



EMPLOYER FREQUENTLY ASKED QUESTIONS ABOUT EMPLOYEES AND COVID-19

March 26, 2020

This FAQ is to address questions common to many employers regarding their policies and employees as they confront the shifting landscape of the COVID-19 Pandemic. This FAQ is an overview of the applicable legal standards and best practices, particularly as they relate to Minnesota law. The information contained in this FAQ is provided as general information but is not legal advice; every situation requires a review of the specific factual circumstances. If you would like advice on situations specific to your company or organization, please do not hesitate to **contact Emeric Dwyer of Chestnut Cambronne PA at 612-336-2914** to discuss.

What should I do if an employee exhibits symptoms of COVID-19 or tests positive for COVID-19?

An employee who tests positive or exhibits symptoms of COVID-19 should be sent home immediately. The employee should self-quarantine for at least fourteen days, or the then current recommendation of the state department of health and/or CDC. Additional time may be necessary. The employer should work with the employee to determine when returning to work makes sense and will ensure the protection of all employees and customers who may be at risk due to the employee's illness. The employee should not be allowed to return to work until they have a doctor's note clearing them for work.

Given the extraordinary nature of the COVID-19 pandemic, employers should not require documentation or a test confirmation before sending employees home. Employers can request that information from employees at a later date. The health and safety of employees must be the primary focus of employers.

Employers should provide notice to all employees who worked in close proximity to an individual sent home due to suspected or confirmed infection with COVID-19. This

notice must not identify the individual by name or other personally identifying information. This notice should be in writing or e-mail and made as soon as possible.

Do I have to give paid or unpaid leave to employees who are ill or who are caring for family members who may have COVID-19?

Many employees are likely eligible to leave under the Family and Medical Leave Act (“FMLA”) to care for themselves or their family. Normally, employees are entitled to 12 weeks of FMLA leave to care for themselves or a family member with illness. However, the Emergency Paid Sick Leave expanded FMLA coverage due to the COVID-19 pandemic.

Employees now may also take FMLA leave if they are unable to work – either on site or remotely – because they are caring for a minor child whose school or childcare provider has closed due to a declared public health emergency related to COVID-19.

The Emergency Paid Sick Leave Act has also expanded employee eligibility for “emergency FMLA leave.” Employees who have been employed for at least 30 calendar days can take emergency FMLA leave due to a health pandemic declaration. Employees are still required to have been employed by the employer for at least 12 months and 1,250 hours of service in the last year to be eligible for FMLA leave for non-COVID-19 related medical leave.

A major change is to FMLA is that employees who take the emergency FMLA leave are required to be paid. The first 10 days of emergency FMLA leave can be unpaid. After 10 days, employers have to pay two-thirds (2/3) of the employee’s regular pay, capped at \$200 a day, and a maximum total of \$10,000. Employees are still limited to a total of 12 weeks of FMLA leave in a year, both emergency and non-emergency FMLA leave.

FMLA does allow intermittent leave, however employees caring for family members with COVID-19 symptoms should not be allowed to return to work and risk spreading the infection. Employees who work remotely may be permitted to take intermittent leave, depending on their circumstances.

Minneapolis, Saint Paul, and Duluth Ordinances also permit employees to use accrued Sick and Safe Time leave to care for ill family members.

If my workforce needs change while employees are on FMLA, do I have to give them their jobs back when their FMLA leave ends?

Generally, employees who take FMLA leave are entitled to receive their old job or a similar job back when their leave ends. If an employer needs to lay off employees while those employees are on emergency FMLA leave, please contact Chestnut Cambronne PA to discuss the nature of the layoff and FMLA compliance.

Employers with less than 25 employees have new job restoration obligations for employees who take emergency FMLA leave. A small employer must make reasonable efforts to restore an employee who took emergency FMLA leave to the same or an equivalent position. If the small employer cannot do that because the position no longer exists due to economic conditions or other operational issues caused by the COVID-19 pandemic, the small employer does not have to immediately restore the employee. However, the small employer must offer to reinstate the employee within one year if an equivalent position becomes available.

Am I required to compensate employees who are off of work because of government order or because of self-quarantine?

The Emergency Paid Sick Leave Act requires that private employers with less than 500 employees and government employers provide paid sick leave to employees. The United States Department of Labor ("DOL") is empowered to exempt employers with fewer than 50 employees from this requirement if providing such leave would jeopardize the viability of the business; those regulations are still being prepared.

Covered employers are required to give paid sick leave to every employee who is unable to work or telework because:

- The employee is subject to a federal, state, or local order of quarantine or isolation due to COVID-19;
- The employee has been directed by a doctor to self-quarantine because of COVID-19 concerns;
- The employee is experiencing symptoms of COVID-19 and is seeking a diagnosis;
- The employee is caring for a family member that meets the above criteria; or
- The employee is caring for a child whose school or care provider closed or is unavailable is unavailable due to COVID-19 prevention measures.

The act also empowers federal regulators to specify additional conditions for which employees may become eligible for sick leave.

Covered employers have to provide (i) all full-time employees with 80 hours of paid sick leave, and (ii) part-time employees with hours of sick leave equal to the average number of hours that employee works over a two-week period. Employees who are using sick leave due to their own quarantine, isolation, or illness must be paid the greater of their employee's regular rate of pay, the federal minimum wage, or the applicable state or local minimum wage, to a maximum of \$511 per day and \$5110 total. Employees who are using leave to care for family members or children must be paid two-thirds (2/3) of the greater of the employee's regular rate of pay, the federal minimum wage, or the applicable state or local minimum wage, to a maximum of \$200 per day and \$2000 total.

Employees who are eligible to receive sick leave or paid time off should be compensated under those policies. Employers have to pay employees the greater benefits they are entitled to under the Emergency Paid Sick Leave Act or their own policies.

The federal government is offering a tax credit to covered employers equal to the amount those employers must pay under the Emergency Paid Sick Leave Act.

There may be additional requirements placed on employers. Employers in cities with sick leave requirements, such as Minneapolis and St. Paul, should ensure their sick leave policies are compliant with applicable local Sick and Safe Time ordinances. Employers with unionized employees may be subject to additional obligations for "lost time wages," depending on the terms of their collective bargaining agreements.

Employees who are not receiving compensation may be eligible for unemployment insurance payments, which is administered by the Minnesota Department of Employment and Economic Development. Employees who have short-term disability policies may also be eligible for benefits under those policies.

Can I institute a temporary paid time off policy for employees during the COVID-19 Pandemic?

Yes. The COVID-19 Pandemic is a unique situation, and many employers are choosing to institute new paid time off policies for employees. Employers can institute PTO policies for a limited time. These policies should be carefully written to reflect their temporary nature.

Certain states, such as Colorado and New York, are instituting emergency paid sick leave measures. The United States Congress is also considering amendments to paid

sick leave laws. We are continuing to monitor additional developments and will update clients as they progress.

Can I ask employees if they have the virus or require a medical test for employees?

Generally, employers are prohibited from inquiring about employee health and can only institute medical tests in very limited ways. These requirements are reduced during a pandemic declaration. Employers may have a valid interest in employee safety and need to ensure that employees who are coming into work are not exposing other employees or customers to a public health risk. As such, any questions that employers wish to ask their employees should be based upon a standard set of questions sent to all employees. Employers might be able to test employees for the virus – such as by taking employee temperatures – in certain circumstances.

Nonetheless, there is still potential liability associated with asking for employee medical information or instituting testing. For instance, employers are required to keep medical information confidential. Further, employers cannot inquire about disabilities except in very specific circumstances, even if the employee’s disability makes them more vulnerable to the COVID-19 virus.

If your business is such you need to institute a medical test for employees, please contact Chestnut Cambronne, PA to discuss the manner and method to institute such testing.

What should I do with an employee working at home who appears to be ill with, or has tested positive for, COVID-19 virus?

Those employees should be directed to remain home and not come to any work sites. Otherwise, treat those employees as you would any other employee, as discussed above.

What should I do with my employees who have to care for children who are not allowed to go to school?

Minnesota schools are closed at least through early May, and it is anticipated that they will remain closed or institute “distance learning” policies after that date. There is no law or common practice associated with such an unusual circumstance.

Many places of business will reopen in April when Governor Walz lifts the “shelter-in-place” order taking effect March 27, 2020. Many employees will have children who will

not be attending school or will be engaged in “distance learning” from home. The best practice is to allow those employees to work from home, if they are not working from home already. Employers might let those employees use PTO or take unpaid time off. Given the widespread nature of school closures, employers should strongly consider allowing employees to use best efforts to work from home while caring for children, and continue to pay them. To the extent an employee cannot continue to fulfill his or her employment duties due to childcare issues related to the COVID-19 pandemic, the employee is entitled to certain unemployment benefits under the Minnesota Executive Order 20-05 and the FMLA Leave Expansion. This is an extraordinary time, and employers should consider all factors involved.

Can my employees sue employers if they contract COVID-19 at work?

Worker’s compensation laws will most likely bar claims against employers from employees who contract COVID-19 at work. Furthermore, determination of source of infection is likely impossible in most cases. Employers are usually only liable for employee claims if they show an “intent to harm” their employees. However, if an employee is infected at work and then infects a family member or others, those other parties may have a claim against employees. Employers who take reasonable steps to protect employees, including the steps outlined above, will likely defeat any such claim. Follow CDC guidelines and keep records of those efforts.

Is an employer eligible for unemployment insurance?

Under Minnesota’s unemployment insurance statutory scheme, a person who owns 25% or more of a business, or who is a close relative of a person who owns 25% or more of a business, is not eligible to receive unemployment insurance if the business ceases operations. Employers can elect to cover themselves or other normally “ineligible” persons and pay increased premiums; however that election must be done in advance of the need for unemployment compensation with significant lead-in time.

Again, the COVID-19 Pandemic is an event unprecedented in the modern world. The situation is changing for many people daily. Chestnut Cambronne PA remains ready, willing, and able to assist employers with their needs. **If you want to discuss these or any other employment matters, please contact Emeric Dwyer of Chestnut Cambronne PA at 612-336-2914.**

The information provided in this document does not, and is not intended to, constitute legal advice; instead, all information, content, and materials herein are for general

informational purposes only. Use of this information or communication with Chestnut
Cambronne PA about this document does not create an attorney-client relationship.