From an employer’s perspective, a crisis such as the COVID-19 pandemic raises many issues and highlights the importance of nurturing every company’s most valuable asset: its people. This is a high-level overview of our developing thoughts to help our clients navigate the current environment which, in many ways, feels like uncharted territory. The considerations outlined below are intended to provide a framework for how to manage current issues without losing sight of long-term goals.

**Providing a Safe Work Environment.** Section 5(a)(1) of the Occupational Safety and Health Act of 1970 (the OSH Act) requires employers to provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm. Although no new legal regulations or standards have been mandated, OSHA has provided guidance on how to prepare the workplace, which includes steps to take to prevent risk of exposure, planning guidance based on infection prevention and industrial hygiene practices, and a discussion of engineering, administrative, and work practice controls and personal protective equipment (PPE).

Employers should consider issuing their own guidance to their workforce regarding infection prevention, how to handle illness or symptoms, and any requirements the employer wants to implement with respect to travel.

*Workers with Symptoms.* If an employee (or anyone else who comes to the workplace, including clients, contractors, or vendors) **has symptoms** consistent with the COVID-19 virus, which include fever, cough, sore throat, muscle aches or shortness of breath:

- They should not come to the office.
- They should consider seeking immediate medical attention.
- They should not return to work until they are symptom-free for 24 hours and they have written clearance from their healthcare provider.
- If their jobs permit them to work from home, they should do so according to the employer’s remote work policy.
- If they are not able to work from home, they should use paid time off (PTO) and short-term disability (STD) benefits, as applicable.
Traveling Employees without Symptoms. If an employee (or anyone else who may come to the workplace regularly such as consultants or contractors) has returned from traveling to a location on the CDC’s list with a Level 2 or Level 3 Alert, and is not experiencing any symptoms:

- They will be expected to self-quarantine for fourteen days from the time they left such country.
- If their jobs permit them to work from home, they may be expected to work from home during this time, according to the employer’s remote work policy.
- If an employee is not able to work from home, consider how or whether they will be paid for the self-quarantine period.
  - If the employee is exempt, and they have performed any work during the workweek, they must be paid for the entire week.
  - If the employee is non-exempt, typically they are paid only for hours worked. The employer may consider offering the employee unpaid leave, paid leave for some period of time, or require that the employee use any available PTO.

Recommendations for Implementing Guidelines.

- Confirm that staffing agencies, contractors, professional employer organizations or temp agencies are following the same protocol with respect to any leased or temporary employees and notify the employer if a worker experiences symptoms.
- Consider whether an employer’s PTO and unpaid leave practices, such as requiring employees who are quarantined and unable to work remotely to use all PTO and sick leave, incentivize the desired behavior of staying away from the workplace and avoiding infection.
- Consider waiving normal eligibility requirements, such as employment for a certain period of time, for new employees to use PTO for medical or quarantine reasons.
- Determine whether any of the employer’s STD eligibility requirements should be waived, including whether any circumstances warrant such waiver being handled on a case-by-case basis during the outbreak.
- Communicate and confirm with any insurance providers before disseminating information relating to applicable coverage and waiving eligibility requirements.

Reviewing and Updating Policies and Agreements. Employers should review their policies to determine whether changes are required or recommended in the current environment.

- **Sick Leave or PTO Policies**
  - Confirm these policies permit paid leave in the event of a family member’s illness, quarantine, or school closure.
  - Consider waiver of eligibility requirements, such as employment for a certain period of time.
  - Consider implementing a leave donation policy to encourage employees to help each other comply with quarantine measures.
  - Add any new benefits provided by emergency legislation, such as the Colorado HELP rules that provide four days of paid sick leave to workers in certain industries.
- **Short-Term Disability Policies.** Consider waiver of eligibility requirements, such as employment for a certain period of time.
• **Unpaid Leave or Other Personal Leave Policies.** Consider granting leave for employees who chose to travel to a country with a Level 2 or Level 3 Alert from the CDC and lack time off to cover the quarantine period.
• **Remote Work, Telecommuting, and Alternative Work Schedule Policies.** Implement or revise to prepare for the event that a large part of the workforce may need to work remotely.
• **Healthcare Plans.** Employers with self-insured medical plans may consider whether to waive or reduce the cost-sharing requirements for testing, future vaccinations and treatment for COVID-19. Certain state insurance departments, including California, New York and Washington, are requiring no-charge for testing for COVID-19. Employers that have insured plans should confirm with the insurer how it will treat testing, future vaccinations, and COVID-19 treatment under the plan in anticipation of increased questions about these issues.
• **401(k) Plans.** If the employer’s 401(k) plan does not permit in-service distributions for employees who are age 59½ or older or allow plan loans, consider whether to amend the plan to provide one or both features to assist employees with expenses arising in connection with COVID-19.
• **Collective Bargaining Agreements.** Review for any special provisions covering emergencies or disruption of business operations.
• **Staffing Agency or PEO Agreements.** Ensure the agency or PEO is required to notify the employer if a contract worker or leased employee has symptoms of COVID-19 or is required to be quarantined, and verify that the agency or PEO is responsible for providing health insurance coverage.

**Handling Common Wage and Hour Issues.**
• Employers are required to pay employees who are absent from work, who are being quarantined, who are self-monitoring at home, or who are otherwise ill with COVID-19 or caring for a family member, if they have accrued paid time off pursuant to any paid safe/sick leave law.
• Employees may be entitled to paid leave benefits under state or local leave laws if they are caring for qualifying family members with COVID-19.
• After any paid safe/sick leave is exhausted, the obligation to pay employees depends on whether they are classified as exempt or non-exempt, and whether they are required to be absent from work.
  o Non-exempt employees are only paid for actual hours worked. Therefore, if they are unable to return to work after exhausting any paid leave entitlement, they are not required to be paid.
  o Exempt employees must be paid their full weekly salary if they perform any work during a work week. Further, if an employer requires exempt employees to be absent from work—such as to self-monitor for COVID-19 symptoms at home—the employer must pay these employees the full weekly salary.
  o If exempt employees are diagnosed with COVID-19 and are unable to work due to their medical condition, then the employer likely would not have to pay them after the exhaustion of any paid leave entitlement.
• Employers should extend any state- or employer-provided disability benefits to eligible employees who are absent from work due to COVID-19.
• See [Q&A: COVID-19 or Other Public Health Emergencies and the FLSA](#)
Assessing Unemployment Insurance and Workers’ Compensation Coverage

- Employees subject to furlough due to a temporary shutdown of the employer’s operations may be eligible for unemployment insurance (UI). Depending on the size and length of any temporary shutdown, an employer may be required to notify the applicable state unemployment department.
- Employers may also be eligible for UI work-sharing programs as an alternative to layoffs, where the employer reduces an employee’s hours and wages, which are partially offset with UI benefits.
- Workers’ compensation (WC) policies generally extend insurance benefits to employees for work-related injuries. Employees who are unable to perform their regular duties because of contracting COVID-19, and who can show they contracted the virus on the job could potentially be eligible for WC benefits.
  - As part of the WC claim, an employee must show that they contracted the virus at work, and such contraction was “peculiar” to their employment.
  - The analysis is very fact-specific and must be analyzed under state law, but is more likely to be successful in the case of a health care worker or first responder, as these workers may be more likely to benefit from a presumption that they contracted the virus in the course of their job.

Considering the Implications of the ADA

- Carefully consider whether an employee who becomes ill with COVID-19 has a disability before providing reasonable accommodations under the Americans with Disabilities Act (ADA). “Disability” is a physical or mental impairment that substantially limits one or more major life activities of such individual, a record of such an impairment, or being regarded as having such an impairment.
- The ADA governs employers’ disability-related inquiries and medical examinations for all applicants and employees, including those who are not “disabled.”
- If an employer wants to conduct a medical exam, which would include checking employees’ body temperatures, the exam must be job-related and consistent with business necessity, which means that the employer has a reasonable belief that an employee’s ability to perform essential job functions will be impaired by a medical condition or an employee will pose a direct threat due to a medical condition.
  - Whether or not a procedure is a medical exam is determined by “considering factors such as whether the test involves the use of medical equipment; whether it is invasive; whether it is designed to reveal the existence of a physical or mental impairment; and whether it is given or interpreted by a medical professional.”
  - A “direct threat” is “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” 29 C.F.R. § 1630.2(r). If an individual with a disability poses a direct threat despite reasonable accommodation, the employee is not protected by the nondiscrimination provisions of the ADA.
  - The EEOC has advised that the assessment by the CDC or public health authorities would provide the objective evidence needed for a disability-related inquiry or medical examination. During a pandemic, employers should rely on the latest CDC and state or local public health assessments.
- Employers must keep in mind that the ADA prohibits employers from excluding employees with disabilities from the workplace for health or safety reasons unless they pose a “direct threat,” which is defined as a significant risk of substantial harm even with reasonable accommodation. However, this applies to employees who fall under the definition of disability, which is why it is important to carefully consider whether an employee with COVID-19 falls within the definition.
- See Pandemic Preparedness in the Workplace and the ADA
Understanding the Policies and Procedures that Are Acceptable under the EEOC’s Pandemic Preparedness in the Workplace and the ADA Guidance.

- Employers may send employees home if they display COVID-19 symptoms.
- Employers may ask employees if they are experiencing COVID-19 symptoms, such as fever or chills and a cough. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.
- If pandemic COVID-19 symptoms become more severe or if pandemic COVID-19 becomes widespread in the community, as assessed by state or local health authorities or the CDC, then employers may measure employees’ body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.
- Employers can mandate that employees report on their recent travels to assess exposure risks. Employers can encourage employees not to travel during this time and cancel business travel to high risk destinations. Employers should be sensitive to employee requests to avoid travel, particularly to high risk countries. When an employee returns from travel to a country or region with an active COVID-19 outbreak, employers do not have to wait until the employee develops symptoms to ask questions about exposure during the trip, even if the travel is personal.
- If employees voluntarily disclose (without a disability-related inquiry) that a specific medical condition or disability that puts them at increased risk of COVID-19 complications, the employer must keep this information confidential. The employer may ask these employees to describe whether any assistance will be needed (e.g., telework or leave for a medical appointment).
- Employers may encourage telework as an infection control strategy, and as a reasonable accommodation.
- Employers may require employees to adopt infection-control practices, such as regular hand washing, at the workplace.
- Employers may still ask employees why they have been absent from work if the employer suspects it is for a medical reason.
- Employers may require employees who have been away from the workplace during the pandemic to provide a healthcare provider’s note certifying fitness to return to work. However, this may change, as advised by the CDC, if healthcare providers are too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary or a willingness to permit the employee to return to work during the wait for certification.

Understanding FMLA Leave – Unpaid but Job Protected.

- To be eligible for FMLA leave, an employee must work for a covered employer, and must have worked for 1250 hours during the last 12 months.
- Although the symptoms of COVID-19 have been reported as flu-like, COVID-19 may be considered a serious health condition depending on the circumstances. Accordingly, an employee with COVID-19 or an employee who is taking care of a qualifying family member with COVID-19 may be permitted to take protected FMLA leave.
- FMLA leave consists of up to 12 weeks of unpaid, job-protected leave in a designated 12-month leave year for specified family and medical reasons which may include the flu where complications arise that create a “serious health condition” as defined by the FMLA.
• Employees who take time off to avoid exposure to COVID-19 would not be protected under the FMLA.
• The Department of Labor’s guidance asks employers to encourage employees who are ill or who are exposed to ill family members to stay home and consider flexible leave policies for employees in these circumstances.
• The FMLA does not require paid leave, but it allows employees to elect or an employer to require the substitution of paid sick leave and paid vacation or personal leave in some circumstances.
• Employers should also consider state requirements if paid leave or paid disability benefits are mandated by the state.
• See Q&A: COVID-19 or Other Public Health Emergencies and the FMLA

**Adopting a Leave Donation Program.** A leave donation program may be a useful tool in light of the COVID-19 outbreak to reduce employee anxiety over quarantine policies and mitigate the risk of noncompliance. For example, an employer may require employees with children subject to a school closure due to a confirmed COVID-19 case to remain home for a 14-day quarantine period. But if the employees or their children are not ill, and the employees’ jobs are not eligible for telework, they may be tempted to disregard the quarantine policy if they do not have enough accrued paid time off (PTO).

• Leave donation programs allow employees to donate accrued hours of PTO, vacation, and potentially personal days or sick leave, to an employer-managed leave bank that can be used by other employees who need more leave than they have available.
• As with any employer-provided benefit, there are a number of design considerations associated with a leave donation program, including the following:
  o Impact on the employer’s budget and cash flow, as it may result in an overall increase in paid leave being used that would otherwise be forfeited under a use-it-or-lose it system.
  o Rules that impact what types of leave may be contributed to a leave donation program, which vary from state to state.
  o Neutral eligibility criteria to avoid discrimination claims.
  o Protection of an employee’s privacy and compliance with various privacy laws.
  o Tax consequences for both the donating and recipient employees, unless the program qualifies for special tax treatment under exemptions created by the IRS for either medical emergencies or a major disaster (as declared by the president under §401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Stafford Act)).

**Understanding Implications of Layoffs or Plant Closings and the WARN Act.**
• The Worker Adjustment Retraining Notification (WARN) Act requires employers who are planning a plant closing or a mass layoff to give affected employees at least 60 days’ notice of such an employment action. Damages and civil penalties can be assessed against employers who violate the WARN Act.
  o An employer is any business enterprise that employs 100 or more employees, excluding part-time employees.
  o A plant closing is a temporary or permanent shutdown of a single site of employment resulting in termination or layoff exceeding 6 months for 50 or more employees (excluding part-time employees) in any 30-day period.
A mass layoff is a reduction in force of at least 50 employees (excluding part-time employees) at a single site of employment, where at least 33% of the active employees are terminated or laid off for more than 6 months.

- The regulations allow for reduced notice to employees where the plant closing or mass layoff is caused by business circumstances that were “not reasonably foreseeable as of the time that notice would have been required.” However, employers must give as much notice as practicable and must state why the notice period was reduced.
- The unforeseen business circumstances exception requires fact-specific analysis, and there are not clear guidelines as to when it applies. This provision could apply to the COVID-19 outbreak, depending on the effect it has on an employer.
- In any event, the WARN Act requires notices with specific information included for employees, government units, and unions, if applicable. Further, a number of states (including California and New York) have mini-WARN Acts that have lower thresholds that trigger notice requirements. It is important to be aware of state law on this topic.

Tailoring a Remote Work or Telecommuting Policy to an Employer’s Needs. Allowing employees to work remotely can be a lifesaver in a situation where an entire office must close due to an outbreak. However, employers that normally do not permit remote work or do not have remote work policies should consider implementing one and whether it is more desirable for any such policy to be limited to specific emergency situations.

- Although allowing employees to work remotely can be crucial to staying operative throughout closures, an employer should consider that many employees with disabilities request telecommuting as an accommodation. If all jobs move to remote work in case of an emergency, an employer may lose its argument that a certain job cannot be performed remotely. One option is to include language in a policy that employees are permitted to work remotely in the emergency or crisis situation and acknowledge specifically that not all of the employees’ essential job functions can be performed remotely.
- Items that may be included in a remote work policy:
  - Technology requirements, e.g., internet
  - Security requirements
  - Equipment provided by employer
  - Hours of work
  - Expectation that employee will take PTO appropriately
  - Safety requirements (workplace injury notification requirements)
  - Availability for calls, online meetings
  - Job expectations
  - Temporary nature
  - At-will nature of employment is unchanged
  - Expenses reimbursed – pay attention to state requirements here
  - Acknowledge in emergency that there will be some juggling of work and personal responsibilities
  - Non-exempt employees – recording all hours worked accurately
  - Tax consequences are employee’s responsibility
Acknowledgment that arrangement is temporary and on an emergency basis

- If an employer already has a BYOD policy in place, it may be helpful to extend that policy if employees will be doing work on their own equipment instead of using an employer laptop.

Understand COVID-19 and its Impact on Employer Health Plans. An employer should anticipate the possibility of receiving an increased number of questions relating to its health plans and coverage relating to COVID-19 and ensure that their plans adequately protect their employees.

- Employers that have self-insured medical plans may waive cost-sharing requirements for testing, future vaccinations and treatment for COVID-19. For employers that have insured plans, they should consult with the insurer regarding cost issues related to testing, future vaccinations, and treatment for COVID-19.
- Internal Revenue Service (IRS) guidance provides that a high deductible health plan (HDHP) under section 223(c)(2)(A) of the Internal Revenue Code (Code) may provide health benefits associated with testing for and treatment of COVID-19 without a deductible or with a deductible below the minimum deductible (self only or family) for an HDHP without jeopardizing the plan’s status as an HDHP. See Notice 2020-15. As a result, an employee covered by the HDHP will not be disqualified from being an “eligible individual” under Section 223(c)(1) of the Code who may make tax-favored contributions to a health savings account.
- State insurance departments in California, New York and Washington are requiring no-charge for testing for COVID-19.

Reviewing 401(k) Plan Distributions. Employees may want to access funds in their accounts under their 401(k) plan to help with various expenses that may be related to COVID-19. At this time, the IRS has not issued any guidance addressing COVID-19 and 401(k) plans. However, to the extent not already provided, an employer may amend its plan to permit in-service distributions for employees who are age 59½ or older and/or allow plan loans in order to assist employees with expenses arising in connection with COVID-19.

Considering Impact of Pandemic on Executive Compensation Arrangements. Employers that are currently implementing performance-based plans or considering new executive arrangements should consider the long-term impact of those decisions.

- Incentive Plans. Creating incentive plans and establishing performance goals that will create meaningful and appropriate incentives in a volatile market can be challenging. However, companies generally have greater flexibility than in the past when setting performance goals, given that most companies are no longer concerned about complying with the qualified performance-based compensation requirements of Section 162(m).
  - When establishing new performance-based compensation programs, in consultation with the company’s accounting and finance departments, consider:
    - Waiting until a future compensation committee meeting to establish performance criteria,
    - Anticipating the need to allow discretion to (or requiring that) future performance measurements be adjusted to neutralize the impact of COVID-19,
- Using relative performance measures (such as the company’s TSR relative to the TSRs of the company’s peer group),
- Creating new short-term performance goals aimed at incentivizing desired behavior, or
- Using cash-based awards, rather than (or in substitution of a portion of) awards that are stock-based or track the value of a company’s stock.

- **Contractual Obligations.**
  - A company should be aware of any contractual obligations (such as under employment agreements or severance policies) before making changes to salaries, bonus opportunities or benefit offerings to ensure the company does not inadvertently breach a contractual obligation or trigger an employee’s right to resign and receive severance.
  - When entering into new employment agreements, a company should consider including as an exception to clauses that provide good reason protection in the case of salary or bonus opportunity reductions, reductions that are made in connection with management-wide or company-wide reductions.

**Online Resources**
- CDC Interim Guidance for Businesses and Employers
- Pandemic Preparedness in the Workplace and the ADA
- OSHA Guidance for Employers
- Q&A: COVID-19 or Other Public Health Emergencies and the FMLA
- Q&A: COVID-19 or Other Public Health Emergencies and the FLSA

If you have any questions regarding the above issues, please contact Jennifer Trulock, Mark Bodron, or Robin Melman, members of Baker Botts’ Labor and Employment and Employee Benefits teams.