

## Work in the Time of Coronavirus

If you've read *Love in the Time of Cholera*, you know that running a business in 2020 is nothing like that. Employers addressing this unprecedented pandemic have lots of questions. Below are some quick tips on sick leave, layoffs, medical evaluations, and other issues. As this crisis unfolds, Tuesley Hall Konopa will remain open to address your legal needs. Coming changes might affect our in-person contact, but our lawyers and other professionals will stay engaged to serve our clients. In the meantime, consider the following guidance, which is current as of March 16, 2020:

### A. It's okay to stick with your normal paid time off policies for now, but be ready for changes.

The House of Representatives passed the [Families First Coronavirus Response Act](#) on March 14th. If the Senate passes it, and the President signs it, then employees will have a guarantee of 14 sick days relating to COVID-19, easier access to FMLA leave, and other benefits. We are waiting to see the final law before offering more detailed guidance.

As of today, you may insist that employees away from work for Coronavirus reasons follow normal paid time off policies. We advise that you **do not** penalize employees under normal attendance policies whose absences are caused by the pandemic. We also recommend employers exercise some flexibility and understanding with required doctors' notes.

### B. If mass layoffs may be coming to your business, now is the time to start planning.

The federal WARN Act generally requires 60 days' notice for "mass layoffs" by employers with 100 or more employees. **Please seek legal advice because the counting of employees can be confusing.** Employers are to provide specific written notice to affected workers and certain local government offices.

A "mass layoff" only falls under the Act if it will be for 6 months or more, but if there is a risk at least some employees will have their hours reduced by at least 50% for at least six months, then the most conservative advice would be to give WARN notices even if you hope and expect any layoffs will be shorter.

WARN is a complicated law with exceptions for "natural disasters" and "unforeseeable business circumstances" that might apply to COVID-19. Generally, these exceptions spare the employer liability for shortening the notice, but **notice is still required.** Given the unprecedented nature of this outbreak, Congress may intervene to modify the WARN Act. Even so, if the size of your workforce and the size of your layoff implicates WARN, you should consider giving as much WARN notice as possible—even if it's only a few days.

### C. Employers will have to be creative.

There is a "general duty" under OSHA for all employers to protect their employees from workplace hazards. You may rely on this to force employees to stay home from work if they have flu-like symptoms, have likely exposure to Coronavirus, or present other risks. You may also:

- Consider new standards for work-from-home to mitigate risks;

- Inform your employees of any exposure risk they may have faced at work, **but without revealing confidential medical information about affected employees;**
- Consider temperature screenings before allowing employees to return to work **but seek guidance as other “medical examinations” could implicate the Americans with Disabilities Act.**

#### **D. Be thinking about “force majeure.”**

Using a Latin phrase, the law has long allowed a contracting party to avoid fulfilling a contract if unforeseeable circumstances make performance impractical or impossible. Historically, things like wars, natural disasters, and labor strikes have been considered *force majeure* events. Most legal scholars believe the COVID-19 outbreak will fit that standard. In fact, the NBA is already talking of invoking this rule to avoid paying players. Depending on the terms of your agreements, your business may be able to rely on *force majeure* to avoid certain contracts. But your business partners might be able to do the same to you. This is another area where advance planning and careful guidance are in order.

#### **E. Stay in touch.**

The news media and your inbox are flooded with Coronavirus information. That won't stop any time soon. As you try to run your business while staying abreast of public health needs, contact Tuesley Hall Konopa for legal guidance in this evolving situation.



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