



LANGLEY & BANACK
INCORPORATED

ATTORNEYS AND COUNSELORS AT LAW

A COVID-19 UPDATE TO OUR FRIENDS

Langley & Banack, Inc. continues its commitment to serving our clients and is fully operational with all attorneys and staff working either in the office or remotely. In order to maintain recommended social distancing protocols, we are limiting visitors to our offices and instead conducting business via video conferencing or internet. Although the coronavirus situation is dynamic and constantly evolving, we offer this update and invite you to contact us should you have any questions. The following is an initial review of complex and evolving regulation, and this memo should not be considered a legal opinion or a substitute for advice from your attorney.

The Latest

Today, Gov. Greg Abbott issued an executive order that bans dine-in eating and gatherings of more than 10 people. In addition, schools, bars and gyms may not be open, and visits to nursing homes and retirement centers are prohibited. The executive order takes effect at midnight today through Friday, April 3rd, but could be extended. While domestic travel is allowed, employers are urged to allow only essential personnel to report to the workplace.

On Wednesday, March 19, 2020, President Trump signed into law the Families First Coronavirus Response Act which contains the following key points:

- **Emergency Family and Medical Leave Expansion Act**
 - Amends the Family Medical Leave Act (“FMLA”) to provide for up to 12 weeks of leave to eligible employees who are unable to work (or telework) due to a need for leave to care for a child under 18 years of age if the school or place of care is closed or the child care provider of such child is unavailable due to the current COVID-19 public health emergency as declared by federal, state or local authorities;
 - Applies to employers who employ less than 500 employees and to employees who have been employed for at least 30 calendar days;
 - The first 10 days of leave may be unpaid, but employees shall have the option to apply any accrued paid leave available to them; the remaining 10 weeks of leave shall be paid at a rate no less than 2/3 the employee’s regular rate of pay, subject to a \$200/per day and \$10,000 individual aggregate limit;



LANGLEY & BANACK

INCORPORATED

ATTORNEYS AND COUNSELORS AT LAW

- Employers of employees who work as health care providers or emergency responders may elect to exclude them from these benefits;
- The Act shall take effect within 15 days of its enactment until December 31, 2020;
- The Secretary of Labor has the authority to issue regulations that may provide for exemption of businesses with fewer than 50 employees.
- **Emergency Paid Sick Leave Act**
 - Requires employers with less than 500 employees to provide paid sick time to an employee in case of:
 - The employee's quarantine or isolation by order of a governmental authority;
 - The employee's self-quarantine at the advice of a health care provider;
 - The employee's experience of symptoms of COVID-19 and absence for medical diagnosis;
 - The employee's care of an individual subject to a quarantine/isolation order or self-quarantine on advice of a health care professional;
 - The employee's care of a son or daughter whose school or childcare provider is closed or unavailable due to COVID-19 precautions; or
 - The employee's experience of similar conditions to COVID-19, as may be determined by applicable government agencies.
 - Full-time employees shall be eligible for 80 hours of paid sick time; part-time employees shall be eligible for paid sick time based on the average of hours worked over a 2-week period.
 - Depending on the reason for the paid sick time, employees may be subject to different daily/aggregate limits of compensation.
 - Paid sick time shall be immediately available to employees and an employer may not require an employee to use other available paid leave in lieu of paid sick time provided for under the Act.
 - The Act shall take effect within 15 days of its enactment until December 31, 2020, and the Secretary of Labor shall publish a poster for employers to post in the workplace.



LANGLEY & BANACK

INCORPORATED

ATTORNEYS AND COUNSELORS AT LAW

- Individuals employed as health care providers or emergency responders may be exempt from these provisions and it is anticipated the Secretary of Labor will issue regulations providing further guidance to employers.
- **The following serve as general guidelines for employers based on the current guidance from federal, state and local authorities:**
 - **Telework** While employers are not required to allow employees to work from an alternative location, telework is an effective infection-control strategy (and one recognized as a reasonable accommodation under the ADA) and should be encouraged. For those who have the proper infrastructure and security protocols for remote work, employees should be encouraged to take advantage of this capability. Tasks best suited for telework are generally those that are exempt from overtime requirements. In such instances, and regardless of whether these employees are working at their normal full capacity, the salaries for these individuals should not change. For clients with a workforce comprised of mainly hourly employees who are eligible for overtime, transitioning to a virtual workplace may be more difficult and poses the extra challenge of making sure all time worked is properly recorded, including any work over 40 hours in a given workweek. Alternative models under the FLSA may be better suited for clients who are trying to transition their workforce to a virtual environment.
 - **“Presenteeism”** If an employee reports for work but exhibits symptoms of coronavirus, the employee should be asked to leave the workplace. Advising such workers to go home is not a disability-related action per EEOC guidance. Additionally, the action would be permitted under the ADA if the illness were serious enough to pose a direct threat.
 - **Symptom Inquiries** During the coronavirus pandemic, ADA-covered employers may ask employees who call in sick whether they are experiencing coronavirus symptoms. All information about employee illness should be maintained as a confidential medical record in compliance with the ADA and HIPAA. Per the pandemic declaration, even if disability-related, these inquiries are justified by a reasonable belief based on objective evidence that the coronavirus poses a direct threat.
 - **Examinations** Measuring an employee’s body temperature is generally considered to be a medical examination. Based on the current pandemic declaration, employers are probably justified in measuring temperature; however, it is important to note that some people with coronavirus may not have a fever, especially those who have been exposed but are not symptomatic.



LANGLEY & BANACK

INCORPORATED

ATTORNEYS AND COUNSELORS AT LAW

- **Travel** Although employers may be able to continue requiring employees to complete business-related travel as part of their job-related duties, a more flexible approach utilizing technology is recommended to avoid liability in the event an employee contracts coronavirus while traveling for work. For employees who have traveled during the coronavirus pandemic (even if travel was for personal reasons), employers may ask employees to self-report and need not wait until symptoms develop before asking about possible exposure. Travel-related inquiries are not considered disability-related. Employers may then ask that such employees self-quarantine for 14 days from the date of last possible exposure to reduce the risk of transmission.
- **Vacation/Personal Time** Since vacation time is not guaranteed by law but is usually a “perk,” most employers are legally authorized to suspend vacation days and require employees to report for work instead. While employers cannot dictate what employees do during their personal time, employers may recommend and encourage against certain off-the-clock activities that may increase the risk of coronavirus exposure.
- **Infection-Control** During the coronavirus pandemic, employers may require their employees to adopt infection-control practices, such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal without fear of ADA reprisal. Employers may also require employees to wear personal protective equipment to reduce the transmission of coronavirus but should make sure to accommodate any disabled employee who may request a reasonable accommodation under the ADA (such as non-latex gloves).
- **Work Absences** During the coronavirus pandemic, an employer may ask an employee about absences from work if the employer suspects it is for a medical reason. Asking why an individual did not report to work is not a disability-related inquiry, and employers are entitled to know why an employee has not reported.
- **Doctor’s Note** An employer may require a release from a healthcare provider certifying the employee’s return to work following an absence during the pandemic. Such inquiries are justified under the ADA standards for disability-related inquiries of employees. As a practical matter, however, healthcare providers may not be able to provide the customary documentation, so employers should be flexible.
- **Close Contact** Workers are protected from retaliation for refusing to take on what they consider an unsafe assignment and should not discipline an employee who raises a safety concern. For employers whose employees are in close contact with members of the public, workers may be justifiably concerned for their personal safety, so it is



LANGLEY & BANACK
INCORPORATED

ATTORNEYS AND COUNSELORS AT LAW

important for employers to engage with their employee to understand and assess the potential threat. In scenarios where a “reasonable” employee would deem an assignment safe, the concerns of hyper-sensitive employees may not be protected.

- **Employer Liability** Due to the difficulty in determining the origin of exposure to coronavirus, it is unlikely that employers are liable for an employee’s claim that he or she contracted the illness on the job. To prevail on this type of claim, the employee would need to prove that he or she contracted coronavirus through “conditions peculiar to the work” and there were no other opportunities for exposure.
- **Privacy Employers** generally have an obligation to warn others if they learn of an employee who has contracted coronavirus. Reporting obligations to local health authorities may exist as well. Even so, the best practice is to protect the employee’s identity and not identify him or her by name.

Authors



Gayla S. Corley

Shareholder

gcorley@langleybanack.com

(210) 240 – 3882 mobile



Erica E. Valladares

Shareholder

evalladares@langleybanack.com

(210) 478 – 7610 mobile