



John Gannon <johngannon200@gmail.com>

AG Opinion Regarding Retail Sales and Virus

Kane, Brian <brian.kane@ag.idaho.gov>
To: John Gannon <johngannon200@gmail.com>
Cc: "White, Kimi" <Kimi.White@ag.idaho.gov>

Fri, Mar 27, 2020 at 11:15 AM

Dear Rep. Gannon:

In general, both State and private employees that feel that they are unable to work because of health related reasons are protected by both the Family Medical Leave Act and the Americans with Disabilities Act. Both these Acts have specific requirements on how to access those protections and the employees that qualify for protections under those Acts. Additionally, the protections under the FMLA have recently expanded to add additional qualifying reasons for FMLA leave that is specific to COVID-19 concerns. The ADA provides employees with accommodations if they require a reasonable accommodation to complete the essential functions of their job. Courts have recognized unpaid leave as an accommodation under the ADA, in addition to some of the ideas you raised, including protective masks, gloves, and potentially protective screens to protect employees that require an accommodation to complete the essential functions of their position. Employers can reject a requested accommodation if it is an undue hardship or if the medical diagnosis/disability does not support the need for the requested accommodation.

Here is some general information for the FMLA:<https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs28.pdf>

Here is some information on the expansion of FMLA pursuant to the Families First Coronavirus Response Act: https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

As for your question related to OSHA, OSHA does not have any specific COVID-19 regulations, but it does have an analysis of what regulations may be implicated by COVID-19, which can be found here: <https://www.osha.gov/SLTC/covid-19/standards.html>

As to your first question, I am not aware of any law that requires the employer to take measures to protect employees outside the laws identified above. As to your second question, yes, employees with preexisting conditions may make a request for FMLA or an accommodation under the ADA assuming they are an eligible employee and the employer is within the scope of the Act. As to your third question, the situation is too fact specific. In general, an employee that is terminated is still eligible for unemployment benefits as long as the employee was not terminated for misconduct associated with his/her employment.

Finally, you ask for any other thoughts our office might have. Our office has worked closely with the Division of Human Resources, the Department of Health and Welfare, the Superintendent of Public Instruction, and the Governor's Office in developing guidance for State agencies. You may find the guidance and resources these entities have published on their websites of benefit.

I hope this guidance provides you with the information you need. Please let me know if you have any additional questions.

Brian

House of Representatives State of Idaho

Brian Kane
Office of the Attorney General
Statehouse
Boise, Idaho
Via Email

Dear Mr. Kane;

I have a concern about those people who are required to work in an environment that is hazardous because of their contact with the public or other workers. It is felt that the threat of the virus is so significant that most Idahoans are required to stay home within the framework of the Governor's directive. Yet those who are exempt are required by employers to work.

My concern is that some of those required to work have a health condition which puts them at much higher risk of serious harm or death if they are exposed to the virus. I have seen some workers post on social media that they are quitting their job because of the risk. These workers are on the "front lines" and I am thinking that legally or not, there is a moral obligation to protect all of them, including those with a preexisting condition, as much as possible.

With this in mind I have the following questions in order to provide guidance for our employers and employees.

1. Is an employer legally required to take reasonable steps to protect all employees from possible virus contact, such as plastic screens between customers and employees, limiting the number of people entering a store so that 6 foot distances can be easily maintained, providing masks of some kind that at least limit the dispersal of a cough or sneeze or other steps?

A. Is the answer the same for State and private employees?

2. If an employee has a preexisting condition such as diabetes, pulmonary disease or other condition that has been identified as making the virus much more dangerous to a person, is this a disability and must the employer provide reasonable accommodations under the American with Disabilities Act?

A. Are there any OSHA regulations that would apply?

3. If an employee in a retail situation chooses not to come to work, can the employee legally be fired and if so does that affect eligibility for unemployment benefits?

Are there any other thoughts that your office might have concerning this very difficult situation?

Thank you for your review.

