

## OPINION

## COVID-19: an employee's rights, an employer's obligations

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Following are some of the legal issues that may come into play if clients lose their jobs, have hours reduced (either temporarily or permanently), or cannot work or telework for reasons directly related to COVID-19.

#### What are my rights if I have been terminated or laid off?

#### Unemployment benefits

For the majority of laid-off or terminated employees, applying for unemployment benefits may be the only option. If someone has lost his job or had hours significantly reduced, he can apply online to the Massachusetts Department of Unemployment Assistance to receive a portion of wages.

On March 18, Gov. Charlie Baker signed into law a bill suspending the current statutory one-week waiting period between losing a job and applying for benefits. People can therefore apply immediately if they lose their job.

Before they apply, they should determine if they are eligible for unemployment, which is based on the duration of employment and the amount of money earned. The state provides a helpful benefits calculator to determine eligibility and benefits.

#### Wrongful termination

The default in Massachusetts law (and in most states) is "at-will" employment. This means that an employer can legally terminate or lay off an employee for any reason, or for no reason at all, as long as the reason is not illegal.

For example, if a worker loses his job solely because his employer believes it can no longer afford to pay the worker, that would not constitute wrongful termination in most scenarios. In that case, the best bet would likely be to apply for state unemployment benefits.

However, there are legal claims that could apply to circumstances that are likely to arise during the coming days, weeks and months. If someone believes one or more of the claims described below apply to him — even for at-will

employees — he should seek legal guidance to determine whether he has a viable claim of wrongful termination or retaliation.

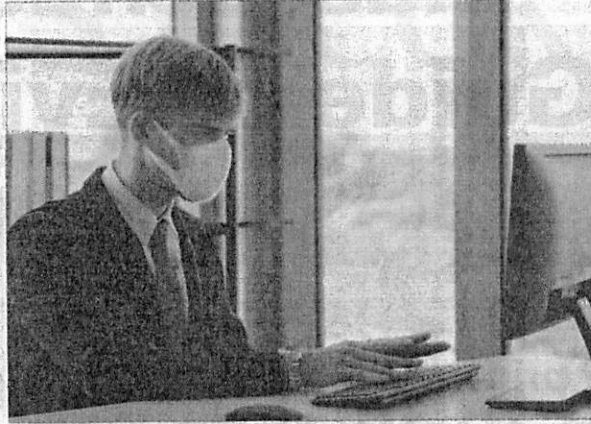
- OSHA — If someone reasonably believes in good faith that performing his job places him in imminent danger of serious injury or death, and he informed the employer, and the employer did not correct the dangerous condition, he may have the right to refuse to work under the federal Occupational Safety and Health Act. If an employer retaliates against a worker for such a refusal (by terminating the worker, for example), he may have an OSHA claim. People should seek legal counsel as swiftly as possible because OSHA has extremely short statutes of limitation. More information can be found on the U.S. Department of Labor's website.

- Disability discrimination — Under G.L.c. 151B, the predominant Massachusetts anti-discrimination statute, employers are forbidden from taking adverse action against employees on the basis of membership in a number of protected categories, including race, religion, age, gender, sexual orientation, and, most important for the purposes of this article, medical condition

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and handicap/disability. Along with the federal Americans with Disabilities Act of 1990, Chapter 151B protects workers from losing their jobs based on a medical condition or handicap. For instance, if a worker refuses to attend a meeting or conference, or to travel on a plane, because of legitimate anxiety about contracting or spreading COVID-19, the employer may be obligated to work with the employee to determine if there is another solution, such as a conference call, Zoom or Skype. If the employer is unwilling to work with the worker, and instead disciplines, demotes or terminates, the worker should seek legal counsel to determine if he has been treated wrongfully and illegally.

- Public policy — Under an exception to at-will employment, the "public policy exception," an employer may not fire an employee if the termination would violate an established policy of the commonwealth. For example, if Massachusetts or a municipality orders citizens to stay at home except to meet basic needs such as medical care and grocery shopping (which many locations are already doing), an employer cannot terminate for complying with the order.



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- Employment contracts — Another exception to at-will employment is an employment contract. If someone is a party to an employment contract, the employer may be obligated to pay the worker for the duration of its term, depending on the structure of the contract. However, a great number of contracts contain a force majeure clause, which concern unforeseeable circumstances that prevent someone from fulfilling contractual obligations. Not every one of these clauses is the same, however. If an employer attempts to withhold compen-

or telework for the following reasons related to COVID-19: the employee is subject to government-ordered quarantine or isolation; a health care provider has advised the employee to self-quarantine; the employee is caring for someone who meets one of the above conditions; the employee has coronavirus symptoms and is seeking diagnosis; the employee is a parent whose child's school or place of care is closed due to COVID-19. The amount of pay is capped, depending on the situation. If the employee is the affected individual, the cap is \$511 a day and \$5,100 in the aggregate. If instead the employee is caring for an affected individual, then the caps are \$200 a day and \$2,000 in the aggregate.

- Family and medical leave — Additionally, covered employers must provide up to 12 weeks of job-protected family medical leave to an employee unable to work or telework due to his minor child's school or day care being closed because of the emergency. Employees must have been on payroll for 30 days to be eligible. The first 10 days are unpaid, during which time the employee may collect the paid sick time described above. After that, employers must pay covered employees for 10 weeks, based on their normal schedule, at two-thirds their regular pay rate, capped at \$200 a day and \$10,000 total.

Given that this bill was just passed, it may take some time for employers to adapt to its requirements.

#### Workers' compensation

If a worker believes he has contracted the coronavirus at work and has been forced to miss time as a result, he may be entitled to workers' compensation benefits. Generally, infectious diseases may be covered only "if the nature of the employment is such that the hazard of contracting such diseases is inherent in the employment." It remains to be seen how this requirement will be applied to a worldwide pandemic.

#### Negligence

Outside of the workplace, if someone has reason to believe that

he or someone close to him was infected with COVID-19, he may have legal recourse against the entity responsible for maintaining safe, clean and sanitary premises.

For instance, lawsuits have been filed recently against the Princess Cruise Lines by people who were passengers on the Grand Princess cruise ship. The lawsuits allege Princess Cruise Lines acted negligently and "chose to place profits over the safety of its passengers, crew and the general public." Similar lawsuits may follow against other entities that unreasonably exposed its patrons or customers to infection.

#### Doctor's orders

If someone is placed on quarantine by a doctor and therefore cannot work, and it turns out he tests negative for COVID-19, the employer cannot take adverse employment action against him. In other words, the job is protected because of an inability to work due to a medical order.

#### Associational disability

Employers cannot discriminate against a worker, whether or not he has a disability, because of his known relationship or association with a person with a known disability. That means that an employer is prohibited from decisions based on concerns about the known disability of a family member or anyone else with whom the employee has a relationship or association.

For example, if someone requests time off to care for a sick family member, the employer is prohibited from terminating him for that reason, particularly if other employees are granted similar time off for other reasons. He can also consider applying for FMLA time, presuming he qualifies.

#### Massachusetts WorkShare Program

Finally, if someone is aware that an employer is considering layoffs (or if you are an employer yourself), he may want to investigate the Massachusetts WorkShare Program, by which employers can split available work among affected employees instead of laying off workers.

The program enables employees to receive partial unemployment benefits while working reduced hours. It may be an ideal solution for some workplaces in the face of the difficult decisions that are coming.

These are unprecedented times. The full impact of the pandemic is impossible to predict. At a time like this, it is important for people to be mindful of their rights and the legal protections that may help them navigate through this.

If your client believes he has a legal claim, help is available. Stay safe and be well. Follow the social distancing rules. We will get through this together.

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