BusinessManagement DAILY

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Ask the Attorney: Pandemic paid leave, return to work and more

Employment lawyer Nancy Delogu answers readers' recent questions about operating their business during the pandemic, including paid sick leave, return to work anxiety and downsizing.

Confused about paid sick leave during this time – help!

Q: "We are a senior living company with more than 500 employees. If I send an employee home because they show symptoms of COVID-19, how should I pay them? If an employee refuses to come to work for fear of the virus, what are my options? How long do I have to pay an employee who is out with COVID-19?" – *Richard, Florida*

A: For so long as you employ at least 500 employees, you have no obligation to offer Employee Paid Sick Leave to workers who are diagnosed with COVID-19 or exhibiting symptoms of the disease and seeking medical advice. (Nor do you have to provide paid leave to workers who take time off to care for children whose schools or places of care are closed under the expanded Family and Medical Leave Act provisions of the Families First Coronavirus Response Act established at the same time as the Employee Paid Sick Leave Act.)

Therefore, unless you have workers in one of the many jurisdictions that mandate paid sick leave – and the number of these local laws is growing by the week – the amount of paid leave an employee may receive will depend upon your own policies. Many larger employers have created temporary programs offering more generous leave to those impacted by the coronavirus pandemic, not only to help those employees manage while ill or caring for ill family members, but also to encourage workers to stay at home if they don't feel well – a practice that is particularly important to businesses like yours who are uniquely vulnerable to the spread of the virus among residents.

Can recalled workers stay out due to anxiety?

Q: **"An employee has been on furlough since mid-March. He was asked to return to work and refused, claiming he is experiencing anxiety, and has requested to go on FMLA/CFRA. Does he qualify for FMLA/CFRA leave if he is currently on furlough?" – *Cecilia, California***

A: Generally speaking, no. Employees must be actively employed in order to be eligible for leave benefits. However, you have recalled him, and so if he qualifies for FMLA/CFRA (i.e., he has the required tenure and can provide the medical information necessary to be certified) then you should designate his continued absence as on an FMLA/CFRA leave, so you can begin tracking that use. FMLA leave is unpaid, although he may be entitled to disability benefits as a matter of state law.

At this time, many employers are hearing that workers are anxious about returning to work, but unless the anxiety qualifies as a serious health condition, they will not be able to claim FMLA entitlement solely for that reason. Moreover, workers who are recalled but decline to return likely will not qualify for continued unemployment compensation. Each worker's circumstances will be different, however, and as businesses and

employees navigate the return to work, there are likely to be many challenges, compromises, and adjustment in the weeks and months ahead.

The crisis showed us we're better with a smaller staff. How do we keep it that way?

Q: "Due to the coronavirus, our organization reduced our workforce to better adhere to social distancing guidelines. Our company is small and went from 15 employees to 10. Those who were laid off were able to apply for and collect unemployment. Our plan was to recall them after the stay-at-home order was lifted. However, we have found that the company in fact performs more efficiently with the reduced staff. How can we legally terminate our employment relationship with these people?"– *Susan, Wisconsin*

A: I'm glad to hear you've managed to stay open with two-thirds of your work force in these trying times. Your company is too small to be covered by the federal Worker Adjustment and Retraining Notification Act (WARN Act) or the similar Wisconsin "mini-WARN" statute that requires notice of an impending termination – you must have at least 50 employees to be covered by either law. Assuming further that you workers are employed at-will, with no promises of continued employment, you should be able to simply tell those who have been furloughed (or furloughed and returned) that you have decided to convert the temporary lay-off to a formal separation, or reduce staff size, thus ending their employment.

If the remaining ten workers, no doubt also anxious about their economic prospects in this stressful time, nevertheless become overwhelmed continuing to perform all the work that 15 performed in the past, you can begin recruiting at that time.

Must we now provide masks to employees?

Q: "Is it the responsibility of the employer to furnish masks to employees returning to work?" – *Denise, District of Columbia*

A: That will depend upon whether masks are mandatory in a particular jurisdiction and also whether local law requires employers to pay for the costs of tools used in the work or other business expenses.

In the District of Columbia, as in other state including California, the employer must pay for the cost of "tools" that the employee needs in order to perform the job, and since Mayor Bowser has mandated masks for workers in essential businesses, you should be prepared to furnish those masks to workers, although you can probably also allow them to wear their own masks if you believe those masks meet the required standards.