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MEMORANDUM

TO: Clients of McKague Rosasco LLP

FROM: Erica L. Rosasco

DATE: March 12, 2020

RE: Coronavirus Article

As businesses in California approach a full-blown coronavirus pandemic and infections mount in the U.S., businesses need help navigating tricky workplace situations.

The World Health Organization as of last Friday has confirmed over 95,000 cases worldwide of COVID-19, the disease caused by the coronavirus (“virus”).

What steps should a company take amid concerns over spread of the virus, absenteeism and possible discrimination claims?

First and foremost, if possible and easily achievable, it would be prudent to allow employees to work from home for the next couple of weeks. If you have employees who must physically come to work, you are encouraged to enhance cleaning and sanitizing procedures and urged workers to avoid clustering or making nonessential travel, especially to coronavirus hotspots. If employees are asked to go out of town and they are resistant, be prepared to have open discussions about the necessity and the location. For example, whether the place you are sending them has had any reported outbreaks, options for the employee to remain safe (possibly driving instead of flying) and/or postponing the trip a couple of weeks.

Another helpful step is to ensure you have proactively discussed a plan to approach workers that might report to work with a bad cough or state they are not feeling well. It is acceptable to check in on employees but be empathetic and do not dive too deep into the employee’s health situation so to not run afoul of the Americans with Disabilities Act. Another option is to proactively provide employees the symptoms of the virus and request that anyone experiencing any of the symptoms should avoid coming into work.

When presented with an employee who seems symptomatic, the employer must balance respecting the employee’s need and/or right to work with the employer’s duty to provide a safe work environment for

other employees, especially with the threat of reasonable harm to other employees. A few options to lessen the likelihood of employees reporting to work sick are to:

- Offer additional pay above and beyond what the sick policy might allow (consider giving a few extra days);
- Consider an a moratorium on any discipline for missing work in the foreseeable future (this can be controlled with requesting a medical note if outside of the Paid Sick Leave usage) or consider allowing employees to take other time off paid to supplement his or her pay;
- Consider allowing the employee to perform work from home if feasible.

Additionally, avoid situations where you are bringing groups of employees together in proximity including meetings, group events, conferences, etc. If employees are generally uncomfortable in the workplace, consider offering hand sanitizer and masks, if applicable. These items are not necessarily required by law but will help to maintain a healthy workforce and keep employees productive. These small steps also communicate the employer's desire to keep a healthy safe environment for employees.

Most employees in California should have some form of paid sick leave to use as protected time off. There also may be situations where an employee requests to use Family and Medical Leave Act (FMLA) or the California Family Rights Act (CFRA), but leave under those two acts is unpaid and comes with qualifications, such as having a qualifying "serious health condition" and having worked for the employer for a certain amount of time. Sick employees may also be able to take leave as a reasonable accommodation under the Americans with Disabilities Act (ADA) and the Fair Employment and Housing Act (FEHA) when used in conjunction with a qualifying disability.

Though the use of the above-mentioned protected time off does not cover the fear of getting sick, some ailments can be exacerbated or even deadly if the employee contracts the virus. Generally, it is not the employer's role to play doctor when an employee is seeking to use protected time off, and this is likely not a prudent time to start doing so. If legally allowed, request a doctor's note and take the employee at his or her word.

Reports are pouring in of businesses closing due to the virus such as movie theaters, theme parks, etc. If you are required to close for a brief period, ensure you understand the minimum pay guidelines for nonexempt and exempt employees before taking this step.

Outside of business closures, daycare and schools are also closing due to the virus. Employees should discuss their options with their employers. Employees at worksites with 25 or more employees may also be provided up to 40 hours of leave per year for specific school-related emergencies, such as the closure of a child's school or day care by civil authorities (see Labor Code section 230.8). Whether that leave is paid or unpaid depends on the employer's paid leave, vacation or other paid time off policies. Employers may require employees use their vacation or paid time off benefits before they are allowed to take unpaid leave but cannot mandate that employees use paid sick leave. However, a parent may choose to use any available paid sick leave to be with their child as preventative care.

Finally, all businesses should have some sort of disaster preparedness plan in place. What will you do if you lose your full workforce for one to three weeks? Can you supplement labor? Could you possibly be in a breach of contract situation if unable to finish work as contracted? Taking a few hours and talking and planning through how a business will handle the effects of this virus in totality will be a life saver if required to implement, and will help keep businesses from making a rash, possibly unlawful, decision.

If you have any questions about how to deal with CORVID-19, please contact the experts at McKague Rosasco LLP.