

HENDERSON BROTHERS UPDATE

Considerations for Paid Sick Leave Changes as Coronavirus Spreads

Date: March 15, 2020

The rapid spread of the novel coronavirus and the disease it causes, COVID-19, is sparking new calls for paid sick leave, and employers are beginning to heed the call.

Public health experts urge people to stay away from work if they experience symptoms, but that means time without pay for many workers. Faced with the choice of going to work sick and possibly spreading the virus or not being able to pay their bills, some workers feel they have no choice.

Now some major employers like Walmart, Trader Joes and Darden Restaurants are responding to the dilemma with paid time off (PTO) for workers who come down with COVID-19 as well as those who don't get sick but whose jobs are disrupted because of what world health authorities are now calling a pandemic. In addition, the new coronavirus is driving momentum for national legislation to provide paid sick time.

Structuring New or Expanded Paid Leave

The spread of COVID-19 will likely spur more employers to consider changes or enhancements to their current paid sick time policies, but as you would expect, it's important to structure any new or expanded paid leave so that similarly situated employees receive the same benefit to avoid potential discrimination claims.

Some employers may want to implement or enhance a paid leave policy in response to the public health emergency without making it permanent, and employers generally can do that, but they will need to keep abreast of legal developments that could affect the program's design.

Businesses that decide to introduce paid leave for the first time because of COVID-19 should consider offering it to all employees and should craft their policy with careful consideration, specifying exactly how much paid COVID-19 leave is available, for what purposes it can be used (treatment, care, preventative care, etc.), and what notice and documentation will be required. HBI has sample policies we can provide to get you started.

Employers should also consider whether they want to end COVID-19 related paid leave if a vaccine or treatment becomes available. Written policy that is expected to "sunset" upon access to a vaccine must specify when the paid leave will no longer be available and why. If an end date is not carefully communicated employees denied COVID-19 paid leave at a future time could potentially attribute the deprivation to unlawful reasons, like age or disability discrimination.

HENDERSON BROTHERS UPDATE

Employers that don't provide paid leave for quarantined employees who are unable to work, generally won't face liability unless state or local law requires paid leave. HBI provides state leave updates and side-by-side state comparatives to help employers stay abreast of state leave law changes.

It's unclear at this time whether an employer that allows or enables sick employees to come to work will be faced with liability. Workplace safety experts would caution employers though – there could be liability under the U.S. Occupational Safety and Health Act's general duty to maintain a safe workplace if sick employees are not asked to leave work immediately for medical treatment and quarantine.

Remote Work Policies

In addition to offering paid leave policies, many employers are promoting remote work, which brings up legal consideration as well. Employers can encourage telecommuting when the situation is appropriate but should be careful when they offer this option. Similarly situated employees should be offered the same work options to avoid any employee or group of employees believing they have been selected because of protected characteristics. Telecommuting also may be a reasonable accommodation under the Americans with Disabilities Act (ADA), but a COVID-19 diagnosis on its own may not constitute a disability. Regardless, telecommuting may be a reasonable accommodation for employees with disabilities whose medical conditions could become worse because they become ill with the coronavirus.

Major Employers, Including Walmart Announce Paid Leave

The largest employer in the country, Walmart, has announced that it will offer paid time for both full- and part-time employees who are quarantined either by the government or the company after exposure to the virus. Employees will receive up to 2 weeks of paid leave. Employees who test positive for the illness will get additional PTO.

Walmart also announced it is waiving its attendance policies through the end of April so that employees can stay home without being penalized if they are unable to work or feel uncomfortable at work because of fears about the virus. This particular time off won't be treated as paid leave.

In its response, Microsoft notes how hard the coronavirus outbreak has hit the Puget Sound area of Washington and northern California, where the company has major operations. Early in March, the company asked its employees who can work from home to do so. That move has reduced the need for many hourly workers who drive shuttles, work in company cafes, and provide other services on the company's campuses. The company has responded by paying those workers even when they're not needed on-site.

The company's announcement also spoke of the need for other businesses to step up as the virus spreads. Darden Restaurants also has announced a plan for paid sick leave for hourly employees.

HENDERSON BROTHERS UPDATE

The company, which operates Olive Garden, Longhorn Steakhouse, The Capital Grille, Eddie V's, Cheddar's Scratch Kitchen, Yard House, Seasons 52, and Bahama Breeze restaurants, says it was already working on a policy, but the coronavirus outbreak pushed it forward.

Other companies like Apple, Starbucks, Instacart, DoorDash and McDonald's have instituted new paid leave benefits to address this specific COVID-19 pandemic as well.