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## Mirick O'Connell COVID-19 Legal Updates

Elder Law | Employment Law | Construction Law

### ELDER LAW

#### **THE CORONAVIRUS CRISIS: CHANGES TO LONG-TERM CARE AND ESTATE PLANNING**

Over the past few weeks, our country has been deeply impacted by the COVID-19 crisis. For seniors and those with disabilities, this health crisis is particularly challenging and scary. Recently, there have been changes to the Medicaid program and guidance issued by the Center for Medicare and Medicaid Services (CMS) that all seniors and families with loved ones that are critically ill or in a skilled nursing facility should be aware of. Please note that our attorneys are able to meet with clients via video conferencing to eliminate the need for in-person meetings at the present time.

#### **Ban on Nursing Home Visits**

- CMS has issued guidance prohibiting all visitors and non-essential health personnel from entering a nursing home to see a loved one.
- Visitors may only be permitted to enter in certain end-of-life situations. These visits will be confined to a single room.
- If a visitor displays any sign of illness, they will be banned from entering the nursing home, even in an end-of-life situation.
- Community activities among residents, such as group dining and group activities, are prohibited.

### EMPLOYMENT LAW

#### **THE CORONAVIRUS AND ITS IMPACT ON THE WORKPLACE: PART II**

Since our [Client Alert](#) last Thursday, March 12, 2020, there have been a number of new developments of significant importance to employers as the novel coronavirus (COVID-19) continues to spread.

#### **Congress is Considering Legislation to Create Paid Sick Leave and Expand FMLA Protections for Employees Impacted by the Coronavirus**

Many employers may be aware that the United States Congress is working on legislation that, in part, would create a federal paid sick leave law for employees affected by the coronavirus and expand the provisions of the Family and Medical Leave Act to allow employees impacted by the coronavirus to take job-protected leave. The legislation has passed the House of Representatives and is currently in the Senate where it is being negotiated among lawmakers. We will circulate an additional client alert summarizing the bill in its final form if, and when, it is passed and signed by President Trump.

#### **Equal Employment Opportunity Commission Issues New Guidance Regarding Checking Temperature of Employees**

As noted by the Centers for Disease Control, one symptom of the coronavirus is a fever (although some patients with the coronavirus will not have a fever). As a result, many employers have questioned whether they may take the temperature of

- Nursing home staff must be screened to ensure that they are not displaying any symptoms of the virus.
- Nursing homes are encouraged to facilitate alternate forms of communication between residents and their loved ones.
- Residents must still be granted access to the facility's ombudsman. All legal rights presently granted to residents under current state law remain in place.
- There is presently no limit on how long this ban is expected to last.

#### National Emergency Declaration

- The President issued a proclamation declaring the virus to be a national emergency.
- In the proclamation, Health and Human Services, the agency that administers the Medicaid program, was given authority to waive or modify certain requirements of the Medicare and Medicaid programs in light of the outbreak.
- A waiver allows states greater flexibility in administering their Medicaid programs during the outbreak.

#### Medicare

- Typically, Medicare only pays for the first 100 days of an individual's nursing home care if the individual received at least 3 days of care in a hospital prior to nursing home admission.
- The President's emergency declaration waives this 3-day requirement, and permits Medicare to begin paying for individuals transferring from the hospital to the nursing home right away.
- This change is designed to free up hospital beds for critically ill patients by facilitating more nursing home admissions.
- States have the ability to ask Medicaid for waivers to current eligibility requirements. If Massachusetts implements any type of Medicaid waiver related to COVID-19, we will alert our clients right away.
- Due to an increased number of individuals potentially being transferred to nursing homes in the immediate future, pressure may be placed on families to submit MassHealth applications that are incomplete or improperly prepared. It is our recommendation that clients always consult with a qualified elder law attorney regarding MassHealth long-term care eligibility prior to submitting an application for benefits. Filing a MassHealth application too soon, or without proper legal advice, can have disastrous and costly consequences.

#### Medicaid/MassHealth

- Prior to the COVID-19 outbreak, MassHealth was moving to ban seniors over the age of 65 from transferring their assets into a pooled disability trust.
- In light of the outbreak, MassHealth has indefinitely postponed plans to implement this ban and, as of now, transfers to pooled trusts is permissible.
- Individuals applying for MassHealth should be aware that there may be lengthy delays in application

employees. The EEOC recently released [guidance](#) addressing this specific question and stated that, although measuring an employee's body temperature is a medical examination, "[b]ecause the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature." Employers, particularly large employers, who elect to implement a practice of taking employees' temperatures must be mindful that any delay imposed while employees stand in line to have their temperature taken could be deemed compensable time for wage and hour purposes.

#### Department of Labor Issues Guidance Regarding Application of Unemployment Benefits Laws

The Department of Labor recently issued guidance to state agencies that administer unemployment insurance benefits to make clear that federal law allows states to pay unemployment benefits where " (1) [a]n employer temporarily ceases operations due to COVID-19, preventing employees from coming to work; (2) [a]n individual is quarantined with the expectation of returning to work after the quarantine is over; and (3) [a]n individual leaves employment due to a risk of exposure or infection or to care for a family member."

Upon receipt of the DOL's guidance, the Massachusetts Department of Unemployment Assistance (DUA) issued its own guidance that may inform an employer's decision whether to pay employees for any periods of closure or quarantine or whether to conduct a furlough or reduction-in-force. Specifically, the DUA advised that it "may now pay unemployment benefits if a worker is quarantined due to an order by a civil authority or medical professional or leaves employment due to a reasonable risk of exposure or infection or to care for a family member and does not intend to or is not allowed to return to work . "

The DUA further advised that the Baker Administration is (i) filing emergency legislation that will allow new claims for unemployment benefits to be paid more quickly, and (ii) preparing emergency regulations that would allow people "impacted by COVID-19" to collect unemployment benefits in certain circumstances. It is anticipated that the 1-week elimination period that must be exhausted before an employee becomes eligible for unemployment compensation benefits will be eliminated for those employees impacted by the COVID-19 pandemic.

#### Employee Privacy Considerations

As the coronavirus spreads, it is likely that some employees will contract the virus or be forced to self-quarantine as a result of potential exposure. Employers should advise their employees to contact human resources (or another designated individual in your organization) in the event either of those two events occurs. Obviously, at that point, human resources will need to determine whether, and to what extent, to notify other employees who may have come in contact with the employee who either contracted the virus or who is now quarantined.

In making the above determination, an employer must balance the interests of the impacted employee's right to privacy with the employer's interest in creating and maintaining a safe- and hazard-free work environment, as well as the other employees' interests in working in a safe environment. While it is advisable for an employer to notify its employees that they may have been in contact with someone

processing times due to office closures. To date, we have not received notification that timelines for filing applications will be increased.

- The Office of Medicaid Board of Hearings has decided that all hearings will now be held telephonically, and not in person.

#### Estate and Long-Term Care Planning

- Due to the ban on nursing home visits, the ability of nursing home residents to execute estate and long-term care planning documents is severely limited.
- Members of the Massachusetts estate planning and elder law bars are advocating to the Commonwealth for the allowance of “virtual” notarization, which would allow notaries and attorneys to conduct document signings for individuals using video conferencing. Our firm is monitoring this development and will alert clients right away if “virtual” notarization is implemented by the Commonwealth.
- It is imperative that individuals at risk of illness or those with disabilities take immediate steps to have at least a basic estate plan in place, such as a durable power of attorney, health care proxy, and will.

#### Court Closures

- As of now, Courts across the Commonwealth are closed through April 6, 2020.
- Probate and Family Courts are hearing only emergency matters, which includes petitions for temporary guardianship and conservatorship (not permanent), petitions for appointment of special personal representative, DNR orders, and injunctions.
- Due to all of the closures, non-emergency matters will likely be severely delayed.

These are scary and unpredictable times. Our attorneys in the Trusts and Estates and Elder Law groups are available to discuss your concerns and guide you through the challenges ahead.



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who tested positive for the virus or is under self-quarantine, an employer should not share the impacted employee’s name and/or other identifying information. Employers should limit disclosure of the impacted employee’s personal identifying information to only those individuals in the company who have a need to know (i.e., human resources, manager, etc.). That said, such privacy limitations may voluntarily be waived by the affected employee in order to enable dissemination of his or her name so as to allow their co-workers to better assess their own risk of exposure.

Employers must also be mindful of the Genetic Information Nondiscrimination Act’s prohibition on disclosure of medical information of family members of an employee. Thus, if the affected employee is absent from work in order to care for a family member who has contracted or been exposed to the virus, employers are not free to disclose such medical-related information to others in the workplace.

#### Addressing an Employee’s Refusal to Come to Work Due to Fear of Coronavirus

Although many employers have encouraged employees to work from home during the pandemic, the reality is that some businesses or job functions do not lend themselves to having employees easily work from home. Nonetheless, it is not unreasonable to assume that certain employees will balk at coming to work based on a fear of possible exposure to the virus. In such circumstances, a couple key questions arise:

- What happens in the event an otherwise healthy employee refuses to come to work out of fear that he/she is going to contract the virus?
- Can you discipline the employee?

As discussed in last week’s Client Alert, the federal Occupational Safety and Health Act (OSHA) provides that employers have a general duty to furnish each worker with “employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.” Under OSHA, an employee can refuse to report to work, and not be subject to discipline or discharge, if there is a hazard that is likely to cause death or serious physical harm. To satisfy this criteria, the employee must demonstrate that he/she: (i) asked the employer to eliminate the danger and the employer failed to do so; (ii) refused to work in good faith, such that he/she genuinely believed that an imminent danger existed; (iii) a reasonable person would agree that there is a real danger of death or serious injury; and (iv) there is not enough time, due to the urgency of the hazard, to go through regular enforcement channels to get it corrected.

If an employee meets all four of these criteria, he/she would be protected from discharge or discipline for failing to report to work due to an imminent danger posed by the coronavirus. Thus, employers are well advised to proceed with caution if contemplating imposing discipline based on an employee’s refusal to report to work due to a fear of exposure to the virus. As noted in our prior Client Alert, non-exempt employees would not be entitled to wage payment for time missed from work and exempt employees would not be entitled to wage payment if they perform no services for an employer in a pay week.

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**Mirick O'Connell will continue to monitor and update you on the latest developments concerning the coronavirus.**

**Please reach out to us if you have any questions.**

#### CONSTRUCTION LAW

### THE IMPACT OF CORONAVIRUS ON THE CONSTRUCTION INDUSTRY

The outbreak of COVID-19 (“coronavirus”) has impacted all industries, including construction. First and foremost, we are in the midst of a public health crisis, and the safety and well-being of all project participants should be top of mind. We are also looking at significant economic risk and uncertainty. Our state and federal governments have issued emergency orders. The City of Boston this week announced a complete shutdown of construction projects, with other jurisdictions likely to follow suit.

The impacts to the construction industry and its participants are widespread and range from quarantines and labor shortages to disruptions in the local, national and global material supply chains. All parties, whether owners, contractors, subcontractors or suppliers, should already be in the process of creating protocols for their field and office teams, proactively establishing communications with customers and vendors, and carefully reviewing and confirming all contract and regulatory requirements, which in some cases are changing daily.

The general protocols to consider include: reinforcing good personal hygiene; encouraging employees to stay home if sick; restrictions on travel; and preparedness planning, data security and working remotely. In addition, the following concepts bear particular attention in light of these circumstances and their unique application in the practice of construction.

#### **Delays and Extensions of Time**

Most construction contracts, including standard form documents such as AIA and ConsensusDocs, contain provisions addressing the contracting parties’ rights and obligations in the event of schedule delay, including delays occasioned by “force majeure” (translated from French as “superior force”). While most of these provisions do not reference infectious disease specifically, they commonly allow for the contract time to be extended in the event of causes outside of the contractor’s control, including a force majeure.

It is recommended at this juncture that project participants review these provisions carefully to determine their rights in light of the coronavirus impacts, and, importantly, to ensure compliance with notice and other procedural requirements. Many of these clauses contain strict requirements for particular notice to specified recipients, to be issued promptly upon recognizing the cause of delay, regardless of whether the impact is ultimately borne out. It is recommended here that parties create a form of notice that can be adjusted on a per-project basis, in order to establish a written record and advance notice of impacts.

#### **Material Escalations**

Contractors are beginning to receive notifications regarding delays and impacts to the supply of construction materials, and they are well-advised to review their contracts for protection against this disruption, usually in the form of material escalation clauses. These clauses will typically specify the materials subject to escalation and define the events that

trigger the clause. The methodology for implementing the price increases is variable, and may utilize unit pricing, benchmark pricing or incremental increases based on other factors.

Given the fluidity of the current landscape, contractors should be careful to include language particular to the coronavirus impact, establishing procedures for documenting and proving actual cost increases. The price escalation should address not only increases in price, but also corresponding adjustments in the schedule.

### Termination and Suspension

Most commercial construction contracts contain language that defines the grounds upon which the owner may terminate the contract or suspend the work. These clauses usually describe the rights of the parties regarding procedures for demobilization, remobilization, adjustments and entitlements. It is recommended that contractors remain vigilant, be aware of these clauses, their rights in the event of an owner-directed termination or suspension, and any notice requirements to preserve adjustments that will have to be made or sought in the contract sum and/or contract time.

### Insurance

For each project participant affected by coronavirus impacts, there may be unique insurance considerations depending on the nature and extent of particular losses and claims. Potential claims lie with policies that are written on an "all-risk" basis, for example builder's risk insurance policies, as well as business interruption insurance policies that may afford coverage, for example, for losses sustained by civil authority orders. It is recommended that participants review their policies, with their insurance professionals to the extent possible, and determine their rights and potential loss mitigation procedures that may be available.

### Safety and OSHA

Obviously, worker health, safety and welfare is a priority for all employers. These are not just moral obligations, they are memorialized in several state and federal laws and regulations. For example, OSHA contains a duty for all employers to provide employees with a place of employment "free from recognized hazards that are causing or are likely to cause death or serious physical harm." The current landscape presents unique risks and challenges, which are sometimes changing by the hour or even the minute. There are several trusted resources for employers to review recommendations for best practices, including, but not limited to, directions from OSHA, DOL, CDC and others.

Mirick O'Connell will continue to monitor the impacts of the coronavirus global pandemic on the construction industry and its participants.



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