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Continuing Legal Education Series

Key Employment Law Considerations in the Wake of COVID-19

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Debevoise Coronavirus Checklists—Top 10 Return to Work Considerations for U.S. Employers

April 20, 2020

Employers of all sizes and industries continue to face unprecedented human resources challenges in the midst of the COVID-19 pandemic. We know that many employers are beginning to consider return to work plans, particularly now that the White House announced Guidelines for Opening Up America Again, available here. Although the details are evolving, many of the same general risks and concerns that existed at the outset of the pandemic will persist as statewide workplace shutdown orders begin to lift. It seems very likely that, at least temporarily, the costs of compliance with employment laws and health and safety guidance will increase for all employers. Here are ten employment law considerations to keep in mind when planning for an eventual return to more normal operations.

Regularly Monitor Government Guidance for Employers. The CDC, OSHA, DOL and state and local governmental authorities continue to update their COVID-19 guidance for employers, and we expect there to be additional detailed guidance issued as states plan for reopening. Links to this guidance can be found here among our links to External Resources. Governmental guidance is rapidly evolving, and it is critical for employers to stay current on developments that could impact their operations, including in the states and cities where they are located.

Prioritize Health and Safety. Take all reasonable steps necessary to ensure employee health and safety consistent with governmental guidance. Although this guidance is likely to evolve in the coming days and weeks, requirements will almost certainly include providing employees with personal protective equipment, continuing to encourage telework for certain employees or operations, applying social distancing rules within workspaces, closing common areas, implementing employee health screening and monitoring measures (such as temperature checks or other medical tests and inquiries), maintaining environmental sanitary practices at worksites and limiting

nonessential business travel. **Robust adherence to available guidance on maintaining a safe workplace will serve employers well** as they face the challenge of addressing the safety concerns of employees being asked to return to work and the potential legal claims that could be mounted if returning employees become infected.

Be Mindful of Discrimination Risks. As always, employer policies and decisions concerning the terms and conditions of employment must comply with anti-discrimination laws. Equal employment opportunity principles apply to return to work plans, including which employees to call back to work first or at all. Employers should be careful to treat all employees equally—and without regard to any legally protected characteristics—under any employer policy or practice, including with respect to call backs, telecommuting, medical inquires, reasonable accommodations and the availability of leave or other benefits. Navigating these principles, especially as they apply to older and disabled workers, remains important, even though governmental guidance on re-opening the economy generally identifies older and certain disabled workers as particularly vulnerable to the virus. Absent further government guidance, orders or regulations, **employers should not adopt blanket rules prohibiting older workers or workers with underlying health conditions from working or requiring such workers to work under different conditions than other employees**. Indeed, the U.S. Equal Employment Opportunity Commission cautioned in recently issued guidance available here that "[e]mployers should make sure not to engage in unlawful disparate treatment based on protected characteristics in decisions related to screening and exclusion."

Be Prepared to Grant Reasonable Accommodations. The recently issued White House guidelines encourage employers to strongly consider special accommodations for elderly workers and workers with underlying health conditions. **Employers must be prepared to engage in the interactive process required by the ADA with all employees who request reasonable accommodations** and to grant reasonable accommodations when warranted, while at the same time avoiding discrimination against older or disabled workers.

Make ADA-Compliant Medical Inquiries. While disability-related inquiries and medical examinations are usually prohibited under the Americans with Disabilities Act ("ADA"), COVID-19 poses a "direct threat" that has shifted the compliance requirements during the pandemic. Employers can currently measure temperatures, and indeed may be required to do so. Employers may also ask employees to disclose certain COVID-19-related health information, including why they are absent from work and whether they have virus symptoms. There is likely to be further guidance in coming days or weeks on exactly what type of screening can and should be required before a sick employee returns to work.

Protect Employee Privacy. Employers are likely to be collecting more employee medical information, test records and documentation than before the pandemic. All such information must be treated as confidential medical records and protected in accordance with the ADA and any other applicable state privacy laws. Additionally, if an employee becomes ill or exposed to COVID-19, there will be good reasons to want to share that information and use it for purposes of contact tracing, but it is also important to **maintain the confidentiality of employees' medical data as required by law**, including the medical status and identities of diagnosed employees, unless an employee expressly consents otherwise.

Comply with Federal and State Leave Laws. Assess whether an employee's leave qualifies for job-protected leave under the federal Emergency Paid Sick Leave Act (the "Sick Leave Act"), the Emergency Family and Medical Leave Expansion Act (the "EFMLA"), state law, local sick leave laws or company policy. Our client update available here describes the leave available under the Sick Leave Act and EFMLA. **Ensure that sick leave policies are consistent with current law and governmental guidance** and that employees are reminded of these policies.

Protect COVID-19 Positive Employees from Retaliation. The CDC and others have warned of the stigmatization of individuals who have tested positive for COVID-19. Employers must protect employees from discrimination and retaliation by other employees if they are known or suspected to have COVID-19. Employers must also be careful not to discriminate or retaliate against such employees for being sick or taking leave that they are entitled to take.

Be Prepared to Discipline Employees Who Refuse to Follow the Rules. There will undoubtedly be some employees who refuse or fail to follow new safety rules or who refuse to come to work even if they are not eligible for a reasonable accommodation or leave. Generally speaking, however, as discussed in our update available here, employees do not have the right to refuse to work due to health and safety concerns unless certain relatively stringent conditions are met. Employers are going to have to address employees' preferences and concerns about safety in the workplace in a way that carefully balances several competing considerations. On the one hand, employers will want to be respectful of employees' good faith concerns and must avoid retaliating against employees for raising safety concerns in a protected manner or impairing employees' rights to engage in concerted activity for their mutual aid and protection in the workplace. But, on the other hand, employers need not acquiesce to demands that will impair a return to operations and are unnecessary under the law and not warranted under current health and safety guidance. In some circumstances, discipline for rule violations will be required.

Communication is Key. Effective employee communications can often mitigate legal risks. Take steps to effectively communicate with employees, whether through regular email updates, virtual or telephonic town halls, an intranet site or memos to employees distributed at the worksite. Establish clear points of contact for employees to direct questions and concerns.

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Many of these employment issues involve legal judgments, and managers should check with human resources or internal or external counsel if there are questions about specific situations. If you have any questions or require assistance with compliance with federal and state employment laws during this challenging time, please do not hesitate to reach out.

For more information regarding the coronavirus, please visit our Coronavirus Resource Center.

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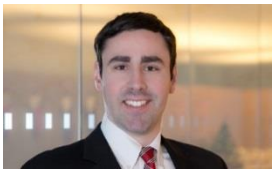

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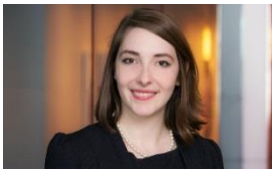

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March 22, 2020 – *Updated April 9, 2020*

FAQ re: New York State's Emergency COVID-19 Paid Sick Leave Law on Disability Insurance and Paid Family Leave

On March 18, 2020, the New York legislature passed and Governor Andrew M. Cuomo signed into law an emergency act that provides employees subjected to orders of quarantine or isolation as a result of COVID-19 with job protections, additional paid and/or unpaid sick leave, and expanded eligibility for statutory paid family leave and disability benefits.[1] These FAQs are designed to provide an overview of how New York's Emergency COVID-19 Paid Sick Leave Law (the "Law") expands entitlement to benefits under New York State Paid Family Leave ("PFL") and Disability Benefits Law ("DBL") and how insurers may be impacted. The information contained herein is current as of March 22, 2020, and is subject to change based on further regulation and guidance that may be issued in the coming days and weeks.[2]

Q: When does the Law take effect?

A: The Law took effect immediately when it was signed into law on March 18, 2020.

Q: Who is eligible to receive the expanded statutory benefit entitlements under the Law?

A: The Law generally applies to (1) employees subjected to a mandatory or precautionary quarantine or isolation order related to COVID-19 issued by the State of New York, the department of health, local boards of health, or any authorized governmental entity and (2) leave taken by an employee to care for a minor dependent child who is subjected to a mandatory or precautionary quarantine or isolation order related to COVID-19 issued by the State of New York, the department of health, local boards of health, or any authorized governmental entity.

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[1] For more information about the new sick leave requirements and job protections under New York's COVID-19 Emergency Paid Sick Leave law, please see our client update: https://www.debevoise.com/insights/publications/2020/03/new-york-adopts-sick-leave-and-job-protections.

[2] The most recent guidance from the State of New York is available here: https://www.governor.ny.gov/paid-sick-leave-covid-19-impacted-new-yorkers/emergency-covid-19-paid-sick-leave

Under the Law, employees under an otherwise qualifying quarantine/isolation order are not eligible for expanded benefits under the following circumstances:

1. *Employees employed by employers with more than 100 employees*: The Law does not provide expanded DBL or PFL entitlements for employees employed by employers with more than 100 employees as of January 1, 2020.

2. *Asymptomatic or undiagnosed remote workers*: An employee is not eligible if (1) the employee is asymptomatic or has not yet been diagnosed with any medical condition; and (2) the employee is physically able to work during the quarantine or isolation order through remote access or similar means.

3. *Recent non-business travel to countries with CDC level 2 or 3 designations after notice*: An employee is not eligible if (1) the employee is subject to a mandatory quarantine or precautionary order because the employee traveled to a country with a level two or level three designation on the CDC's travel health notice; (2) the travel was not a part of employment or at the direction of the employer; and (3) notice was provided to the employee of the CDC travel health notice and this exception to these protections.

4. *Employees who are not eligible for benefits that exceed those provided by federal law:* New York's expanded PFL and DBL benefits are only available to the extent they exceed protections provided under federal law. Under the federal Families First Coronavirus Response Act, effective April 2, 2020, employers who employ fewer than 500 employees and who are not exempt from compliance must provide 80 hours or 2 weeks of paid sick leave at full pay, up to a maximum of $511 per day or $5,110 in total. This creates an additional exception because after April 2, 2020, insurers will only be required to provide PFL and DBL benefits to employees (a) who do not meet the federal criteria or are otherwise exempt from receiving the federal benefits; (b) whose quarantine or isolation orders extend beyond the two weeks provided by federal law; or (c) whose salaries exceed the allowable amount under the federal law.

Q: What is a mandatory or precautionary order of quarantine or isolation?

A: The Law currently does not provide much guidance on what qualifies as a "mandatory or precautionary order of quarantine or isolation." However, according to definitions from the Department of Health, these terms generally refer to orders issued to individuals under the following circumstances:

- A person has tested positive for COVID-19.
- A person has been in close contact (within 6 feet) of someone who tested positive for COVID-19.

- A person has traveled to a country with a level two or level three designation on the CDC's travel health notice.

[Update as of April 9, 2020: New York has issued additional guidance on obtaining an order of quarantine/isolation. Employees may contact their local health department to obtain an order. If their local health department does not immediately provide the order, they may submit an attestation from their licensed medical provider stating that they meet the criteria described above. The employee must still submit the order from the local health department when it becomes available, which must be within 30 days.]

Q: Do municipal, state, or federal "shelter in place" orders qualify as quarantine or isolation orders?

A. Likely no. While we expect the New York Department of Labor to issue additional guidance clarifying this issue, our current interpretation is that the Law does not cover employees who are unable to work due to a "shelter in place" or "stay at home" order. Rather, as described above, the Law applies only to employees who receive an individual order directing them to quarantine or isolate as a result of a specific COVID-19 exposure risk. It is not yet clear to what extent mandatory quarantine or isolation orders will continue to be issued, but we do not believe that qualifying quarantine or isolation orders will be issued to the population at large without regard to specific COVID-19 exposure.

Also, as already discussed, employees who are able to work remotely are not eligible for PFL or DBL benefits.

[Update as of April 9, 2020: As described above, New York has since issued guidance clarifying that employees should contact their local health department to obtain an order of quarantine/isolation, confirming that the "Stay At Home" order is not such an order.]

Q: Do orders requiring businesses to close qualify as quarantine or isolation orders?

A. Likely no. An order requiring businesses to close is not a mandatory or precautionary order of quarantine or isolation, and therefore does not entitle employees to file for disability or paid family leave.

For example, on Friday, March 20, 2020. Governor Cuomo issued an Executive Order that requires all non-essential businesses to close all in-office personnel functions by Sunday, March 22, 2020. This order does not qualify as a quarantine or isolation order.

However, employees affected by business closures are entitled to apply for unemployment benefits.

[Update as of April 9, 2020: As described above, New York has since issued guidance clarifying that employees should contact their local health department to obtain an order of quarantine/isolation, confirming that the "Stay At Home" order is not such an order.]

Q: What amount of PFL and DBL benefits are eligible employees able to receive under the Law?

A. Employees are eligible to be paid their full average weekly wages, subject to a cap of $840.70 per week for PFL benefits and $2,043.92 per week for DBL benefits, for a combined total maximum of $2,884.62 per week. The practical impact of the cap is that an employee who earns $150,000 per year or less will receive 100% of their base salary in the form of PFL and DBL benefits.

However, as described above, PFL and DBL benefits are only available to the extent the DBL and PFL benefits exceed protections provided by federal law or regulations.

[Update as of April 9, 2020: New York has clarified that PFL benefits will be paid at 60% of an employee's average weekly wage, up to the cap. Then, DBL benefits will cover the remainder of the employee's average weekly wage, subject to the cap.]

Q: Do employees receive DBL and PFL benefits concurrently?

A. Yes, eligible employees will receive both paid family leave and disability benefits concurrently. After exhausting the paid sick leave provided by the Law, an employee can submit an application that applies to both paid family leave and disability benefits. In practice, an employee's total benefit will first be covered by paid family leave to a maximum of $840.70, and the remaining difference from the employee's regular weekly wage will be covered by disability to a maximum of $2,043.92, for a total weekly maximum benefit of $2,884.62 per week.

Q: Does the Law raise the maximum allowable disability benefit for all circumstances of disability?

A. No. The statute raises the maximum benefit for disability to $2,043.92 per week *only* for disability leave taken in response to a mandatory or precautionary quarantine or isolation order. The maximum disability benefit is still $170.00 per week for disability leave taken for any other reason.

Q: Can an employee use PFL to care for a family member suffering from COVID-19?

A: Yes, although this is not addressed in the Law, under existing PFL law, an employee may use PFL to care for a family member with a serious health condition. An employee does not need to provide a mandatory or precautionary order of quarantine or isolation to use PFL for family care. Family care leave will be paid at the previously existing statutory rates for up to a 10-week period.

Q: When is an employee eligible to start receiving PFL and DBL benefits under the Law?

A: The usual waiting period to collect PFL and DBL benefits is eliminated for purposes of this Law. Employees who are eligible for PFL and / or DBL benefits may begin collecting benefits on their first day of quarantine if they are not otherwise entitled to paid leave. The following chart summarizes the timing for PFL and BFL benefits.

Insured's Number of employees (as of January 1, 2020)	**Paid sick leave paid by employer**	**Duration of PFL and DBL Benefits**
100 or more	14 days	Law does not address
11 to 99	5 days	Remaining period of quarantine or isolation order after 5 days of employer- paid sick leave
10 or fewer (with net income greater than $1M in prior tax year)	5 days	Remaining period of quarantine or isolation order after 5 days of employer-paid sick leave
10 or fewer (with net income of $1M or less in the prior tax year)	None	Entire period of quarantine or isolation order

Q: How long are employees eligible to receive PFL and DBL payments under the Law?

A: Employees are eligible to receive PFL and DBL benefits for the duration of their quarantine or isolation order. Most quarantine orders last for a period of 14 days. [Update as of April 9, 2020: We note that quarantine orders for symptomatic employees likely last for seven days after symptoms began, or 3 days after a fever has ended.]

Q: Does the Law apply retroactively to provide PFL and DBL benefits to employees subjected to quarantine or isolation orders prior to March 18, 2020?

A: The Law is effectively immediately, and individuals currently under a quarantine or isolation order that was issued prior to the enactment of the statute are eligible for benefits.

Q: How do eligible employees request payment of DBL and PFL benefits?

A: Eligible employees must submit the following to their employer's disability and paid family leave insurance carriers within 30 days after the start of the employee's leave:

- Completed COVID-19 PFL / Disability Request Forms (including employer attestation)
- The mandatory or precautionary quarantine or isolation order

An insurer is not permitted to deny a request for benefits solely because the employer's sections of the application are not completed. However, employers may act as a gatekeeper to minimize claims by ineligible employees.

Q: How soon must insurance carriers respond to requests for payment of DBL and PFL benefits?

A: Insurance carriers must pay or deny claims within 18 calendars days of receiving the completed request.

Q: What happens if insurance carriers do not respond within 18 calendar days to a request for DBL or PFL benefits?

A: Employees may file a request for arbitration with National Arbitration and Mediation (NAM) if the insurance carrier does not pay or deny benefits within 18 calendar days of the request.

Q: What can employees do to challenge a denial of benefits?

A: An employee may file a request for arbitration with National Arbitration and Mediation (NAM) to challenge an insurance carrier's decision to deny benefits.

Q: Does the Law provide any assistance for insurers who will now have to cover the additional disability benefits?

A. Yes. The Law provides that the Superintendent of Financial Services will issue regulations to establish a risk adjustment pool and risk limits to stabilize member claims and protect insurers from disproportionate adverse risks. Members of the pool will contribute to the cost of losses experienced by any other member of the pool that are in excess of the risk limit. Contributions made by members of the pool to offset the losses of another member will be fully repaid with reasonable interest through a mechanism and period of time to be determined by the Superintendent of Financial Services.

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Please contact us if you have additional questions.

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Employer Considerations Related to Health and Safety of Workers during Covid-19 Outbreak

4/2/2020

Roughly three in four Americans currently face some form of a "stay-at-home" order restricting personal movement and the normal operation of business. However, numerous companies remain open for business, whether deemed "essential," through new remote and telework arrangements, or in the absence of a stay-at-home order. Many of their employees continue to report to workplaces across the country, helping, for instance, to keep the stores open, the lights running, and others safe.

Many employers have questions about navigating employees' health and safety concerns, including **(1) how to address employees who are reluctant to come to work because of fear of infection** and **(2) whether employers may face liability if employees who come to work get sick**. Below, we address these questions and note legal and practical considerations as well as best practices recommendations for employers facing them.

In all events, employers who continue to operate an active workplace should think seriously about ways in which they can minimize workplace exposure to COVID-19 and help maintain the health and safety of their workforce. Most critically, employers should ensure that they are closely following guidance from the Centers for Disease Control and Prevention ("CDC"), Occupational Safety and Health Administration ("OSHA"), and local authorities concerning how best to prepare workplaces for the COVID-19 outbreak and reduce the risks of transmission. They should also regularly communicate with employees about the steps they are taking to foster a healthy work environment and be responsive to specific employee health or safety concerns.

WHAT IF AN EMPLOYEE REFUSES TO REPORT TO WORK DUE TO FEAR OF CONTRACTING COVID-19?

Amid increased community transmission and "stay-at-home" orders, employees may fear contracting the virus if they leave home and may refuse to report to a workplace as required. **Generally speaking, however, employees do not have the right to refuse to work due to health and safety concerns unless certain relatively stringent conditions are met.**

Under OSHA guidance, which applies to most private-sector employers, employees are entitled to refuse to work only if they believe in good faith that they are in "imminent danger." Specifically, a work refusal is protected only if: (1) where possible, the employee has asked the employer to eliminate the danger and the employer failed to do so; (2) s/he genuinely believes that an "imminent danger" exists; (3) a reasonable person would agree that there is a real danger of death or serious injury; and (4) regular enforcement channels are not sufficient. "Imminent danger" requires an "immediate or imminent" "threat of death or serious physical harm" or "a reasonable expectation that toxic substances or other health hazards are present and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency."

This inquiry is fact- and context-specific, turning on the nature and imminence of the danger under the circumstances and the reasonableness of the employee's belief. As a result, many workplaces taking precautionary measures against the spread of COVID-19 are unlikely to meet the elements required for an employee to refuse to work, and an employee's blanket refusal to come to work due to a general fear of contracting COVID-19, without more, will in many contexts be unlikely to meet the OSHA standard. Depending on the nature of the work and the workplace, however, there may be some contexts in which employee concerns about COVID infection are more likely to meet the OSHA standard. If an employee refuses to work due to unfounded health and safety concerns, the employee may be subject to discipline, including termination.

However, employers should tread carefully, because they could face an action for retaliation for taking disciplinary action against an employee who refuses to work due to health and safety concerns. In particular:

- **OSHA**. OSHA prohibits retaliation against employees refusing to perform work under the conditions described above. There is no private right of action for such retaliation claims, however; rather, employees must file a complaint within thirty days with OSHA, which can then bring an enforcement action.

- **National Labor Relations Act ("NLRA")**. The NLRA protects against employer retaliation for work refusals regarding unsafe work if the work refusal is made by a non-supervisor employee in good faith and is "concerted," i.e., made by two or more employees acting "in concert," reasonably directed at enforcing a right under a collective bargaining agreement, or made with or on the authority of other employees. (For union employees, the right to refuse work is waived by a contractual no-strike clause unless there is objective evidence of "abnormally dangerous conditions" for the particular workplace). An employee may file a charge with the NLRB concerning the retaliation within 6 months. Notably, this protection is broader than under OSHA in that it does not require the refusal to be objectively reasonable. It is also narrower than OSHA insofar as it protects only "concerted activity."

- **State Laws**. Some states may provide additional protections for employees refusing to work due to safety concerns. For instance, in California, Cal/OSHA protects an employee's right to refuse work that would violate a Cal/OSHA health or safety regulation where the violation would create a "real and apparent hazard" to employees. And in New York, Section 740(2) of the Labor Law provides a cause of action for whistleblowers who refuse to participate in an activity in violation of law, rule or regulation, "which violation creates and presents a substantial and specific danger to the public health or safety."

As a practical matter, **employers should take all reasonable steps available to help ensure the safety of employees under the circumstances**, in particular by following all federal, state, and local orders governing permitted operation of business and all federal, state, and local guidance concerning best practices for personal and workplace safety during the COVID-19 outbreak. They should communicate those measures to employees regularly to make sure employees know about the steps taken and can potentially provide input or raise specific concerns. If all available steps are taken to help ensure safety and employees still refuse to come to work, an employer can consider discipline. But employers will want to consider these potential legal risks as well as the broader consequences of such discipline on the workplace, such as effects on company morale and permanently losing trained or valuable workers.

When faced with employee refusal to work due to COVID-19 fears, employers should also **remember their obligations under the ADA to reasonably accommodate employees** who have disabilities that put them at greater risk if they contract COVID-19. Employers should not ask an employee to disclose an underlying condition; however, employees with underlying medical conditions or disabilities may request accommodation under the ADA. If requested, employers may seek to verify the disability and that an accommodation is needed, and they should consider whether a reasonable accommodation can be reached or whether such accommodation would pose

an undue hardship to the business under the current circumstances. Currently, an employer is not obligated to provide reasonable accommodation if the employee lives in the same household as someone at greater risk due to a disability, but the employer should ensure it is treating all similarly situated employees similarly.

WHAT IF AN EMPLOYEE CONTRACTS COVID-19 WHILE CONTINUING TO WORK? WHAT POTENTIAL LIABILITIES DOES AN EMPLOYER FACE?

If an employee who is continuing to work in the workplace contracts COVID-19, employers should first and foremost **take steps to protect the employee, other employees, and the workplace**. The employee should be instructed to stay home while sick, until the CDC's criteria for discontinuing home isolation are met. Employers should notify relevant co-workers of possible exposure to COVID-19 in the workplace, while maintaining the confidentiality of employees' medical information, including the medical status and identities of diagnosed employees. Employers should also follow CDC disinfecting and cleaning recommendations, and should consider whether additional cleaning or protective measures for the workplace are appropriate.

Should an employee contract COVID-19, it is possible that employers may face actions or claims for liability alleging that the employee contracted the virus in the workplace due to the employer's failure to maintain a safe work environment. These actions may take a number of forms, including enforcement actions by OSHA, claims for workers' compensation, or civil actions for negligence.

Below, we briefly discuss those potential sources of liability as well as ways to mitigate them. Ultimately, the advice remains the same: **employers should make sure they are following applicable health guidance, abiding by relevant laws and orders, and taking steps to enhance workplace safety and address related employee concerns**. Employers who can show that they acted in good faith to reduce the risk of transmission and protect workers' health will be best positioned to weather any legal action even in the face of bad outcomes.

OSHA

Although there is no specific OSHA standard governing COVID-19, OSHA generally requires employers to provide employees with a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." Additional OSHA standards, such as those governing PPE or Bloodborne Pathogens, may apply in certain workplaces. Violations of OSHA, including of this "general duty" clause, are subject to enforcement actions and civil penalties, including

additional fines for willful or repeated violations. Willful violations resulting in death can also give rise to criminal liability.

Employers should thus closely follow and take steps to ensure compliance with relevant OSHA standards and guidance. In particular, employers should follow OSHA's Guidance on Preparing Workplaces for COVID-19 and keep abreast of updates to OSHA and CDC guidance for businesses. Employers should also follow OSHA recordkeeping and reporting requirements as appropriate for work-related cases of COVID-19.

Workers' Compensation

Workers' compensation claims and procedures vary from state to state. Generally, however, workers' compensation laws require an employee to prove (1) that s/he contracted the illness/disease in the course and scope of his/her employment and (2) that the illness/disease was caused by conditions peculiar to his/her employment. Workers' compensation laws generally do not cover "the ordinary diseases of life," and some states specifically exclude from coverage contagious diseases resulting from exposure to fellow employees or to which the employee would have been equally exposed outside of employment.

Although workers' compensation claims are fact-specific and determined on a case-by-case basis, it seems likely that many employees will be unable to claim workers' compensation for contracting COVID-19. Employees in many types of workplaces will likely struggle to establish that contracting the virus was a risk peculiar to their employment rather than a risk borne by the public generally, and/or that COVID-19 is not an "ordinary disease of life." Employees may also have difficulty establishing that they contracted the virus in the course of their employment rather than in another setting.

Those circumstances and the availability of workers' compensation may be different for certain types of workers, however, such as healthcare workers and first responders, who face increased risk as a result of their occupation. At least one state (Washington) will now permit workers' compensation protection for these types of workers who contract COVID-19.

Employers should again make sure they are taking all reasonable steps to prevent transmission in the workplace, thus decreasing the likelihood that an employee contracted the virus at work and that the risk of contracting the virus would be seen as peculiar to the employment.

Negligence

Where workers' compensation applies, it typically provides the exclusive remedy for the workplace harm, subject to limited exceptions, such as intentional or willful conduct by the employer. Where workers' compensation does not apply, however, employees may bring civil actions for negligence. Generally speaking, to bring a claim for negligence, a plaintiff must show that the employer breached its duty of care and that such breach caused harm to the employee.

Although negligence actions are often preferred by plaintiffs, as they offer the prospect of greater recovery than in the workers' compensation system, negligence actions in the context of COVID-19 are likely to face a number of barriers.

First, it may be difficult, depending on the specific facts, to show negligence—breach of the duty of care—on the part of the employer. If an employer has taken reasonable responsive measures and is generally following OSHA/CDC guidance, it will have a strong basis to argue that it was not negligent in maintaining the workplace and should not face liability. Employers will also need to ensure that they are abiding by all statutes, regulations, and executive orders concerning COVID-19, as violation of any such authorities may give rise to a finding of negligence per se, under which a plaintiff can prove negligence by showing that a statute or regulation intended to promote public safety was violated and resulted in harm.

Second, employees may have difficulty establishing that the alleged negligence caused the employee to contract the virus. Given the widespread nature of the outbreak, there will likely be strong arguments that the employee contracted the virus in other settings or as a result of unavoidable transmission despite reasonable precautions.

Both negligence and causation analyses, however, are fact- and context-specific, and thus could require significant time and discovery to rebut. Again, as a practical matter, the best way to discourage the bringing of negligence claims, and to successfully defeat any such claims brought, is to have a clear and strong record of taking employees' health and safety seriously and following all applicable federal, state, and local guidance on the COVID-19 outbreak.

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For more information regarding the coronavirus, please visit our Coronavirus Resource Center.

Please do not hesitate to contact us with any questions.

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Legal Considerations for Layoffs, Furloughs, and Reduction of Workforce in the Wake of COVID-19

March 31, 2020

As the COVID-19 pandemic continues to unfold, the economic impact on businesses is evolving. In response to the significant additional pressures on employers in an unsettled economy, many businesses are continuing to consider or implement various forms of workforce reduction and factoring into their decision-making the scope of the federal relief available to them and their employees under the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"). For more detail on the CARES Act, please refer to our update available here.

Many companies are choosing from a menu of options to control labor costs, including layoffs, furloughs, or temporary reductions in work hours or wages, based on their current or future business needs. Layoffs are a means of permanently eliminating positions; furloughs may be best if the employer lacks the resources currently to pay its employees but intends to recall them after the current economic slowdown; and reducing work hours may be appropriate for employers who need to reduce costs while continuing their operations. Some employers may ultimately deploy a combination of these strategies depending on their business needs.

When evaluating the options, companies should stay mindful of certain legal requirements and risks applicable to layoffs, furloughs, and reducing hours for employees. Below is a summary of key federal and local laws and legislative developments (including recent laws), as well as practice points, to consider when contemplating layoffs, furloughs, or reductions of work hours. Employers will also want to consider the benefits that may be available to them and to their employees under the CARES Act when choosing which approach is best for their specific circumstances.

Anti-Discrimination Requirements. No matter how an employer decides to proceed with employment transition decisions in this uncertain time, under federal, state, and

local anti-discrimination laws, an employer must act without regard to any legally protected characteristic, such as race, ethnicity, national origin, age, religion, sex, gender, or disability. Therefore, employers should treat all similarly situated employees the same way or have a legitimate business reason for treating employees differently (i.e., performance criteria, salary grades, etc.). Employers need to examine carefully any potential criteria that may unintentionally have a disproportionate impact on any particular demographic group.

The WARN Act. The federal Worker Adjustment and Retraining Notification Act ("WARN Act") requires covered employers with 100 or more full-time employees to provide 60 days' advance notice (or pay in lieu of notice) to workers impacted, unions, and government officials prior to a plant closing (layoff of 50 or more full-time employees during any 30-day period at a single site of employment) or a mass layoff (layoff at a single site of employment of 500 or more employees during a 30-day period or layoff of 50-499 employees if they make up at least 33% of the employer's active workforce). For this purpose, a "layoff" occurs when a company temporarily suspends or permanently terminates a person's employment or if the company reduces an employee's work hours more than 50% in each month of any six-month period. WARN requirements may also be triggered if the layoff thresholds are met over a 90-day period as a result of a series of smaller layoffs.

Importantly, for those employers considering a furlough or temporary action, the federal WARN Act will not apply if employees are impacted for 6 months or less.

Although the federal WARN Act contains a force majeure clause, which may be interpreted to apply to the current pandemic, employers should be mindful that the clause does not explicitly address exceptions for epidemics and pandemics, and courts have not yet interpreted the clause to cover pandemics. However, the WARN Act permits shortened notice to impacted employees if terminations result from circumstances not reasonably anticipated 60 days before action was taken. Employers are still required to give written notice with as much advance warning as possible along with an explanation for the shortened notice. If an employer violates the WARN Act, it is liable to each employee for an amount equal to back pay and benefits for the period of violation up to 60 days and may face a fine of up to $500 per day of violation for failing to provide notice to the local government.

"Mini" WARN Acts. In addition to the federal WARN Act, several states have their own mini-WARN Acts with similar requirements, including California, Hawaii, Illinois, Iowa, Maine, New Hampshire, New Jersey, New York, Tennessee, Vermont, and Wisconsin. Below are descriptions of a few examples from key states:

- **New York's** mini-WARN Act requires 90 days' advance notice to certain agencies and parties when there is a mass layoff or reduction in work hours. It also applies to a larger number of employers than the federal WARN Act, as it regulates notice to employers with as few as 50 employees. The notice requirement may be reduced if employment loss is caused by unforeseeable business circumstances such as an "unanticipated and dramatic economic downturn" or a "government ordered closing of an employment site without previous notice."

- **California's** Cal-WARN Act requires 60 days' advance written notice to employees affected by termination or mass layoff. On March 17, 2020, California's governor issued an executive order relieving employers of some of the notice requirements under the Cal-WARN act, on the condition that the employer gives as much written notice as is practicable.

Employers should note that, unlike the federal WARN Act, some state mini-WARN Acts do not have exceptions for temporary layoffs. Accordingly, notice would potentially be triggered even in the event of a temporary furlough. Employers are encouraged to seek counsel when assessing these various statutes, as WARN Act requirements are dependent on particular facts and circumstances.

Wage and Hour Law Compliance. Businesses considering temporary furloughs or reductions in hours should review the Fair Labor Standards Act ("FLSA") and analogous state labor laws to maintain compliance. Employees who are non-exempt under the FLSA must be paid only for time actually spent working. Exempt employees, however, are entitled to their full weekly salary for any work week in which they perform any work. Even answering an email or responding to a phone call could violate the "no work" rule. When implementing a furlough or hours reduction, employers should place exempt employees on furloughs in at least full-week increments. Additionally, employers should establish proper systems to ensure that exempt employees are not required to work, and do not work, during furlough. To the extent salary reductions are contemplated for exempt employees, employers should consider, among other things, any notice requirements under state or local law, and whether the salary reduction would cause an employee's wages to decline below the applicable threshold for exemption under FLSA requirements (currently $684 per week). The employer should also consider the impact, if any, of a salary reduction on the affected employee's entitlement to pension accrual or 401(k) plan matching contributions, or benefits under any applicable severance arrangements.

Management Employee and Employment Contract Considerations. For management-level employees, employers should consider employees' contractual rights under employment agreements or offer letters, severance, equity compensation, or similar plans before changing any positions or reducing compensation or benefits. In

particular, a "good reason" or similar constructive discharge definition in such a contract could limit the employer's right to reduce a covered employee's salary, bonus opportunities, or employee benefits, or to cause a diminution of duties (which is often included in these provisions). Further, in light of current business pressures, employers entering into any new management arrangements (especially if they include "good reason" arrangements) might wish to expressly allow across-the-board compensation or benefit reductions. Before taking any of these actions for employees with contractual rights, an employer should assess whether an employee's consent is required to avoid a breach of contract claim.

If an employer maintains a severance policy, the policy should be reviewed to confirm whether severance payments and benefits intended for a permanent reduction in force may also be triggered by a furlough. Further, if the employer has reserved the right to amend such policy, the employer might consider amending the policy before taking any employment actions that would trigger payment under the policy.

Unemployment Benefits. Businesses should review individual states' unemployment rules to determine how their policies may impact an employee's ability to obtain unemployment. For example, employees who are furloughed or have their hours reduced may be eligible for unemployment benefits. Many states including New York have waived the non-benefit period in light of the influx of potential claims resulting from the COVID-19 pandemic, and other states have been incentivized to do so by certain provisions of the CARES Act that shift the cost of the first week of benefits to the federal government. In addition, the CARES Act expands unemployment benefits for employees in several ways, including by providing employees who are otherwise eligible for unemployment benefits under state law with an additional $600 per week, through July 2020.

Medical Benefits. During a furlough, employees may be eligible to retain their medical benefits, depending on the terms of the employer's plans. Businesses must review their individual plan documents to determine any potential eligibility issues. Employers should also be mindful of Affordable Care Act ("ACA") implications of their options. For example, if employees are in a stability period, they must remain eligible for coverage as full-time employees even if on furlough and must be offered affordable coverage to avoid exposure under the employer mandate provisions of the ACA. Employees would still be responsible for paying their share of premiums. If the condition of a stability period does not apply, employees will generally lose eligibility under the plan due to reduction of hours, unless the plan documents provide otherwise. Depending on the action implemented, employees may be eligible for COBRA. For those considering a reduction in hours, review the applicable health plan documents to determine if a minimum number of hours is required to retain eligibility under the plan.

For those employees whose hours are reduced to below the minimum hours, they may be entitled to elect COBRA benefits.

Sick Leave Under Emergency Laws. The federal government recently passed the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act, under which covered employers are required to provide paid sick and family leave to employees for certain reasons related to COVID-19. Many states have also passed similar laws. These laws generally do not require employers to provide paid leave to employees who have been furloughed; however, employers must be careful to ensure that any adverse employment decision (such as a furlough, reduction in hours, or layoff) is made without regard to an employee's use or anticipated use of paid leave, as such a decision would violate the anti-retaliation provisions of the laws.

Paid Time Off. Certain states may require employers to pay out unused vacation time or paid time ("PTO") at termination of employment or at the outset of a furlough. Employers should review applicable state law and their PTO policies to determine how to administer PTO upon a layoff or furlough period. Employers may also wish to consider freezing the use and accrual of PTO during a furlough period.

Other Benefits. Employers offering 401(k) plans should review the individual plan rules to determine any potential impact on eligibility, contributions, and notice requirements. Sufficiently larger reductions in the workforce could trigger a partial termination that would require accelerated vesting of employer contributions for the affected workers; whether a partial termination is triggered is based on facts and circumstances. Employers should expect an increase in the number of employees seeking to take loans from their 401(k) accounts, and be prepared to answer employee questions regarding loan repayment of existing loans during furlough or layoff periods. Businesses should also assess any potential impact on ERISA's non-discrimination testing provisions.

Moreover, employers should consider potential impacts on employees' flexible spending accounts and health savings accounts as well as disability and life insurance benefits. All of these considerations are fact-specific inquiries that should be reviewed with counsel.

Prior to implementing layoffs, furloughs, or reductions in force, employers should seek legal advice regarding the particular facts and circumstances of their business and the necessary employee notification requirements. Any of these decisions involve a myriad of federal and state laws, including the federal WARN Act, one or more state WARN Acts, federal and state antidiscrimination laws, COBRA, ERISA, ACA, FLSA and state unemployment insurance programs. Early consultation with legal and human resource professionals can ensure the design and implementation of the right program for the business.

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For more information regarding the coronavirus, please visit our Coronavirus Resource Center.

Please do not hesitate to contact us with any questions.

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New York Adopts Sick Leave and Job Protections for Employees under Quarantine and Isolation Orders Due to COVID-19

March 20, 2020

On March 18, 2020, the New York legislature passed and Governor Andrew M. Cuomo signed into law an act requiring New York employers to provide sick leave and job protection to employees subjected to orders of quarantine or isolation as a result of COVID-19. **The law goes into effect immediately.**

COVID-19 SICK LEAVE REQUIREMENTS AND JOB PROTECTIONS

- **Protected Employees** are those subjected to mandatory or precautionary quarantine or isolation orders issued by the State of New York, the department of health, local boards of health or any authorized governmental entity due to COVID-19.

- **Sick Leave Requirements.** Private employers must provide ***additional*** sick leave benefits —(i.e., provided without loss of the employee's existing accrued sick leave) —to these protected employees as follows:

Number of employees (as of January 1, 2020)	Paid sick leave	Unpaid sick leave	Paid family leave and disability benefits
100 or more	14 days	Not specified	Not specified
11 to 99	5 days	Remaining period of quarantine or isolation order	Remaining period of quarantine or isolation order
10 or fewer (with net income greater than $1 million in prior tax year)	5 days	Remaining period of quarantine or isolation order	Remaining period of quarantine or isolation order
10 or fewer (with net income of $1 million or less in prior tax year)	None	Duration of quarantine or isolation order	Duration of quarantine or isolation order

- **Exceptions:** An employee who is subject to a quarantine or isolation order will be ineligible for the above benefits in the following circumstances:

  - **Asymptomatic or undiagnosed remote workers.** An employee is ineligible if (1) the employee is asymptomatic or has not yet been diagnosed with any medical condition; and (2) the employee is physically able to work during the quarantine or isolation order through remote access or similar means; or

  - **Recent nonbusiness travel to countries with CDC level 2 or 3 designations after notice given by employer.** An employee is ineligible for paid benefits if (1) the employee is subject to a quarantine or isolation order because the employee traveled to a country with a level 2 or level 3 designation on the CDC's travel health notice; (2) the travel was not a part of employment or at the direction of the employer; and (3) notice was provided to the employee of the CDC travel health notice and this exception to the additional job protections and sick leave requirements. However, employees who fall under this exception will be eligible to use accrued leave provided by the employer and/or unpaid sick leave for the duration of the employee's quarantine or isolation order.

- **Job Protections.**

  - **Job Restoration.** Upon return to work, an employee must be restored to the same position of employment held prior to the leave with the same pay and other terms and conditions of employment.

  - **Protection from Discrimination and Retaliation.** Employers may not discharge, threaten, penalize or otherwise discriminate or retaliate against any employee as a result of leave taken pursuant to the law.

- **New York Paid Family Leave and Disability Benefit.** After paid leave is exhausted, employees may use paid family leave (PFL) or disability benefits under New York law for the period of quarantine or isolation. These benefits may be payable concurrently.

  - **NY PFL.** Employees may use paid family leave as a result of a mandatory or precautionary order of quarantine or isolation due to COVID-19 or to provide care for a minor dependent child of the employee who is subject to such an order. Paid family leave is capped at $840.70 per week.

  - **NY Disability Benefits.** An employee will be considered disabled under the law if the employee is unable to perform the regular duties of employment or other employment offered by the employer as a result of a mandatory or precautionary

order of quarantine or isolation due to COVID-19. New York disability benefits under these conditions are capped at $2,043.92 per week.

- **Interaction with Federal Law.** These provisions are available to employees only to the extent that they exceed similar protections and provisions enacted by federal law or regulations in response to COVID-19, including under the recently enacted federal Emergency Paid Sick Leave and Medical Leave Expansion Acts. For more information about these laws, see our client update: https://www.debevoise.com/-/media/files/insights/publications/2020/03/20200319-coronavirus-response-act-signed-into-law.pdf.

ACTION ITEMS FOR NEW YORK EMPLOYERS

Covered employers should immediately comply with the law:

- Assess how the newly mandated requirements interplay with current sick leave policies and federal requirements;
- Prepare to communicate with employees and respond to employee questions about new benefits that may be available to them under the law; and
- Monitor for additional regulatory guidance from the New York commissioner of labor.

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Coronavirus Response Act Signed Into Law: Employers' New Obligations Regarding Paid Sick Leave and FMLA Amendments

March 19, 2020

On March 18, 2020, the Senate passed and President Trump signed into law the Families First Coronavirus Response Act (H.R. 6201). In recognition of the unique challenges faced by the nation in the wake of COVID-19, H.R. 6201 is "phase two" of a series of stimulus packages intended to provide relief to individuals and businesses. It will provide free testing for COVID-19, increase Medicaid funding, provide more resources for food stamps and expand unemployment insurance.

Among the components of this comprehensive stimulus package are the Emergency Paid Sick Leave Act (the "Sick Leave Act") and the Emergency Family and Medical Leave Expansion Act (the "Emergency FML Act"), which will become effective April 2, 2020 and will remain in effect until December 31, 2020. Under these new laws, employers with fewer than 500 employees[1] must provide two weeks of paid time off to workers if they are unable to work due to COVID-19 and up to 12 weeks of paid leave for specified reasons related to the virus, subject to certain caps. Covered employers will be eligible for new tax credits intended to offset the costs associated with compliance.

EMERGENCY PAID SICK LEAVE ACT

- The Sick Leave Act requires a covered employer to provide employees with paid sick time to the extent an employee is unable to work—or telework—because he/she:
    - is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;

[1] The Secretary of Labor has the authority to issue regulations to exclude from coverage certain health care providers and emergency providers from the definition of eligible employees and to exempt small businesses of fewer than 50 employees when the imposition of such requirements would jeopardize the viability of the business as a going concern. Additionally, under the Emergency FML Act, employers of health care providers or emergency responders may elect to exclude such employees. We expect the U.S. Department of Labor to issue further guidance in the coming weeks.

- has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- is caring for an individual (even a non-family member) who is either subject to a quarantine or isolation order or has been advised to self-quarantine;
- is caring for a son or daughter if his/her school or place of care has been closed or the child care provider is unavailable, due to COVID-19 precautions; or
- is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

- **Employers Covered**: This provision applies to employers with **fewer than 500 employees**.
- **Duration of Benefits:** For full-time employees, employers are required to provide **80 hours** of paid sick leave. For part-time employees, employers are required to provide an amount equal to the average number of hours an employee works over **two weeks**.
- **Required Wages:** Sick leave is to be paid at the usual pay rate, subject to a cap of $511 per day and $5,110 in the aggregate; or two-thirds of the employee's usual pay rate, subject to a cap of $200 per day and $2,000 in the aggregate for leave related to a family member, other individual, or an employee's other qualifying condition.
- **Current Policies and Carryover:** These benefits are in addition to any paid sick leave currently provided by employers, and they will not carry over to the following year. Employers may not require employees to use paid time off under the employer's existing policies before using paid time off under the Sick Leave Act.
- **Notice Requirement:** Employers are required to post notice of these benefits.
- **Timing:** These provisions will become effective within 15 days after enactment, which is April 2, 2020, and will remain in effect until December 31, 2020.

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

- The Emergency FML Act temporarily amends and expands the Family and Medical Leave Act ("FMLA") to provide up to **12 weeks** of leave "because of a qualifying need related to a public health emergency."

- **Employers Covered**: This provision applies to employers with **fewer than 500 employees**.

- **Employees Covered**: This provision only applies to employees who have been employed for at least **30 days**.

- **Reason for Leave:** Covered employees are entitled to leave to care for their children under 18 years of age whose school or childcare provider has been closed or becomes unavailable due to COVID-19.

- **Unpaid Period**: The first **10 days** for which an employee takes family leave may be unpaid. During this time, an employee may substitute accrued vacation, personal or sick leave for unpaid leave. For the remaining period of leave, the employer is required to pay at least **two-thirds of the employee's regular rate,** subject to a cap of $200 per day or $10,000 total. Employees who work an irregular schedule are paid based on the average hours worked for the prior six months. Irregular-hour employees who have worked for less than six months are paid based on the average number of hours reasonably expected at the time of hiring. These employees are also subject to the above cap.

- **Job Restoration**: Covered employers with 25 or more employees are still subject to the FMLA's requirements for restoring employees to their positions. Covered employers with fewer than 25 employees are also generally required to reinstate employees subject to certain conditions.

- **Timing**: These provisions will become effective within 15 days after enactment, which is April 2, 2020, and will remain in effect until December 31, 2020.

TAX CREDITS

- To compensate covered employers required to provide sick and medical leave benefits under the new law, the federal government is providing refundable tax credits against the employer portion of Social Security taxes.

- Employers will receive a tax credit equal to 100% of qualified sick and family leave wages paid by the employer. The tax credit for qualified sick leave wages is limited to $511 per day (or $200 for those caring for others or for an employee's other qualifying condition) and is limited to 10 days per employee. For qualified family leave, employers are entitled to a tax credit of up to $200 per day for each employee and is limited to $10,000 in the aggregate.

- Treasury Secretary Steven Mnuchin has represented that the Department of the Treasury will advance funds to employers to meet the paid sick-leave requirements using funds deposited with the Internal Revenue Service. For employers without enough taxes to use, the Department would nevertheless advance funds.[2]

ACTION ITEMS FOR EMPLOYERS

Covered employers should immediately begin planning to comply with the Sick Leave Act and the Emergency FML Act by taking the following initial steps:

- Consider how the newly mandated benefits interplay with current sick leave and FMLA leave policies and any more generous state or local leave laws;

- Prepare to communicate with employees and respond to employee questions about new benefits that may be available to them under the law;

- Monitor for a model employee notice and additional guidance from the U.S. Department of Labor on compliance with the new law; and

- Consider consulting with an accountant to plan for the financial and accounting treatment of the additional paid leave benefits and associated tax credits.

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Please do not hesitate to contact us with any questions.

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[2] https://www.wsj.com/articles/u-s-treasury-to-help-advance-funds-to-employers-for-paid-sick-leave-11584275421.

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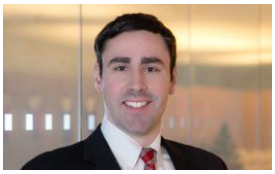

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U.S. Legal Considerations for Remote Work Arrangements in the Wake of COVID-19

March 17, 2020

Workplaces are changing rapidly in response to COVID-19 in order to ensure the health and safety of companies' employees, clients and communities while sustaining the core business. One key development has been a surge in **telework and remote work arrangements**, with the aim of helping to "flatten the curve," or limit and slow transmission of the virus through social distancing. Remote work arrangements can thus provide a useful tool to limit COVID-19 risk—but they can also pose legal risks or challenges to which companies should stay alert.

Government agencies have begun actively encouraging employers to develop remote work policies and programs. For instance, in its *Interim Guidance for Businesses and Employers*, the CDC expressly asks employers to explore "policies and practices, such as flexible worksites (e.g., telecommuting) . . ., to increase the physical distance among employees."[1] Similarly, OSHA's *Guidance on Preparing Workplaces for COVID-19* recommends "[m]inimizing contact among workers, clients and customers" by means of "virtual communications and implementing telework if feasible."[2] The DOL has likewise made clear that employers "may encourage or require employees to telework as an infection-control strategy,"[3] and the EEOC has agreed that "[t]elework is an effective infection-control strategy."[4]

Companies confronting COVID-19 are thus strongly encouraged to consider promoting or facilitating remote work arrangements where possible. In doing so, however, they should stay mindful of **certain legal risks and challenges** posed by teleworking programs, particularly when implementing new policies quickly or for workplaces unfamiliar with remote work. Below are a few **key reminders and practice points for developing remote work arrangements**:

Be Mindful of Discrimination Risks. A remote work policy cannot treat employees differently on the basis of any protected characteristic, such as age, disability or

1 https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html
2 https://www.osha.gov/Publications/OSHA3990.pdf
3 https://www.dol.gov/whd/healthcare/flu_FLSA.htm
4 https://www.eeoc.gov/facts/pandemic_flu.html

perceived disability status, or national origin. Federal, state and local laws against discrimination in employment remain in full effect, so employers should not, for instance, ask only those over a certain age, those with pre-existing conditions or those from certain countries to work from home.

Employers should also ensure that employees receive any necessary reasonable accommodations in accordance with the Americans with Disabilities Act as the nature of the workplace changes and employees are asked to contend with new technologies. For example, it is possible that disabled employees may require special equipment or technology at home in order to continue to perform the essential functions of the job.

More generally, employers should keep in mind the stresses faced by employees during uncertain times and the potential for stressful situations to negatively affect a company's culture and morale. Employers should stay attuned to workplace dynamics even when some or all of the employees are working remotely to make sure that employees are continuing to treat each other with respect and are not taking actions based on cultural biases or stereotypes. It will be important to foster a sense of community while teleworking and to affirmatively promote the company's policies against discrimination and harassment, such as by holding regular teleconferences, sending out periodic email reminders of the company's commitment to a safe and respectful workplace, and encouraging supervisors to regularly check in with workers.

Manage Timekeeping and Overtime Risks. As with laws against discrimination, employers must continue to follow the wage and hour laws. In particular, for non-exempt employees who work remotely, their remote work is still considered "hours worked" for purposes of wage and hour requirements like overtime and minimum wage. Employers must thus make sure that non-exempt remote workers accurately record their time worked in the absence of usual clock in and clock out procedures.

Employers can use a number of different tools for maintaining appropriate timekeeping for non-exempt employees, including electronic timesheets, documenting hours via personal or group spreadsheet, or asking employees to email managers when they clock in and out. Whichever system is used, managers will need to be diligent about reminding employees that the same timekeeping policies apply, such as by sending out an email reiterating the policies and telling employees to sign off if they are sending emails after hours or otherwise working unauthorized overtime. Employers should also closely monitor the reporting of hours worked to make sure that their remote timekeeping system is effective and employees are not reporting incorrect times (e.g., simply listing 9am and 5pm every day).

Remember Employee Expense and Equipment Reimbursements. Once employees are working remotely, they may in certain states be eligible for reimbursement for cell

phone, internet or equipment used in furtherance of the employer's business. In California, for instance, courts have required employers to reimburse a reasonable percentage of employees' phone bills and internet bills when they use their devices for work, even if those employees have unlimited phone or data plans and incur no additional expenses as a result of the work usage. Additional states with expense reimbursement laws include Illinois, New Hampshire, Massachusetts, Pennsylvania, Washington, D.C. and others.

Employers in these jurisdictions—and elsewhere—may want to consider the expenses they now expect employees to incur while teleworking and assess what reasonable reimbursement amount should be paid to employees.

Take Cyber Risks Seriously. With more remote work come more opportunities for business disruptions from technological glitches. First and foremost, companies should make sure that they can handle the remote capacity expected from new remote work arrangements, such as by running tests where employees log on simultaneously before implementing full-scale teleworking. Similarly, employers should try to anticipate the additional burdens on IT resources and staff and provide support as needed.

Companies should also be alert to potential cybersecurity risks. Be on the lookout for coronavirus phishing scams—like fake CDC updates or IT alerts—and make sure that legitimate mass emails to employees do not look like or get discarded as phishing emails. Employers may also want to consider investing in secure video or telephone conferencing systems and checking with vendors to ensure that they are prepared against cybersecurity threats.

You can find more information on cyber preparedness in the face of COVID-19 at https://www.debevoise.com/insights/publications/2020/03/debevoise-coronavirus-checklists-cybersecurity.

Protect Confidential Information. Working outside the office may mean that trade secrets or sensitive business information also have travelled outside the office. Employers should make sure that employees are aware of company policies on confidential information and information security and, in particular, are aware of how those policies play out in a remote work setting. For instance, employers should make clear to employees what physical items are acceptable to be taken from the workplace and what precautions should be taken for confidential documents and information, such as keeping them out of public spaces or maintaining a folder or box for documents that need to be disposed of securely. Where companies require protected remote access, they should remind employees of that requirement and reinforce prohibitions on "workarounds" that may become more attractive during a prolonged period of teleworking.

Effects on All Aspects of the Business. Remote working can have an impact on all aspects of a business, so employers should think broadly and critically about how telework may affect normal business functions, including hiring, discipline and terminations. For instance, if hiring new employees during a period of remote work, employers should remember that the I-9 rules require an employer to review original identity and work authorization documents in the *physical presence* of the employee within three days of on-boarding. Employers may, however, designate an individual to serve as an agent for the in-person review of the documentation, so employers may want to consider a protocol for designating an agent to ensure the I-9 process is compliant. Similarly, employers will want to consider how to continue with training, feedback and discipline functions and will need to seriously consider how to handle any necessary terminations during the period of remote work.

If you have any questions or require assistance with developing legally compliant remote work arrangements, please do not hesitate to reach out.

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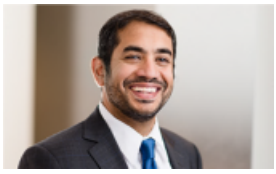

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Debevoise Coronavirus Checklists – Employee Communications

March 14, 2020

As employers are planning for the impact of COVID-19 on the workplace, many employers—and individual supervisors—are questioning what they can and cannot say to employees. Here are ten "do's" and ten "don'ts" to help employers and managers navigate sensitive communications with employees.

TOP 10 DO'S

- ✓ DO notify employees of their possible exposure to COVID-19 the workplace, but maintain the confidentiality of employees' medical information as required by law, including the medical status and identities of diagnosed employees or family members of employees.

- ✓ DO ask employees to inform management (i) if they are diagnosed with COVID-19, (ii) if they have been exposed to a diagnosed person or (iii) if they have traveled to a country on the CDC's warning list for any reason in the prior 14-day period.

- ✓ DO encourage employees to stay home from work when they are feeling ill, and ask employees to leave the office if they are experiencing symptoms.

- ✓ DO follow-up with employees who indicate that they are ill to ask if they are experiencing COVID-19 symptoms, such as fever, chills or a cough.

- ✓ DO contact employees who are absent from work without explanation to inquire about their absence.

- ✓ DO communicate regularly with employees regarding the steps management is taking to ensure health and safety at the workplace.

- ✓ DO remind employees to practice good hygiene at work and provide concrete examples and guidelines tailored to the employer's workplace and business (i.e., do not leave food out, wash hands, do not host visitors, etc.).

- ✓ DO make clear to employees that discrimination or retaliation against employees who have been diagnosed with COVID-19 will not be tolerated.

- ✓ DO direct employees to official government sources of information about COVID-19 when communicating about the virus with employees.

- ✓ DO listen and be responsive to employees' direct questions and concerns.

TOP 10 DON'TS

- ✓ DON'T share an employee's confidential medical information with others.

- ✓ DON'T disclose the identity of an employee diagnosed with or exposed to COVID-19.

- ✓ DON'T tell employees that they must obtain medical care.

- ✓ DON'T ask employees to disclose whether they have an underlying medical condition that may make them especially vulnerable to COVID-19.

- ✓ DON'T request that employees cancel personal travel plans.

- ✓ DON'T require employees not known to be sick to use sick days.

- ✓ DON'T comment on an employee's age, disability or susceptibility to contract the virus.

- ✓ DON'T make comments about other countries or ethnicities that could be perceived as discriminatory.

- ✓ DON'T threaten employees who are on medical leave with disciplinary action.

- ✓ DON'T spread rumors or unsubstantiated information about the virus.

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Please do not hesitate to contact us with any questions.

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Debevoise Coronavirus Checklists—U.S. Employer Considerations

March 13, 2020

Employers of all sizes are facing unprecedented human resource challenges in the face of the COVID-19 pandemic. We know that many employers are already developing responses, and there is no one-size-fits-all approach. Here are ten employment law considerations to keep in mind when planning for the impact of the virus on the workplace.

Regularly Monitor Government Guidance for Employers. The CDC, OHSA, DOL and state and local governmental authorities have issued guidance for employers. Links to this guidance can be found here among our links to External Resources. Governmental guidance is rapidly evolving, and it is critical for employers to stay current on developments that could impact their worksites.

Prioritize Health and Safety. Take all reasonable steps necessary to ensure employee health and safety consistent with governmental guidance. Actively encourage sick and exposed employees to stay home. Promptly send sick employees home and require symptomatic or exposed employees to stay home for at least 14 days or until healthy. Where feasible, consider allowing remote work arrangements, limiting visitors and restricting business travel. Maintain environmental sanitary practices at worksites.

Make ADA-Compliant Medical Inquiries. While disability-related inquiries and medical examinations are usually prohibited under the Americans with Disabilities Act, COVID-19 poses a "direct threat" that has shifted the compliance requirements during the pandemic. Management can ask employees to disclose why they are absent from work and whether they have virus symptoms. However, do not mandate that an employee seek or obtain medical care.

Protect Employee Privacy. If an employee becomes ill or exposed to COVID-19, there will be good reasons to want to share that information, but it is also important to maintain the confidentiality of employees' medical data as required by law, including the medical status and identities of diagnosed employees or family members of employees.

Evaluate Sick Leave Policies. Ensure that sick leave policies are consistent with current governmental guidance and that employees are reminded of these policies. Consider whether it is feasible to modify current sick leave policies to afford greater flexibility and additional paid time off to employees.

Comply with Federal and State Leave Laws. Assess whether an employee's leave qualifies for job-protected leave under the federal Family Medical Leave Act (the "FMLA"), state law, local sick leave laws or company policy. Eligible employees who are covered by the FMLA are entitled to up to 12 weeks of job-protected unpaid leave during a 12-month period due to a serious health condition or to care for a spouse, daughter, son or parent who has a serious health condition. An asymptomatic quarantine is not a serious health condition that would trigger FMLA protections.

Be Mindful of Discrimination Risks. As always, employer policies and decisions concerning the terms and conditions of employment must comply with anti-discrimination laws. Treat all employees equally—and without regard to any legally protected characteristics—under any employer policy or practice, including with respect to medical inquires, modification of work hours, telecommuting and the availability of leave or other benefits. Protect employees from discrimination and retaliation by other employees if they are known or suspected to have COVID-19.

Don't Run Afoul of Wage and Hour Laws. Any pay reductions must comply with applicable laws, including state wage theft laws, and any contractual or collective bargaining requirements. Exempt employees generally must receive their full salary for any week in which any work is performed to maintain the employee's exempt status. A salary reduction may also create overtime obligations if an exempt employee's salary drops below the applicable threshold under the Fair Labor Standards Act or similar state laws. Non-exempt employees must only be paid for the time they actually spend working. While hours may be more difficult for managers to monitor for remote workers, employers should continue to require non-exempt employees to record and be paid for all work time.

Don't Forget "WARN." Consider any potential notification requirements under the Federal WARN Act or state "mini-WARN" acts. Decisions to close facilities permanently or to furlough employees for periods longer than six months may trigger federal WARN Act requirements, which require advance notification of 60 or 90-days depending on the jurisdiction. Temporary layoffs or furloughs less than six months may trigger mini WARN Act requirements.

Communication is Key. Effective employee communications can often mitigate legal risks. Take steps to effectively communicate with employees, whether through regular

email updates, an intranet site or memos to employees distributed at the worksite. Establish clear points of contact for employees to direct questions and concerns.

* * *

Many of these employment issues involve legal judgments, and managers should check with human resources or internal or external counsel if there are questions about specific situations. If you have any questions or require assistance with compliance with federal and state employment laws during this challenging time, please do not hesitate to reach out.

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MassMutual

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EMPLOYER

Recruit and retain top talent

Individual Disability Income Insurance

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The disability divide

As companies compete for top talent, the benefits offered to this group of employees can become key to attracting and retaining the best people.

Employer provided Long-Term Disability (LTD) policies typically don't cover bonuses or incentive compensation, which can create a disability income gap for top performing, highly compensated employees. An illness or injury that prevents these executives from working could cause them to lose a sizable portion of their income.

Employer-paid individual disability income insurance from MassMutual can add to your employee benefits program* by helping to attract top talent and reducing a potential disability income gap for highly compensated employees. It involves minimal administrative time to implement and maintain.

Another option to consider is cost-free for your company — voluntary individual disability income insurance. An insurance offer can be designed specific to your company, and your employees' personal income protection needs.

* NOTE: There may be implications under the Employee Retirement Income Security Act ("ERISA") depending on how disability income insurance policies are made available to the employees and whether such an arrangement constitutes an "employee benefit plan" under ERISA. Employers should consult their own tax and legal advisors for further information on potential ERISA implications.

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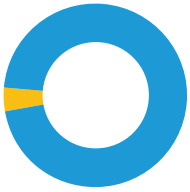
Meet Lauren...

See why she needs to protect a sizable portion of her income.

Lauren is a successful sales person. She leads an active life and always exceeds her sales goals.

Her annual base salary is **$250,000** but she consistently earns another **$100,000** in bonuses.



Her annual net income is **$234,500** and she has a group LTD plan that covers **60% of her base income** (up to $10,000/mo).

The company group LTD plan will only cover **$80,400** on an after-tax basis, leaving a sizable income gap.

Lauren can protect a greater portion of her total income with individual disability income (DI) insurance from Massachusetts Mutual Life Insurance Company (MassMutual).[1]

The above example assumes an effective tax rate of 33% and a group LTD plan paid for by the employer that provides up to $10,000 of gross benefit per month ($80,400 net, annually).

[1] This individual disability income insurance does not coordinate with group long-term disability coverage. Claim decisions are rendered independent of each other.

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Protecting their most valuable asset — income

Making individual disability income insurance from MassMutual available to your highly compensated employees can reduce the financial risks that disability poses.

For your company

- Discounts off MassMutual's standard unisex rates.
- Differentiate your reward package for retaining and recruiting top talent.
- Help protect highly compensated employees whose benefits are limited by a group LTD plan maximum.
- Guaranteed standard issue — MassMutual will guarantee to offer your employees a policy at standard rates, provided they meet the eligibility criteria outlined in the underwriting proposal.

For your employees

- Covers a portion of variable performance pay, which can be 50% or more of an executive's compensation.
- Simplified underwriting — answering a few simple questions determines eligibility vs. full medical underwriting if they were to buy disability income insurance on their own.
- Non-cancellable coverage to age 65 (premiums must be paid on time).
- The policy is portable so employees can take their policy with them, including premium discounts, if they change employers.[1]
- Flexible coverage offer allows employees to reduce the monthly benefit amount to meet their coverage objectives.

[1] Coverage increases issued under the policy's Right to Apply for Additional Monthly Benefits with Full Underwriting provision will not carry the discount if a new policy must be issued.

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Riders

To help your employees personalize the policy to meet their financial needs, we offer a number of optional riders.[2, 3]

Catastrophic Disability Benefit Rider (CAT)[4]	The CAT Rider provides benefits for a catastrophic disability, as defined in the rider, to cover up to 100% of pre-disability earned income when combined with a base policy.
Cost Of Living Rider (COLA)	The COLA Rider helps benefits keep pace with inflation in the event of a disability lasting longer than 12 months. Increases start to accrue after the insured is disabled for 12 months, or the full waiting period, whichever is longer. Increases are compounded at 3% and there is no limit to the number of adjustments that may be made under the COLA Rider.
Extended Partial Disability Benefits Rider (EPR)	The EPR Rider provides partial disability benefits if the insured, while still disabled, works at his/her regular occupation, or a new occupation, but in a reduced capacity due to their sickness or injury. To qualify for benefits, during the first 6 months of partial disability (including the waiting period or thereafter), the insured must have: • a minimum 15% loss of time; or • a minimum 15% loss of income; or • the ability to do some, but not all, of the main duties of their occupation. After 6 months of partial disability, the insured must have a minimum 15% loss of income. The Extended Partial Disability Benefits Rider also includes a recovery benefit. After a period of total disability or partial disability payments, a recovery benefit will be paid provided the insured's loss of income is at least 15% of pre-disability income, and there is a direct relationship between the insured's loss of income and the previous disability. The recovery benefit will be paid through the 6th month following the insured's full recovery and return to work. MassMutual will periodically evaluate the direct relationship between the insured's loss of income and the previous disability. We will continue to make monthly payments as long as the insured's loss of income is at least 15% of pre-disability income and there is a direct relationship between the insured's loss of income and the previous disability. Monthly payments will not exceed the maximum benefit period for partial disability.

[2] All riders are offered at an additional cost and terminate on the policy anniversary date or the next, following the insured's 65th birthday.

[3] The information is only a brief description and does not include all terms and conditions for payment of benefits. Refer to the riders for complete details of coverage. If there is a conflict between the information provided and the actual rider, the terms of the rider will govern.

[4] CAT Rider is not available in CT.

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Riders

(Continued)

Group Supplement Rider (GSR)	The GSR Rider provides partial disability benefits to supplement group benefits provided by an employer. • Coverage A (partial) provides a benefit when the insured is partially disabled, under a doctor's care, working at his/her own occupation, and suffers an income loss due to the disability of at least 15% of pre-disability income. • Coverage B (proportionate) provides a benefit when the insured is partially disabled, under a doctor's care, working in a new occupation for which he/she is reasonably suited by education, training and experience, and has an income loss due to disability of at least 15% of pre-disability income (not available with the Own Occupation Rider).
Own Occupation Rider (Own OCC)	The Own OCC Rider provides a monthly benefit if, due to a disability, the insured cannot perform the main duties of his/her occupation and is working in another occupation. The insured must be under a doctor's care.
RetireGuard Rider	The RetireGuard Rider can help replace up to 100% of an amount equal to the retirement plan contributions, including both employee's and employer's contributions, that would have been made to the employee's eligible defined contribution plan if the employee had not become totally disabled. It is not a retirement plan, nor a substitute for one. When insured with RetireGuard, during a period of total disability MassMutual will pay benefits into an irrevocable trust. Benefits are not paid into an employer-sponsored retirement plan. The trust offers different investment options so that a client can select the option that best meets his/her retirement goals. Trust services are provided by The MassMutual Trust Company, FSB, a wholly-owned subsidiary of MassMutual.

QUICK FACTS

48% of human resource managers believe their companies have a responsibility to help employees protect their incomes from the risk of disability.[5]

More than 1 in 4 of today's 20 year-olds will become disabled before retirement age.[6]

Engagement made simple

We get the importance of employee enrollment and participation. Our integrated enrollment campaign includes customized messages designed for different life stages and coverage needs of employees.

Getting started

For a no-obligation estimate for adding individual disability income insurance from MassMutual to your employee benefits package, please provide a high-level employee census and your current group LTD booklet.

[5] 2013 Employer perspectives on disability benefits study, MassMutual and the Society for Human Resource Management.

[6] U.S. Social Security Administration, Fact Sheet dated March, 2016.

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A trusted leader

With over 160 years in the insurance industry, including over 50 years of offering disability income insurance, we have a long history of remaining financially strong during changing market conditions. Our financial strength ratings[7] are among the highest of any company in any industry.

We created MassMutual@WORK to reach more people with the products, guidance, and tools they need to secure their financial future, and protect the ones who matter most. As a recognized leader in workplace solutions, we are committed to helping you do more for your employees.

As a mutual company, MassMutual does not have shareholders. The company is managed with the long-term interests of its members and policyowners in mind, and we work every day to make decisions to help them meet their financial needs in the future. We work every day to make decisions to help them meet their needs in the future.

For more information, go to massmutual.com.

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[7] Financial strength ratings are as of 7/15/2017: A.M. Best A++; Fitch AA+; Moody's Aa2; Standard & Poor's AA+. Ratings are for MassMutual (Springfield, MA 01111) and its subsidiaries, C.M. Life Insurance Company and MML Bay State Life Insurance Company (Enfield, CT 06082). Ratings are subject to change.

MaxElect is not available in California.

MaxElect (Policy Form ICC13XLSME, XLS-ME-04 and XLS-ME-13 (ICC13XLSME in North Carolina) is issued by Massachusetts Mutual Life Insurance Company (MassMutual), Springfield,MA 01111-0001. Policies have exclusions and limitations. Policies may vary in some states.

New York policies: This policy provides disability income insurance only. It does NOT provide basic hospital, basic medical or major medical insurance as defined by the New York State Insurance Department. The expected benefit ratio for this policy is 61.0 percent. This ratio is the portion of future premiums which the company expects to return as benefits, when averaged over all the people with this policy.

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The Four Types of Financial Advisors

Which one should you work with?

We find that, by and large, people seeking financial advice know to look for a financial advisor who has high levels of integrity and who wants to do what is in their clients' best interest at all times. But it seems that fewer people pay attention to the *orientation* of their financial advisor candidates. As a result, they may risk choosing an advisor who isn't a great fit.

Here's a look at four different types of advisors you are likely to encounter and how they stack up against each other in some key areas. Armed with this information, you should be able to better assess which type is best suited for you based on factors such as your goals, the complexity of your financial situation and your net worth.

The wealth management hierarchy

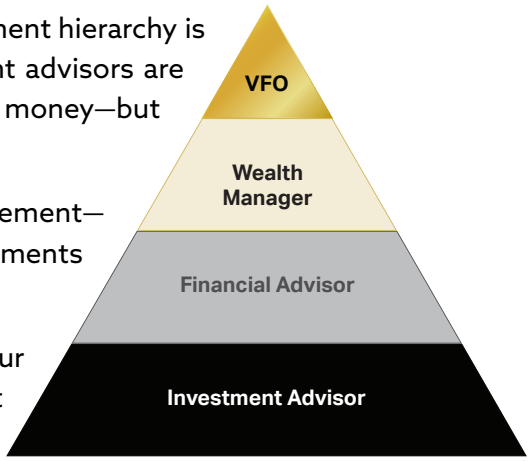
The wealth management hierarchy below illustrates the range, depth and breadth of the financial solutions you can get from different types of advisors.

Let's examine each group.

1. **Investment advisor.** A good way to think about the wealth management hierarchy is that it's progressive, or additive. We start with the base. Investment advisors are excellent financial professionals who do a very good job managing money—but that's all they do.

   While investment advisors provide a single solution—money management—that one solution can have multiple variations (from securities to investments in private companies, real estate, artwork and so forth).

   If all you want is someone who manages your money well—positions your investment capital, reallocates it as needed and so on—you can stop at this level. If you want or need expertise beyond money management, you'll need to move up the wealth management hierarchy.



2. **Financial advisor.** When you move to the next level of the wealth management hierarchy, more types of expertise are available to you. Like investment advisors, financial advisors are primarily focused on delivering money management services and products. However, they also provide some wealth planning services.

   The wealth planning capabilities of financial advisors tend to be relatively basic and fall within a fairly narrow range of expertise. This typically makes them appropriate for individuals and families with lower levels of complexity in their financial lives. Again, if your financial situation is not complicated, an expert financial advisor may be what you need to pursue the types of outcomes you want.

Next, let's look at the two highest levels of the hierarchy and the value they bring.

3. **Wealth manager.** If you work with a wealth manager, you also can get excellent money management services along with planning services. However, the level of services you will receive will be elevated because wealth managers and their teams can address truly complex situations requiring multiple specialties.

   The biggest difference we see between financial advisors and wealth managers is that the latter can typically deliver a more extensive and in-depth range of wealth planning expertise. That expertise might include income tax planning, cross-border planning and financial life management planning.

   Wealth managers also tend to offer greater coordination of solutions to address their clients' financial issues and concerns. For example, a client's tax-mitigation plan might be informed by his or her charitable giving strategy along with his or her eventual wealth transfer desires. As a result, none of the strategies work against or conflict with the others.

   Working with a wealth manager will indeed get you most of the best solutions that will enable you to achieve a well-structured financial world.

4. **Virtual family office**. The pinnacle of the wealth management hierarchy is the high-performing virtual family office, or VFO. A VFO incorporates exceptional wealth management with robust attentiveness to administrative and lifestyle matters. High-performing virtual family offices are also able to deal with the important one-off special projects that might arise.

   With coordinated solutions that address clients' financial situations and many aspects of their families' well-being, a VFO can build and protect personal wealth while also making their daily lives much easier.

   Not surprisingly, a high-performing virtual family office is not the right choice for everyone—especially if your needs and challenges are not sufficiently complex. But if you need a level of support and capabilities that goes beyond the other three categories, a VFO could be a good fit.

   To see how each category measures up, consider the needs of a hypothetical successful entrepreneur seeking to sell his or her company. The amount a business owner ends up with can depend to a great degree on the expertise received through the sale process (see the chart below).

What Each Type of Financial Professional Can Do When You Sell Your Company

Type of professional	Pre-sale expertise	Sale expertise	Post-sale expertise	Likely outcome
Investment advisor	Not applicable	Not applicable	Limited to money management	After the sale, management of likely fewer assets
Financial advisor	Usually minimal, if any	Not applicable	Primarily money management	After the sale, management of likely fewer assets
Wealth manager	Varied to extensive	Not applicable	Varied to extensive	Family wealth *larger* at and after sale
High-performing virtual family office	Extensive	Supportive	Extensive	Family wealth *maximized* at and after sale

The upshot: The "perfect" financial professional for you and your family depends both on your situation and the level of expertise you need to address your needs, goals, concerns and wants. Keep this hierarchy of wealth management in mind as you meet and assess potential advisors. It could help guide you to the right advisor for you.