SURVIVING THE PANDEMIC
HUMAN RESOURCE LEGAL ISSUES

October 12, 2006
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I. General Workplace Issues

A. Employers generally have discretion to require employees to work longer work hours than those typically scheduled.

1. Must be aware of exempt (salaried) vs. non-exempt (hourly) status. Non-exempt employees must be paid time and one half their regular rate of pay for all hours worked in excess of 40 in a work week. Exempt employees are not entitled to overtime pay.

2. Employers may be restricted in adding additional work hours for employees who require FMLA leave or who are disabled.

3. Factory and mercantile establishments generally must comply with Wisconsin’s “one day of rest in seven” law.

   a. Employees must generally be given 24 consecutive hours of rest in each calendar week.
b. Exemptions may be granted in unusual circumstances.

c. Possible penalties are $10 to $100 per offense.

B. Employers may generally unilaterally reduce work hours.

1. Must do so on a non-discriminatory basis.

2. Non-exempt employees will be paid only for hours worked.

3. Under the Fair Labor Standards Act “salary basis test,” exempt employees must be paid their full salary if they work any hours in a given work week. Thus, they may not be docked salary due to a work slow down unless they do no work in a particular work week. It may be valid legally to adjust salaries of exempt employees for longer-term reductions in hours.

C. Employers can add and subtract job duties, change job descriptions, etc., so long as such changes are implemented in a consistent and non-discriminatory manner.

D. Subject to other legal requirements (FMLA, disability laws, etc.), employers may generally enforce their regularly applicable attendance and absenteeism policies. However, employers will want to proceed with caution in certain circumstances. (i.e., healthy employee who refuses to come to work). And, as a practical matter, employers will likely want to be flexible regarding attendance in the event of mass illness.

II. Leave and Disability Issues

A. Family and Medical Leave Rights and Obligations

1. FMLA laws generally apply to employers who have 50 or more employees.
2. **Federal FMLA.** Employees are entitled to up to 12 weeks of unpaid leave for an employee’s own serious health condition or to care for a family member with a serious health condition.

3. **Wisconsin FMLA.** Employees are entitled to up to 2 weeks of unpaid leave for an employee’s own serious health condition or to care for a family member with a serious health condition.

4. Employers can require medical certification of the need for FMLA leave.

5. Employees who take FMLA leave must be reinstated to their former position or a substantially equivalent position.

B. **Disability laws**

1. Employers cannot discriminate against employees with disabilities and must provide reasonable accommodations for disabled employees.

2. Both federal and state disability law generally provide that temporary medical conditions are not “disabilities”. Thus, pandemic-related illnesses (and related lingering affects of such illnesses) may or may not qualify as disabilities.

3. If a disability exists, an employer may be required to provide additional unpaid leave, job restructuring or other accommodations.

4. Disability laws restrict an employer’s ability to ask employees about medically related issues. Medical inquiries must be job related and consistent with business necessity.

5. Employers must maintain any medically related information about employees as confidential. Such information should not be kept in general employee personnel files.
III. Compensation and Benefits Issues

A. Employers should review and update their policies regarding FMLA, sick leave, PTO, vacation, short term and long-term disability, etc.

B. Employers should also review their employee benefit plans (such as retirement plans) to be aware of whether long-term absences may impact plan eligibility, vesting or accrual.

C. Employee use of accrued paid time off for an illness may vary depending on the nature of the illness. For example, if a leave qualifies under the Wisconsin FMLA, the employee has sole discretion whether to use paid leave or whether to take the Wisconsin FMLA-covered leave unpaid.

D. Employers are not obligated to continue paying employees who have exhausted their accrued paid time. This rule applies regardless of whether the employer does not allow the employee to work, the employee is unwilling to come to work, or the employees is medically unable to come to work. (Note: Employers will generally be required to pay exempt employees for those work weeks in which they perform any work).

E. Employees who are laid off may be eligible for unemployment benefits.

F. Workers compensation issues may arise if employees become ill in the course of employment (traveling, first aid responders).

IV. Workplace Safety and Health Issues

A. OSHA Requirements

1. General Duty Clause to keep the workplace free of recognized hazards.
2. Employers may have to assess safety issues, train on infection control procedures, require use of hand, body and respiratory protective measures and cleaning protocols.

B. Screening and Reporting Processes

1. Employers generally may screen employees to determine whether employee should be at work.
   a. Use caution in who is doing the screening and the scope of the screening.
   b. Confidentiality is critical. Information about employee health status generally should not be shared except on as a need to know basis.
   c. Taking actions based on (i) perceived conditions; or (ii) an employee’s “association with a disabled person” is risky.

2. Employers should develop a policy to report employee illness.

V. Communicating with your employees

A. Share materials that educate employees on the fundamentals of pandemic illness (symptoms of influenza and modes of transmission), personal and family response strategies.

B. Anticipate employee fear and prevent the rumor mill. Proactive communication will get you significant good will.

C. Ensure that your communications are culturally and linguistically appropriate.

D. Share appropriate parts of your pandemic preparedness plan with employees.
E. Develop methods for employee communication.

F. Remind employees of resources available to them (EAP plan, vendor-provided benefit counseling, etc.)