2009) (determining that employer did not violate statute by firing employee who was traveling to Florida weekly because employer fairly determined the work could not be performed from Florida), *vacated in part on other grounds by* 591 F.3d 101 (2d Cir. 2010).

[13] 740 ILCS 14/1.

[14] *See, e.g.*, New York Supreme Court, *Coronavirus – Revised Courthouse Procedures* (March 12, 2020), <https://www.nycourts.gov/legacypdfs/courts/1jd/supctmanh/PDF/cv19-procedures.pdf>; United States District Court for the Eastern District of Michigan, *Notice of Courthouse Visitor Restrictions* (March 11, 2020), <http://www.mied.uscourts.gov/PDFFiles/NtcCourthouseRestrictions.pdf>.

[15] As in the context of other laws, the fact that an accommodation was made for one person may be relevant to whether that accommodation is “feasible” under the ADA for another employee. *Cf. Equal Employment Opportunity Commission v. TriCore Reference Laboratories*, 849 F.3d 929, 941 (10th Cir. 2017) (discussing role of precedent under the Pregnancy Discrimination Act). However, it is not dispositive; interpretive guidance under the ADA acknowledges that a particular accommodation may impose an undue hardship on an employer in one circumstance but not another. 29 C.F.R., Appendix to Part 1630 (Interpretive Guidance on Title I of the Americans with Disabilities Act) (“Whether a particular accommodation will impose an undue hardship for a particular employer is determined on a case by case basis. Consequently, an accommodation that poses an undue hardship for one employer at a particular time may not pose an undue hardship for another employer, or even for the same employer at another time.”).

[16] *See* Department of Labor, *Fact Sheet #21: Recordkeeping Requirements under the Fair Labor Standards Act (FLSA)*, <https://www.dol.gov/agencies/whd/fact-sheets/21-flsa-recordkeeping>.

[17] *See, e.g.*, Cal. Labor Code § 226.7.

[18] Department of Labor, *COVID-19 or Other Public Health Emergencies and the Fair Labor Standards Act Questions and Answers*, <https://www.dol.gov/agencies/whd/flsa/pandemic>.

[19] *See, e.g.*, Cal. Labor Code § 2802; 820 ILCS 115/9.5 (Illinois); *see also* 12 NYCCR 142-2.10 (regarding wage deductions).

[20] 20 C.F.R. 639.3(f).

[21] EEOC, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* § III.B.8, https://www.eeoc.gov/facts/pandemic_flu.html (“If the CDC or state or local

public health officials recommend that people who visit specified locations remain at home for several days until it is clear they do not have pandemic influenza symptoms, an employer may ask whether employees are returning from these locations, even if the travel was personal.”).

[22] EEOC, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* § III.B.6.

[23] *Id.*

[24] *Id.*

[25] *Id.* at § III.B.7.

[26] *Id.*

[27] EEOC, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* § III.B.9; *id.* at § III.A.1 (stating, in the context of pre-pandemic guidance, that “[a]n inquiry asking an employee to disclose a compromised immune system or a chronic health condition is disability-related because the response is likely to disclose the existence of a disability. The ADA does not permit such an inquiry in the absence of objective evidence that pandemic symptoms will cause a direct threat.”).

[28] *Id.* at § III.B.9; *see also id.* at n.33 (“When pandemic influenza symptoms only resemble those of seasonal influenza, they do not provide an objective basis for a “reasonable belief” that employees will face a direct threat if they become ill.”).

[29] *Id.*

[30] H.R. 6201, Division C (March 13, 2020), <https://docs.house.gov/billsthisweek/20200309/BILLS-116hr6201-SUS.pdf>.

[31] *Id.*, Division E.

[32] *Id.*, Division G.

[33] CDC, *Interim Guidance for Businesses and Employers* (“Ensure that your sick leave policies are flexible and consistent with public health guidance and that employees are aware of these policies” and “[t]alk with companies that provide your business with contract or temporary employees about the importance of sick employees staying home and encourage them to develop non-punitive leave policies”); OSHA, *Guidance on Preparing Workplaces for COVID-19*, 11 (same).

[34] Department of Labor, *COVID-19 or Other Public Health Emergencies and the Fair Labor Standards Act Questions and Answers*.

[35] *Id.*

[36] *Id.* (citing WHD Opinion Letter FLSA2005-41).

[37] DOL, *Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA)*, <https://www.dol.gov/agencies/whd/fact-sheets/17a-overtime>; Department of Labor, *Field Operations Handbook* § 22g11 (“A prospective reduction in the predetermined salary amount to not less than the applicable minimum salary due to a reduction in the employee’s normal scheduled workweek is permissible and will not defeat the exemption, provided that the reduction in salary is a bona fide reduction that is not designed to circumvent the salary basis requirement (e.g., a 20 percent reduction in an exempt employee’s salary while assigned to work a normally scheduled 4-day reduced workweek due to the financial exigencies of the employer and/or to avoid layoffs would not violate the regulations as long as the reduced predetermined salary amount is at a rate that is not less than the applicable minimum salary of \$455.00 per week”).

[38] *See, e.g.*, San Francisco, *Formula Retail Employee Rights Ordinances*, <https://sfgov.org/olse/formula-retail-employee-rights-ordinances>; *see also* HR Dive, *Predictive Scheduling Laws* (Dec. 2, 2019), <https://www.hrdiver.com/news/a-running-list-of-states-and-localities-with-predictive-scheduling-mandates/540835/>.

[39] *See, e.g.*, Cal. Code Regs., tit. 8, § 11010(5) (“Reporting Time Pay”) (“Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee’s usual or scheduled day’s work, the employee shall be paid for half the usual or scheduled day’s work, but in no event for less than two (2) hours nor more than four (4) hours, at the employee’s regular rate of pay, which shall not be less than the minimum wage”); 7 D.C. Admin. Code § 907.1 (“The employer shall pay the employee for at least four (4) hours for each day on which the employee reports for work under general or specific instructions but is given no work or is given less than four hours of work, except that if the employee is regularly scheduled for less than four hours a day, such employee shall be paid for the hours regularly scheduled. The minimum daily wage shall be calculated as follows: payment at the employee’s regular rate for the hours worked, plus payment at the minimum wage for the hours not worked, as described above.”); 454 MA Admin. Code 27.04(1) (“When an employee who is scheduled to work three or more hours reports for duty at the time set by the employer, and that employee is not provided with the expected hours of work, the employee shall be paid for at least three hours on such day at no less than the basic minimum wage. 454 CMR 27.04 shall not apply to organizations granted status as charitable organizations under the Internal Revenue Code.”); NJ Admin. Code 12:56-5.5 (“(a) An employee who by request of the employer reports for duty on any day shall be paid for at least one hour at the applicable wage rate, except as provided in (b) below; (b) The provisions of (a) above shall not apply to an employer when he or she has made available to the employee the minimum number of hours of work agreed upon by the employer and the employed prior to the commencement of work on the day involved”); 12 CRR-NY 142-2.3 (“An employee who by request or permission of the employer reports for work on any day shall be paid for at least four hours, or the number of hours in the regularly scheduled shift, whichever is less, at the basic minimum hourly wage.”).

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[40] See New Jersey Earned Sick Leave Act Notice, https://www.nj.gov/labor/forms_pdfs/mw565sickleleaveposter.pdf.

[41] Colorado Department of Labor and Employment, Colorado Health Emergency Leave with Pay, 7 CCR 1103-10 (March 11, 2020), <https://www.colorado.gov/pacific/cdle/colorado-health-emergency-leave-pay-%E2%80%9Ccolorado-help%E2%80%9D-rules>.

[42] Department of Labor, *U.S. Department of Labor Announces New Guidance on Unemployment Insurance Flexibilities During COVID-19 Outbreak* (March 12, 2020), <https://www.dol.gov/newsroom/releases/eta/eta20200312-0>.

[43] H.R. 6201, Division D.

[44] DOL Opinion Letter, FLSA2005-3 (discussing prepayment plan for overtime wages), https://www.dol.gov/sites/dolgov/files/WHd/legacy/files/2005_01_07_3_FLSA_PrepaymentPlan.pdf; Cal. DLSE, *Opinion Letter* (Nov. 25, 2008), <https://www.dir.ca.gov/dlse/opinions/2008-11-25-1.pdf>.

[45] Department of Labor, *COVID-19 or Other Public Health Emergencies and the Family and Medical Leave Act Questions and Answers*.

[46] OSHA, *Guidance on Preparing Workplaces for COVID-19*, 13; CDC, *Interim Guidance for Businesses and Employers*.

[47] See, e.g., Cal. Labor Code § 512.

[48] See Department of Labor, *State Minimum Wage Laws*, <https://www.dol.gov/agencies/whd/minimum-wage/state> (identifying, by state, the number of hours after which premium pay is required). Note that under federal law, extra pay for night or weekend work is not automatically required. See DOL, *E-Laws Adviser*, https://webapps.dol.gov/elaws/faq/esa/flsa/005.htm?_ga=2.39763365.725891313.1583959806-662641776.1578432998.

[49] See OSHA, *Long Work Hours, Extended or Irregular Shifts, and Worker Fatigue*, <https://www.osha.gov/SLTC/workerfatigue/index.html>; OSHA, *Workplace Violence*, <https://www.osha.gov/SLTC/workplaceviolence/>.

[50] CDC, *Interim Guidance for Businesses and Employers*.

[51] Department of Labor, *COVID-19 or Other Public Health Emergencies and the Family and Medical Leave Act Questions and Answers*, <https://www.dol.gov/agencies/whd/fmla/pandemic>.

[52] *Id.*

[53] EEOC Guidance, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* § III.B.6.

[54] See 29 C.F.R. § 1630.14(c)(1)(i).

[55] OSHA, *Guidance on Preparing Workplaces for COVID-19*, 18; see OSHA, *COVID-19*, <https://www.osha.gov/SLTC/covid-19/standards.html>.

[56] 29 C.F.R. § 1904.4(a); *id.* at § 1904.7.

[57] 29 C.F.R. § 1904.5 sets forth the standards for determining work-relatedness of fatalities, injuries, and illnesses.

[58] See, e.g., Washington State Department of Labor and Industries, *Workers' Compensation Coverage and Coronavirus (COVID-19) Common Questions*, <https://lni.wa.gov/agency/outreach/workers-compensation-coverage-and-coronavirus-covid-19-common-questions>; California Labor & Workforce Development Agency, *Coronavirus 2019 (COVID-19) Resources for Employers and Workers*, <https://www.labor.ca.gov/coronavirus2019/#chart>.

[59] EEOC Guidance, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* § III.C.16 (“such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees”).

[60] EEOC, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* § III.B.13; Department of Labor, *COVID-19 or Other Public Health Emergencies and the Family and Medical Leave Act Questions and Answers*; OSHA, *Guidance on Preparing Workplaces for COVID-19*, 11; CDC, *Interim Guidance for Businesses and Employers*.

[61] *Id.*

[62] Department of Labor, *COVID-19 or Other Public Health Emergencies and the Family and Medical Leave Act Questions and Answers*.

[63] EEOC, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* § III.B.13. This guidance also states that, “Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it.”

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Gibson Dunn attorneys regularly counsel clients on the compliance issues raised by this pandemic, and we are working with many of our clients on their response to COVID-19. Please feel free to contact any of the Gibson Dunn lawyers listed above.

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