SWICA
Legal Protection from Jobsite Related Infections – August 25, 2020

Presented by
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Employer Liability for COVID-19 Infection
Workers’ Compensation

• The Texas Department of Insurance has decided that COVID-19 may be an occupational disease as defined by the Texas Workers’ Compensation Act if it is contracted as a result of employment.

• Workplace COVID-19 infection is covered by Workers’ Compensation.
Employer Liability for COVID-19 Infection
Workers’ Compensation

Workers’ compensation subscribers in Texas cannot be sued for COVID-19 work-related exposure even is such exposure is caused by the employer’s own negligence.
Employer Liability for COVID-19 Infection
Workers’ Compensation

• The only exception would be in the case of an employer’s gross negligence which results in employee death

• Injured employee’s estate would need to prove:
  – Workplace exposure and the likelihood of serious injury; and
  – That the employer knew of such likelihood but did not care
Employer Liability for COVID-19 Infection

- For non-subscribers (or who have employees who have opted out of the workers’ compensation system), the potential for liability is substantial. Employees who can establish any non-subscriber employer negligence can achieve a full recovery of damages.

- COVID-19 is another justification for becoming a workers’ compensation subscriber.
Employer Liability for COVID-19 Infection

- Workers’ compensation does not insulate contractors from lawsuits by employees of other contractors on the same project (except under CCIP and OCIP plans).
- Contractors should likely brace for COVID-19 related negligence actions of this type.
- Such suits will likely target contractors on projects with large COVID-19 infection clusters who do not take substantial steps to protect against the spread of COVID-19 among workers.
Company’s Can Require Waivers from Clients & Office Visitors Relating to COVID-19 Infection
Returning Employees to Work
Advance Notice to Employees

- When telework will end
- Continued availability of telework, if any
- Advise of new safety precautions to prevent spread of COVID-19 and protect employees
Protecting Employees on Site

- Check-in questionnaire: Only provides information on known contacts/symptoms
- Temperature check: Only provides information on symptoms
- Social distancing in office/directional pathways
- Barriers/hand sanitizer
- COVID-19 positive/possible exposure protocol
- Actively encourage sick employees to stay home
Workplace Safety Controls

- Stagger work hour/days
- Policy for employees feeling sick during days
  - Google now limits those to 30 minutes
- Avoidance of in-person meetings
- No congregating in breakrooms, etc.
Employee for Lying on Questions or Failure to Report Positive/Potential Positives

- Subject to discipline/dismissal.
- Put “subject to discipline” language in initial back to work notice or daily questionnaire.
- Also – what do to when employees lie to stay home?
Employees Generally Cannot Refuse to Report to Work

- Can refuse to perform in unsafe work conditions
- ADA, FMLA and FFCRA Considerations
Testing Employees for COVID-19

• Temperature check and COVID-19 virus testing allowed. Relaxation of ADA.
• If testing too time consuming (more than de minimis), must pay employees for testing time/waiting to test.
• Do not discriminate in testing protocol.
• Notify employees of positive or presumptive positive exposure from test results.
• Maintain employee confidentiality/or get consent.
• Testing must be reliable and accurate or it is violative of ADA.
The EEOC issued new guidance which established that businesses **cannot** make employees take COVID-19 antibody tests.

The EEOC has previously stated that employers **can** require employees to submit to tests that detect the active presence of the virus itself. The new guidance does not affect the EEOC’s stance on COVID-19 virus tests, and such tests are still permitted.

Based upon this guidance, employers cannot use COVID-19 antibody test results to make decisions about returning employees to the workplace. ADA violation.
When an Employee Tests Positive or is Potentially Positive

- Tell potential close contacts.
- Send notice identifying work unit and shift/day on site.
- Do not identify employee by name unless you have written consent.
Consents: Either Pre- or Post-Exposure

- Should:
  - Be in writing
  - Be signed
  - Specify who can be told
  - Specify how consent can be revoked
Testing Once-Infected Employees Before they Return to Work

• Employers can choose to have recovered employees tested before they return to work.

• But tests may continue to find traces of the virus even after the person has recovered and is no longer contagious.

• Can also allow employee to return to work without testing per CDC guidelines.
CDC Return to Work Guidance

• **If employee had symptoms isolate for:**
  – 10 days after symptoms first appear; and
  – 24 hours pass without fever without medications; and
  – other symptoms improve.

• **If employee was without symptoms isolate for:**
  – 10 days after first positive test; or
  – Employee receives two negative tests at least 24 hours apart.
Work Related COVID-19 Infections

COVID-19 infections contracted at work are recordable.
OSHA now directs that ALL employers, not just those with a high level of COVID-19 exposure, must conduct an investigation to determine if employee COVID-19 infections were contracted at work.
Employer Investigation of COVID-19 Origin

Employers must make reasonable efforts to determine if the exposure might be work-related. Those reasonable efforts include:

- Asking the employee limited questions about how he or she believes COVID-19 was contracted.
- Making inquiries about the employee’s work and non-work activities, and possible exposure, leading up to the diagnosis.
OSHA Employers must Take Measures to Keep Employees Safe or You Could be Cited

• **General Duty Clause.**
• **Even if that employer did not create hazard:**
  – Working alongside a sub that does not take precautions.
  – Potential citation if your employees are exposed to the hazard and employer knew or failed to use reasonable diligence to discover the hazard and abate it.
Fatality/In-Patient Hospitalization for COVID-19

If a fatality in-patient hospitalization occurs within 30 days of work-related infection, you must report the event to OSHA.
# FFCRA Leave

<table>
<thead>
<tr>
<th></th>
<th><strong>Emergency Paid Sick Leave</strong></th>
<th><strong>Emergency FMLA</strong></th>
</tr>
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<tbody>
<tr>
<td></td>
<td>(10 days of paid leave total between reasons below)</td>
<td>(10 days of unpaid leave, then 10 weeks of paid leave)</td>
</tr>
<tr>
<td>Parent caring for his or her</td>
<td>Paid at 2/3 the employee’s regular rate.</td>
<td>Likewise paid at 2/3 the employee’s regular rate.</td>
</tr>
<tr>
<td>child because of a school</td>
<td>Capped at $200 per day and $2,000 in the aggregate.</td>
<td>Capped at $200 per day and $10,000 in the aggregate.</td>
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<tr>
<td>closure or child care</td>
<td></td>
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<tr>
<td>unavailability due to COVID-19</td>
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<tr>
<td>Care for quarantined</td>
<td>Paid at 2/3 the employee’s regular rate.</td>
<td><strong>Not covered.</strong></td>
</tr>
<tr>
<td>individual or substantially</td>
<td>Capped at $200 per day and $2,000 in the aggregate.</td>
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<tr>
<td>similar care</td>
<td></td>
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<tr>
<td>Employee quarantined by</td>
<td>Paid at full regular rate.</td>
<td><strong>Not covered.</strong></td>
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<tr>
<td>government order or on advice</td>
<td>Capped at $511 per day and $5,110 in aggregate.</td>
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<tr>
<td>of health care provider, or</td>
<td></td>
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<td>out for diagnosis or</td>
<td></td>
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<tr>
<td>treatment due to COVID-19</td>
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Only applies if employee is unable to work or telework.

- Other leave?
DOL Interpreting the FFCRA to Provide for Any COVID Related Leave

- Will IRS follow suit on tax credit?
- Cannot discriminate against employee who recovered from COVID-19 and returns:
  - FFCRA leave protection
  - Regarded as disabled
Special Circumstances

• Ask employees if they do not believe they can resume in-person work. If so, discuss this with employee in more detail.

• Do not ask if employees have health conditions that prevent return to work.
  – This would violate the American with Disabilities Act.
Employees with Underlying Medical Conditions Who Do Not Want to Return to Work

- Must engage in the interactive process to determine if you can accommodate the person either:
  - Through continuation of telework;
  - Other means to mitigate risk of COVID-19 in light of medical condition; or
  - Leave: FFCRA/FMLA.
Discussion

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