

EMPLOYMENT LAWSCENE ALERT: WISCONSIN AND CITY OF MILWAUKEE SAFER AT HOME ORDERS ISSUED - EFFECTIVE MARCH 25, 2020

The State of Wisconsin has issued a statewide Safer at Home Order, which will become effective at 8:00 a.m. on March 25, 2020, and will remain in effect until 8:00 a.m. on Friday, April 24, 2020, or until a superseding order is issued. The full text of the Order can be found [here](#).

The Order requires all businesses in Wisconsin, except businesses the Order defines to be Essential Businesses and Operations, to cease all activities except Minimum Basic Operations. Essential Businesses and Operations means Healthcare and Public Health Operations, Human Services Operations, Essential Infrastructure, and 26 other categories of businesses. Healthcare Operations, which include hospitals, dental offices, eye care centers, personal care agencies, massage therapists, chiropractors, and veterinary care, among other entities, are exempt from the Order, so those businesses may remain open. Essential Infrastructure may also remain open, including, but not limited to, food production, distribution, and sale; certain types of [construction](#); building management and maintenance; airport operations; operation and maintenance of utilities; and internet, video, and telecommunication systems.

Some of the other businesses and industries that qualify as Essential Businesses and Operations include stores that sell groceries and medicine; food and beverage production, transport, and agriculture; organizations that provide charitable and social services; gas stations and businesses needed for transportation; financial institutions and services; hardware and supplies stores; critical trades, including, but not limited to, plumbers, electricians, carpenters, cleaning and janitorial staff for commercial government properties, security staff, HVAC, and moving companies; bars and restaurants for consumption off-premises; supplies to work from home; supplies for Essential Businesses and Operations; transportation; home-based care and services; professional services such as legal, accounting, insurance, and real estate services; child care, subject to the March 18, 2020, DHS limitations; and manufacturing, distribution, and supply chain for critical products and industries.

Essential Businesses and Operations are encouraged to remain open, and to the greatest extent possible, should comply with social distancing requirements, including maintaining a six-foot distance from others, and use technology to avoid meeting in person, including virtual meetings, teleconference, and remote work.

All public and private K-12 schools must close, except for facilitating distance learning and

virtual learning. Public libraries are closed for all in-person services but may continue to provide online services and programming. Schools and public libraries may be used for Essential Government Functions and food distribution. Places of public amusement and activity, salons, and spas must also close.

Businesses that are not considered Essential Businesses and Operations must cease all activities, with the exception of Minimum Basic Operations and remote work. Minimum Basic Operations are the minimum necessary activities to maintain the value of the business's inventory, ensure security, process payroll and employee benefits, or for related functions and the minimum necessary activities to facilitate employees of the business being able to continue to work remotely. All businesses, even those that are considered non-essential, are permitted to continue allowing individuals to work from home.

Additionally, all individuals in Wisconsin are ordered to stay at home or at their place of residence, with certain exceptions. People may leave their homes for Essential Activities, Essential Government Functions, Essential Business and Operations, Minimum Basic Operations, Essential Travel, and Special Situations. Essential Activities include health and safety (e.g., obtaining medical supplies or medication, visiting a healthcare professional); obtaining necessary supplies and services (e.g., obtaining or delivering services and supplies such as food and household consumer products); outdoor activity that complies with social distancing (e.g., walking, biking, hiking, running); working at Essential Business Operations and performing Minimum Basic Operations; and caring for others. Essential Travel includes all travel related to the provision of or access to Essential Activities, Special Situations, Essential Governmental Functions, Essential Business and Operations, or Minimum Basic Operations; travel to care for elderly, minors, dependents, persons with disabilities, or other vulnerable persons; travel to or from educational institutions for purposes of receiving materials for distance learning, for receiving meals, or any other related services; travel to return to a place of residence from outside of Wisconsin; travel required by law enforcement or court order, including transportation of children pursuant to a custody agreement; and travel required for nonresidents to return to their place of residence outside of Wisconsin. All other public and private gatherings of any number of people occurring outside a single household or living unit are prohibited.

The statewide Order is enforceable by local law enforcement, including county sheriffs, and violation and obstruction of the Order is punishable by up to 30 days of imprisonment, or a fine of up to \$250, or both.

The City of Milwaukee has issued a city-wide "Stay-at-Home" order, which will become effective at 12:01 a.m. on March 25, 2020, and which is substantially similar to the statewide Safer at Home Order. The Milwaukee Order can be found [here](#).

O'Neil, Cannon, Hollman, DeJong and Laing is considered an Essential Business under both

the Wisconsin and City of Milwaukee orders and remains open during this time. We encourage you to reach out with any questions, concerns, or legal issues you may have, including those related to coronavirus.

EMPLOYMENT LAWSCENE ALERT: WISCONSIN TO PUT IN PLACE SAFER AT HOME ORDER

Today, March 23, 2020, Wisconsin Governor Tony Evers announced via Twitter that he is issuing a Safer at Home Order tomorrow, Tuesday, March 24, 2020. The Order will likely go into effect shortly thereafter. This Order will follow similar orders in states such as New York, California, and Illinois. The Order will cease all non-essential business statewide. This does not prevent businesses from continuing to have employees work from home. Additionally, essential businesses, such as healthcare, grocery stores, and pharmacies, will continue to remain open. It is currently believed that restaurants will be allowed to continue curbside takeout and manufacturers will be allowed to continue business operations. The Order is also likely to further limit personal interactions, as Gov. Evers's tweets this morning stated that it "means no sleepovers, no playdates, and no dinner parties with friends and neighbors." Employees who work at essential businesses and individuals who need to use the services of essential businesses will continue to be allowed to travel for such purposes. The goal of this order is to be proactive in stopping the spread of COVID-19.

We will provide additional information as soon as it becomes available from the Governor's office.

EMPLOYMENT LAWSCENE ALERT: PRESIDENT SIGNS FAMILIES FIRST CORONAVIRUS RESPONSE ACT EXPANDING EMPLOYEES' FMLA RIGHTS AND MANDATING PAID SICK LEAVE

The President signed the COVID-19 bill, H.R. 6201, into law late Wednesday night, not wasting any time during this national health emergency, after the Senate approved the bill by a vote of 90-8. Before the Senate took its vote, the House of Representatives made technical corrections to the bill from the version of the bill that the House passed early

Saturday morning. The House's technical corrections actually made substantial limitations to the scope of who qualifies for expanded Family and Medical Leave Act (FMLA) rights and made clarifying changes to the portion of the bill that provides employees with two weeks of emergency paid sick leave.

On Monday, we provided our readers with a summary of the House of Representatives' version of H.R. 6201, which can be found [here](#). The Senate's version of H.R. 6201 limits the expanded FMLA leave entitlement to only those employees who are unable to work due to a need to care for their child under 18 years of age because the child's school is closed or the child's child care provider is unavailable due to the public health emergency caused by the coronavirus pandemic. The Senate's version also capped the amount of paid sick time at \$200 per day and \$2,000 in the aggregate per employee for an employee who is: (i) taking care of an individual subject to a quarantine order or who has been advised by a health care provider to self-quarantine; (ii) caring for the employee's child if the child's school or place of care has been closed due to the coronavirus or if the child care provider for the child is unavailable; or (iii) experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

The Senate's version also made significant changes to the emergency paid sick leave portion of the bill. Most noteworthy being that there is now a cap on the amount of paid sick time in the amount of \$511 per day and \$5,110 in the aggregate for employees who are quarantined or isolated due to coronavirus or are experiencing symptoms of COVID-19 and seeking a medical diagnosis.

This article will describe what employers need to know about the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act which are now part of the Families First Coronavirus Response Act (the Act) which is now law. A copy of the Act can be found [here](#).

Emergency Family and Medical Leave Expansion Act

Effective April 1, 2020, employers with 500 or fewer employees will be required to provide employees, who have worked for their employer at least 30 calendar days (forget about the 1,250 hours service requirement during the preceding 12-month period for other types of FMLA leave), with up to 12 weeks of FMLA leave. These expanded FMLA leave rights extend through December 31, 2020.

Employees entitled to these expanded FMLA leave rights are limited only to those employees who are unable to work (or telework) due to a need for leave to care for their son or daughter under 18 years of age if the school or place of care has been closed, or if the child care provider of such child is unavailable because of the public health emergency caused by the coronavirus. The first 10 days for this FMLA leave will be unpaid. If the FMLA leave extends

beyond 10 days for this purpose, then the employer will be required to provide up to 10 weeks of paid leave for this expanded leave.

The paid leave amount for eligible employees for the available 10-week period is based on an amount equal to not less than two-thirds of the employee's regular rate of pay multiplied by the number of hours the employee would otherwise be scheduled to work. As mentioned above, the paid portion of the leave is now capped at \$200 per day and \$10,000 in the aggregate for each employee. This portion of the Act represents one of the corrections made to the House's first version of the bill so that the amount of the employer's liability for paid leave now matches the amount of tax credit available to the employer for providing such paid FMLA leave.

Currently, the Act covers all employers with 500 or fewer employees, including small employers who employ fewer than 50 employees. However, the Department of Labor is authorized to issue regulations that would exempt small employers with fewer than 50 employees from the paid leave requirements of the bill if such payment obligation would jeopardize the viability of the employer's business as a going concern. This means that if a small employer chooses not to provide the paid leave benefit for expanded FMLA leave, it does so at its own peril subject to its ability to defend itself on the basis that any such paid leave jeopardizes the employer's existence as a going concern. That burden could be high for small employers to meet.

Qualifying Need Related to a Public Health Emergency

Obviously, employees who have been diagnosed with the coronavirus and otherwise meet the definition of having a serious health condition will qualify for regular unpaid FMLA leave like any other employee with a serious health condition. Now, however, employees who have worked for an employer for a period of at least 30 days and have a "qualifying need related to a public health emergency" will qualify for expanded FMLA leave with the opportunity to have 10 out of their 12 week FMLA leave allotment to be paid. The Act defines a "qualifying need related to a public health emergency" as an employee who is unable to work (or telework) due to a need for leave to care for their child under 18 years of age if the school or place of care for such child has been closed, or if the child care provider of such child is unavailable, due the public health emergency cause by the coronavirus pandemic.

Expanded FMLA Provides for Both Unpaid and Paid Leave

The first 10 days of leave under the expanded FMLA would be unpaid. However, employees may elect, but employers cannot require employees, to substitute any accrued vacation leave, personal leave, or medical or sick leave for the unpaid portion of the leave.

After expiration of the 10 days of leave for a qualifying need related to a public health

emergency, employers will be required to provide employees with paid leave. The paid leave provision of the Act will require employers to pay employees an amount equal to at least two-thirds of each employee's regular rate of pay multiplied by the number of hours the employee would otherwise be normally scheduled to work. If the employee works a varying number of hours each workweek, then the employer must base the amount of paid leave on the average number of hours that the employee was scheduled to work per day over the previous 6-month period preceding the need for the leave. The amount of paid leave is capped at \$200 per day or \$10,000 in the aggregate.

Restoration Rights

Like with other types of leave provided under the FMLA, employers will be required to restore employees to their position after expiration of their leave. However, employers with fewer than 25 employees are relieved of the obligation to restore an employee to his or her position if all the following four conditions are met:

- The employee took leave for a “qualifying need related to a public emergency”;
- The position that the employee held no longer exists due to economic conditions or other changes of the employer caused by the public health emergency;
- The employer makes reasonable efforts to restore the employee to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment; and
- If the employer is unable to restore the employee's employment to an equivalent position, then the employer must contact the employee within a 1-year period beginning on the date the FMLA leave concludes if an equivalent position eventually becomes available within that 1-year time period.

Emergency Paid Sick Leave Act

Effective April 1, 2020, employers with 500 or fewer employees, through December 31, 2020, will be required to provide up to 80 hours of paid sick leave to an employee, regardless of how long the employee has been employed by the employer, if the employee is:

- Subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- Experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
- Caring for an individual who is subject to an order to quarantine or isolate by a public order or self-quarantine as advised by a health care provider;
- Caring for the employee's son or daughter if the school or place of care for such child has been closed, or if the child care provider of such child is unavailable due to COVID-19 precautions; or
- 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 will be required to post and keep posted, in conspicuous places on the employer's premises, a notice to employees describing the requirements of the paid sick leave portion of the Act. The Department of Labor will make a model notice available no later than 7 days after enactment of the Act.

Full-time employees will be entitled to up to 80 hours of paid leave based on their normal wage. Part-time employees will be entitled to paid leave equal to the number of hours worked, on average, over a two-week period. Paid sick leave is capped at \$511 per day and \$5,110 in the aggregate for employees who are quarantined or isolated due to coronavirus or are experiencing symptoms of COVID-19 and seeking a medical diagnosis. The amount of paid sick time is also capped at \$200 per day and \$2,000 in the aggregate per employee for an employee who is: (i) taking care of an individual subject to a quarantine order or who has been advised by a health care provider to self-quarantine; (ii) caring for the employee's child if the child's school or place of care has been closed due to the coronavirus or if the child care provider for the child is unavailable; or (iii) experiencing any other substantially similar condition specified by the Secretary of Health and Human Services. However, both full-time and part-time employees will be entitled only to two-thirds of their wages, as calculated under the Act, when the paid sick leave is used for those reasons where the amount of paid leave is capped at \$200 per day. Small employers employing fewer than 50 employees may be able to claim an exemption to the requirements of the paid sick leave portion of the Act if the employer can show that compliance would jeopardize the viability of its business as a going concern.

The paid sick time provided under the Act would be in addition to any other paid leave made available to the employee by the employer. Employers also cannot require an employee to use other paid time, like vacation or PTO, before using paid sick time provided under the Act. In addition, the paid sick leave can't be carried over from year to year, and the employer is not required to pay any unused paid sick leave to the employee at the time of the employee's separation of employment if the employee has not used such sick leave prior to separation.

Tax Credits for Paid Sick Leave and Paid Family and Medical Leave

To assist employers in paying employees either paid FMLA leave or paid sick leave, employers will be entitled to tax credits on their employer's portion of payroll taxes for wages paid to employees.

For paid FMLA leave, an employer will be entitled to a tax credit for qualified family leave wages in an amount up to \$200 per day or \$10,000 in the aggregate (5 days x 10 weeks x \$200/day cap). If any tax credit exceeds the amount of payroll taxes due by the employer, then such excess would be treated as an overpayment entitling the employer to a refund.

For paid sick leave, the available tax credit for each employee would be for wages capped at \$511 per day while the employee is receiving paid sick leave because: (i) the employee is subject to a quarantine or isolation order by a public official; (ii) the employee has been advised by a health care provider to self-quarantine; or (iii) the employee is seeking a medical diagnosis because the employee is experiencing symptoms of coronavirus. The available tax credit to an employer who pays paid sick leave to an employee is \$200 per day if the leave: (i) is taken to care for an individual subject to a quarantine order or who has been advised by a health care provider to self-quarantine; (ii) is taken to care for the employee's child if the child's school or place of care has been closed due to the coronavirus or if the child care provider for the child is unavailable; or (iii) is taken by the employee who is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

If you have questions regarding compliance with these new legal requirements for either expanded FMLA rights or paid sick leave, please contact one of our employment lawyers, Joseph Gumina or Erica Reib, at (414) 276-5000.

18 OCHDL ATTORNEYS RECOGNIZED BY SUPER LAWYERS

Each year, *Super Lawyers* surveys the State of Wisconsin's 25,000 attorneys and judges, seeking the State's top attorneys. *Super Lawyers* then selects the Top 10 Attorneys in Wisconsin, Top 50 Attorneys in Wisconsin, Top 25 Attorneys in Milwaukee, and Super Lawyers (consisting of the top 5% of attorneys in Wisconsin).

The 2019 lists were published by *Super Lawyers* in December 2019, and include the following attorneys from O'Neil Cannon:

- Dean P. Laing:
 - Top 10 Attorneys in Wisconsin (Ranked #2)
 - Top 50 Attorneys in Wisconsin
 - Top 25 Attorneys in Milwaukee
 - Super Lawyer
- Seth E. Dizard:
 - Top 50 Attorneys in Wisconsin
 - Top 25 Attorneys in Milwaukee
 - Super Lawyer
- Douglas P. Dehler: Super Lawyer
- James G. DeJong: Super Lawyer

- Peter J. Faust: Super Lawyer
- John G. Gehringer: Super Lawyer
- Joseph E. Gumina: Super Lawyer
- Gregory W. Lyons: Super Lawyer
- Patrick G. McBride: Super Lawyer
- Joseph D. Newbold: Super Lawyer
- Chad J. Richter: Super Lawyer
- John R. Schreiber: Super Lawyer
- Jason R. Scoby: Super Lawyer
- Steven J. Slawinski: Super Lawyer

In addition, Erica N. Reib was selected by *Super Lawyers* as Rising Stars (a Rising Star must be 40 years old or younger or in practice for 10 years or less).

In total, 18 attorneys of O'Neil, Cannon, Hollman, DeJong and Laing were recognized by *Super Lawyers*, which has called the firm "the Milwaukee mid-sized powerhouse."

Super Lawyers is a national rating service that rates attorneys in all 50 states. The selection process utilized by *Super Lawyers* is multi-phased and includes independent research, peer nominations, and peer evaluations.

EMPLOYMENT LAWSCENE ALERT: WISCONSIN ISSUES NEW BAN ON MASS GATHERINGS OF 10 OR MORE PEOPLE-WHAT DOES THAT MEAN FOR MY BUSINESS?

Under the direction of Wisconsin Governor Tony Evers, the Wisconsin Department of Health Services has ordered a ban on mass gathering of 10 or more people. Pursuant to Emergency Order #5 Prohibiting Mass Gatherings of 10 People or More, a "mass gathering" is "any planned or spontaneous, public or private event or convening that will bring together or is likely to bring together 10 or more people in a single room or single confined or enclosed space at the same time." All gatherings that bring together fewer than 10 people in a single room or confined or enclosed space at the same time must preserve social distancing of six feet between people and follow all other public health recommendations issued by the Wisconsin Department of Health Services and Centers for Disease Control. Additionally, all bars and restaurants in the State of Wisconsin shall be closed, except that restaurants may remain open for take-out or delivery service only. No seating may be provided, and no food may be consumed at the restaurant. Restaurants are to preserve social distancing of six feet

between customers during pick up. Under the order, all public and private schools and institutions of higher learning shall be closed for instructional and extracurricular activities.

This does not affect critical infrastructure and services such as grocery stores, food pantries, childcare centers, pharmacies, and hospitals. Retail food establishments, such as grocery stores, convenience stores, and farmer's markets, are required to close all seating intended for consuming food, cease self-service operations of salad bars, beverage stations, and buffets, and prohibit customers from self-servicing all unpackaged food. Office spaces are also exempt from the Order, although they are required to implement social distancing, including teleworking, as much as practicable. Additionally, manufacturing, processing, distribution, and production facilities are exempt from this Order. This is intended to encourage social distancing and limit the spread of coronavirus. This Order goes into effect at 5:00 p.m. on Tuesday, March 17, 2020, and will remain in effect for the duration of the public health emergency declared in Governor Evers's Executive Order #72 or until a superseding order is issued. At this time, there is no specific end date to Executive Order #72 or the Order Prohibiting Mass Gatherings of 50 People or More. Failure to comply with this directive could result in fines and imprisonment.

The full Order can be found [here](#).

EMPLOYMENT LAWSCENE ALERT: WISCONSIN BANS MASS GATHERINGS OF 50 OR MORE PEOPLE-WHAT DOES THAT MEAN FOR MY BUSINESS?

Earlier this afternoon, Wisconsin Governor Tony Evers directed Wisconsin Department of Health Services Secretary-designee, Andrea Palm, to order a ban on mass gathering of 50 or more people. Pursuant to the Order Prohibiting Mass Gatherings of 50 People or More, a "mass gathering" is "any planned or spontaneous, public or private event or convening that will bring together or is likely to bring together 50 or more people in a single room or single confined or enclosed space at the same time." This does not affect critical infrastructure and services such as grocery stores, food pantries, childcare centers, pharmacies, and hospitals. Office spaces as well as manufacturing, processing, distribution, and production facilities are also exempt from the Order. Some affected Wisconsin businesses, including bars and restaurants, will be permitted to remain open provided that they operate at 50% of seating capacity or 50 total people, whichever is less; preserve social distancing of six feet between tables, booths, bar stools, and ordering counters; cease self-service operations of salad bars,

beverage stations, and buffets; and prohibit customers from self-dispensing all unpackaged food and beverage. This is intended to encourage social distancing and limit the spread of coronavirus. This Order goes into effect at 12:01 a.m. on Tuesday, March 17, 2020, and will remain in effect for the duration of the public health emergency declared in Governor Evers's Executive Order #72 or until a superseding order is issued. At this time, there is no specific end date to Executive Order #72 or the Order Prohibiting Mass Gatherings of 50 People or More. Failure to comply with this directive could result in fines and imprisonment.

The full Order can be found [here](#).

EMPLOYMENT LAWSCENE ALERT: CAN I SEND MY SICK EMPLOYEE HOME?

Many companies are currently wondering what to do if they know an employee or their family member is sick with coronavirus or the flu or if someone seems to be sick with the coronavirus or the flu. The CDC has issued Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19). The CDC has issued the following recommendations, along with other tips and guidance:

- **Actively encourage sick employees to stay at home.** This means that employees who have symptoms of respiratory illness (e.g., cough, fever over 100.4°) should not come to work until they are free of all such symptoms for at least 24 hours, without the use of medicine. Employees who are caring for someone who is sick may also refer to CDC guidance on how to conduct a risk assessment of their potential exposure and should also stay home if they are at risk of contracting a contagious illness. This may require employers to be more flexible with their sick leave policies and use of time off. If sick employees are encouraged or required to come to work for fear of losing their jobs, it could have a larger impact on your company by making more employees sick and further limiting the company's ability to conduct normal operations.
- **Separate sick employees.** Employees who show signs of respiratory illness while at work should be separated from other employees and sent home immediately.
- **Emphasize staying home when sick, respiratory etiquette, and hand hygiene.** Companies should emphasize that sick employees should stay home. Additionally, while at work, employees need to cover their noses and mouths while coughing and sneezing, use tissue, wash their hands, and use hand sanitizer frequently. Companies may consider putting up posters with reminders of these actions and providing tissues and hand sanitizer. The CDC has sample posters ([here](#)) that employers can post at their workplace that encourage employees who are sick to stay at home.
- **Perform routine cleaning.** Companies need to ensure that frequently touched surfaces – workstations, countertops, doorknobs – are cleaned and disinfected regularly.

Companies may also consider providing disposable wipes for employees to use.

There are certain legal obligations regarding how companies treat sick employees. All Wisconsin companies with one or more employees are subject to the Wisconsin Fair Employment Act (“WFEA”), and all companies with fifteen or more employees are subject to the Americans with Disabilities Act (“ADA”). Both of these laws protect employees with disabilities and perceived disabilities, as well as employees who are associated with people with disabilities, from discrimination. However, these laws still allow companies to send an employee who has or appears to have a contagious disease such as coronavirus or the flu home because that employee poses a direct threat of making other employees sick.

In conclusion, yes, sick employees who pose a risk of spreading a contagious illness to your other employees can be sent home from work and should be encouraged to stay home from work until they no longer pose such risk. In this instance, businesses may need to consider one-time, situation-based modifications to their sick leave and absenteeism policies that would allow employees to miss work and not be penalized for it. Employers should not make their decisions about sending an ill employee home based on fear but, rather, on rational, objective, and observable facts designed to protect the interests of all employees and to ensure that your company’s continued operations are not placed at risk.

EMPLOYMENT LAWSCENE ALERT: WORRIED THAT YOUR EMPLOYEE HAS THE FLU? OR IS IT CORONAVIRUS?! HERE ARE SOME THINGS TO CONSIDER

The recent world-wide coronavirus outbreak has, thus far, had a fairly limited impact in the U.S. However, health officials believe that it’s not a matter of “if” the U.S. has an outbreak of the virus, but “when.” The CDC has stated that the “[d]isruption to everyday life may be severe,” which could include schools being closed, mass public gatherings being suspended, and businesses having their employees work remotely. Additionally, we’re still well within the grasp of cold and flu season, so employers are going to have to deal with the impact of employees needing leave illnesses of some severity. This raises a number of potential employment law concerns, and employers must consider the following:

- Wage and Hour.
 - Under the FLSA, an employee is considered exempt if they meet certain duties tests and receive compensation on a “salary basis.” The FLSA regulations provide that, for an exempt employee to be paid on a “salary basis,” the employee must

receive his or her full salary for any week in which the employee performs any work without regard to the number of days or hours worked. However, a deduction may be made when an exempt employee is absent from work for one or more full days for sickness or disability if the deduction is made pursuant to a “bona fide” plan, policy, or practice of providing compensation for loss of salary occasioned by sickness or disability. The employer is not required to pay any portion of the employee’s salary for a full-day absence for which they receive compensation under such plan or if they do not receive compensation under such plan because the employee has not yet qualified for the plan or has exhausted their leave allowance under the plan. Therefore, an exempt employee may be forced to take leave for such illness under the employer’s bona fide plan. If they are not yet eligible or have exhausted their leave, an employer may deduct a full day’s wages from an exempt employee’s salary if that person does not report for work for the day due to sickness or disability. Such a deduction will not violate the “salary basis” rule or otherwise affect the employee’s exempt status. If, however, the employee works only a partial day because of sickness or disability, the employer may not make deductions from the employee’s salary for the lost time because an exempt employee must receive a full day’s pay for the partial day worked in order for the employer to meet the “salary basis” rule. Time worked includes time worked from home.

- Additionally, if the employer chooses to close due to concerns regarding the spread of disease, it cannot deduct the day’s wage from an exempt employee’s salary. It is the U.S. Department of Labor’s (“DOL”) position that an employer must pay an exempt employee his or her full salary for any week in which work was performed if the employer closes its operations due to a weather-related emergency or other emergency. The DOL’s position is based, in part, on the FLSA’s regulation that provides that deductions may not be made for time when work is not available. When it is the employer’s decision to close its business because of an emergency, the DOL presumes that employees remain ready, willing, and able to work. Under such circumstances, deductions may not be made from an exempt employee’s salary when work is not available. If deductions are made under such circumstances, the employer risks losing the exemption, thus subjecting it to potential overtime liability. If the employer’s operation are closed for a full workweek, no salary must be paid. Employers are permitted to require that employees utilize their available paid time off during an employer-mandated office closure, whether for a full day or a partial day. However, if the employer does not provide paid time off or if the employee does not have available paid time off, the employer may not deduct from the employee’s salary for the closure. The employer may not require that the employee have a negative leave balance or make an already negative leave balance more negative as the result of requiring the employee to take paid time off for an office closure.
 - Non-exempt employees do not have to be paid for time not worked.
- FMLA.
 - The FMLA is clear that, ordinarily, the common cold and flu are not serious health

conditions. However, more severe cases that require inpatient care or continuing treatment by a healthcare provider, and therefore meet the definition of serious health condition, do qualify. Therefore, employers need to be carefully tracking who is eligible for FMLA leave and why the employee needs time off and providing timely eligibility notices to employees. When in doubt, employers should err on the side of caution and provide a eligible employee taking time off for illnesses with an eligibility notice and certification of healthcare provider. Then, with the information provided by the employee's healthcare provider, the employer (potentially assisted by counsel) can determine whether the employee's particular illness meets the definition of a "serious health condition" under the FMLA. Additionally, eligible employees are entitled to FMLA for the care of a family member who has a serious health condition, so employees with spouses, children, or parents who are suffering from a severe flu or coronavirus may also be entitled to FMLA leave.

- Disability Discrimination.
 - Employees with certain health conditions may be more susceptible to other diseases, such as colds, flus, or the coronavirus. Therefore, employers may have to consider reasonable accommodations such as working from home or avoiding travel in order to help those employees avoid the risk of further infection. However, employers should use caution about requiring health screenings or otherwise inquiring about potential medical conditions, as this could also be a violation of the ADA and state disability discrimination laws.
 - If the employee is displaying symptoms of a contagious illness at work the employer can (and probably should) send them home, and that will not violate the ADA. If it turns out that the condition was a minor illness, it will not be considered a disability; and if the condition is severe enough to be considered a disability, then the employer was justified in protecting other employees from the direct threat that the contagious illness posed.
- OSHA.
 - Although OSHA has not issued any guidance specific to the coronavirus, under OSHA, employer have a general duty to furnish a place of employment that is free from recognized hazards that are causing or likely to cause the death of or serious physical harm to employees. To that end, employers should consider making hand sanitizer available, particularly in environments with public contact; making sure that surfaces and eating areas are cleaned and disinfected; and encouraging employees who are sick to stay home. Additionally, while the standard cold and flu are not reportable illnesses, OSHA has deemed the 2019 Novel Coronavirus a recordable illness when a worker is infected on the job. Therefore, employers need to know whether their employees are infected, how they got infected, and fill out the appropriate OSHA Form 300 if necessary.

In planning for a pandemic, employers will have to consider how to maintain essential operations and services when necessary resources may not be available. In particular, employers will have to determine if core business activities can be sustained over an extended period of time when only a minimal workforce may be available. The U.S.

Department of Homeland Security provides some steps employers can take now to ensure that their respective businesses can survive and continue to provide critical goods and services to the public. These steps include:

- Identify your company's essential functions, such as payroll or information technology, and identify the individuals that can perform them;
- Cross train non-essential employees to perform essential functions;
- Ensure sufficient essential resources are available at each worksite;
- Plan for interruptions of essential government services, such as mass transit;
- Update and modify sick leave policies and communicate with employees the importance of staying away from the workplace if they become ill;
- Establish policies and practices to allow employees to work from home;
- Collaborate with insurers, health plans, and major healthcare facilities to share your pandemic contingency plans and to learn about their capabilities and plans;
- Promote and maintain a healthy work environment by, for example, providing easy access to alcohol-based hand sanitizer products;
- Communicate with your employees about the threat of a pandemic and the steps that you, as their employer, are taking to prepare for it.

For more information on what your business can do to be prepared for a pandemic, visit the U.S. Department of Homeland Security's website www.ready.gov.

EMPLOYMENT LAWSCENE ALERT: HAPPY HOLIDAYS! HERE'S A LAWSUIT!

The holiday celebration season is in full swing and everyone is ready to celebrate! And while that hopefully means reflecting on successes of the past year and bonding with coworkers, employers need to be aware of their exposure to potential liability arising from holiday celebrations and what they need to do to reduce or avoid such potential liability. While not to drive the joy out of the holidays, here are some common concerns employers should be aware of during the holiday season and tips on how to reduce employers' risk:

1. **Is That Mistletoe?:** Prevent Sexual Harassment. In light of the continued focus on the #MeToo movement, employers should stay focused on preventing sexual harassment during the holiday season, which includes any holiday party where coworkers congregate or socialize together. Ensure that your employees are aware of your anti-harassment policy and that they understand that harassment involving any employee at any time, including at a holiday party, will not be tolerated. Remind your employees that, while they are encouraged to have a good time at the holiday party, it is a company-sponsored event where all of your employment policies and rules apply. If you become aware of inappropriate conduct that occurs at the holiday party, you must deal

with it appropriately in the same manner as you would address such an incident had it occurred in the workplace. Additionally, if you receive complaints post-party about activities that may have occurred at the holiday party, you must document the incident, do a proper investigation to deal with those issues, and take prompt corrective action, if necessary.

2. **Hey, What's in This Drink?:** Reduce the Risk of Alcohol-Related Incidents. Employers may be subject to liability for injuries caused by employees who consume alcohol at employer-sponsored events. To avoid potential liability, employers should promote responsible drinking and monitor alcohol consumption appropriately. Employers may want to consider either not serving alcohol or hosting their holiday parties at a restaurant or other off-site location where alcohol is served by professional bartenders who know how to recognize and respond to guests who are visibly intoxicated. Employers may also consider providing information regarding or paying for a ride-sharing service such as Uber or Lyft to promote responsible behavior.
3. **It's Icy Outside!:** Minimize the Risk of Workers' Compensation Liability. Workers' compensation benefits may be available to employees who suffer a work-related injury or illness arising from an employer-sponsored holiday party. To avoid this liability employers should make it clear that there is no business purpose to the event, that attendance is completely voluntary, and that they are not being compensated for their attendance at the event. Illnesses caused by contaminants found in food or beverages may create legal exposure if the providers are not properly licensed, so employers should use licensed third-party vendors who have their own insurance coverage to provide food and beverages.
4. **Am I Required to Be Here?:** Prevent Wage and Hour Claims. Non-exempt employees must be paid for all work-related events that they are required to attend. Therefore, to ensure that the time spent at a holiday party is not considered compensable under state or federal wage and hour law, employers should make it clear that attendance is completely voluntary, hold the party outside of normal working hours, ensure that no work is performed during the party, and make sure that employees are not under the impression that they are performing work.
5. **Happy Non-Denominational Holiday Celebration!:** Avoiding Religious Discrimination Claims. An employer's holiday party or year-end celebration should be about the people who work there and the accomplishments of the organization, not a particular set of religious beliefs unless, of course, you are a religious organization. Employees of all religious and ethnic backgrounds need to feel invited and welcome to attend. Additionally, if employees do not want to attend based on their particular beliefs or practices, an employer may not discriminate or retaliate against the employee for that choice.

So, for this 2019 holiday season, we hope that you spread the joy of the season, have fun, be safe, appreciate the hard work of your employees, and avoid the employment law pitfalls that can come with the holidays!

The Labor and Employment Law Practice Group, O'Neil Cannon

O'NEIL, CANNON, HOLLMAN, DEJONG AND LAING ELECTS JB KOENINGS AND ERICA REIB AS SHAREHOLDERS

O'Neil, Cannon, Hollman, DeJong and Laing is pleased to announce that Attorney JB Koenings and Attorney Erica Reib were recently elected as shareholders of the firm.

JB has been with the firm since 2010, first as a law clerk and then as an attorney in 2011. He works with and advises clients on a wide range of business law matters, including form of entity selection and initial capitalization, raising funds through private equity offerings, securities compliance and broker/dealer matters, mergers and acquisitions, contract preparation and negotiation, and software, technology, and IP matters.

Learn more about JB Koenings by visiting his full [profile](#).

Erica has been with the firm since 2014 and is a member of the Employment Law Practice Group. She assists clients with employment discrimination litigation, non-competition and trade secret litigation, wage and hour issues, NLRB and unfair labor practice matters, employment policy and agreement drafting and review, unemployment compensation, investigations and proper employment practices to avoid litigation.

Learn more about Erica Reib by visiting her full [profile](#).

We are pleased to add both JB and Erica as shareholders.