

N A T I O N A L A U T O M O B I L E D E A L E R S A S S O C I A T I O N

Running a Dealership During a Pandemic: Legal Issues and Federal Mandates

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Beyond the Scope of This Webinar

- Whether light-duty and commercial truck dealerships are considered “essential” or “critical” for purposes of government mandated shut-downs.
- Maintaining liquidity in the retail and floorplan credit markets.
- Laws applicable to vehicle sales made or services provided at a customer’s home or place of business.
- Business interruption and stop loss insurance issues.
- Titling, registration and lien perfection concerns.

NADA, the state and metro dealer associations, and other industry representatives are focusing on the most crucial of these and other pandemic-related issues.



NATIONAL AUTOMOBILE DEALERS ASSOCIATION

Running a Dealership During a Pandemic: Legal Issues and Federal Mandates

Presented by:

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Complexity of Issues and Disclaimer

The Coronavirus is affecting the economy, businesses, and personal lives. Multiple laws are implicated beyond employment laws. It is critical for franchised automobile and commercial truck dealerships to follow any specific state and local health department directives and emergency declarations applicable to the facility, and to consult with expert legal counsel, as necessary.

Workplace Concerns and Dealership Response

Dealerships should convey to employees, customers, and suppliers that they are monitoring the virus outbreak and will take proactive steps as necessary to protect everyone's health and the business

Medical Information



- Dealerships generally are not experts on Coronavirus or other illnesses
- Dealerships can connect employees with appropriate health organizations, government agencies, and other sources of information
- Dealerships should not provide medical opinions or advice on the spread or effects of Coronavirus
- <https://www.nada.org/coronavirus/resources/>

Top 10 Potential Legal Issues *

1. Americans With Disabilities Act (ADA)
2. Worker Adjustment and Retraining Notification Act (WARN)
3. Occupational Safety and Health Act (OSHA)
4. Family and Medical Leave Act (FMLA)
5. Title VII of the Civil Rights Act of 1964

* Dealerships should consult with their own attorneys regarding legal requirements in their state and local jurisdictions.

Top 10 Potential Legal Issues

6. Fair Labor Standards Act (FLSA)
7. National Labor Relations Act (NLRA) and Railway Labor Act (RLA)
8. Workers' Compensation
9. Contract Claims
10. State and local laws regarding leave, wages, etc.



Workplace Mitigation Measures

- Sick employees stay home
- Employees with sick family member stay home
- Send symptomatic employees home
- Encourage respiratory etiquette
- Encourage good hand hygiene
- Increased cleaning of common surfaces
- Encourage calls to health-care providers
- Use personal protective equipment such as disposable plastic gloves for all employees who handle customer vehicles (technicians, porters, etc.)

Considerations for Ongoing Business Operations

Multiple employment laws are involved in operating a business in this rapidly changing environment.

- OSHA's general duty clause requires that Dealerships furnish employees a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees.

Considerations for Ongoing Business Operations

- Under OSHA, employees may refuse to work when there is a reasonable belief that there is a risk of imminent death or serious injury. No retaliation.
- Dealerships must maintain the confidentiality of an employee's medical records.
- Employees may not be discriminated against based on prohibited factors such as race, national origin or ethnicity.

Considerations for Ongoing Business Operations

- If a group of employees refuses to work because of concerns about Coronavirus, the refusal may be considered protected concerted activity under the National Labor Relations Act.
- If there is a union contract, a Dealership's ability to act unilaterally may be limited without the Union's input/approval.
- The ADA prohibits medical examinations of employees unless they are job-related and consistent with business necessity. Taking an employee's temperature may be a medical examination that is also generally considered to be job-related and consistent with business necessity.

Considerations for Ongoing Business Operations

- Consider posting signage to customers about the high priority the Dealership places on their health and highlight some of the steps the Dealership is taking.
- Consider posting notices discouraging sick customers from visiting the Dealership and requesting that the visit be postponed.
- If business levels drop off, it might be necessary to reduce hours or staff at least temporarily. There could be voluntary and mandatory full or partial closings.
- Determine contingency plan for operations with reduced staff and potential laws involved (federal WARN Act, any state mini-WARN Act, unemployment compensation claims, etc.)

Considerations for Employee Absenteeism

Absences will occur for a variety of Coronavirus-related reasons:

- Employees exhibit Coronavirus-like symptoms and are sent home
- Employees test positive for Coronavirus
- Immediate family members test positive for Coronavirus or exhibit symptoms
- Employees choose to travel to locations with travel advisories issued by the CDC and are not permitted to return to the workplace for a period of time
- Employees are exposed to someone with Coronavirus
- Schools are closed and employees have no child care arrangements

Considerations for Employee Absenteeism

- Follow your policies and procedures related to absences, modified as needed based on circumstances, including possibly not requiring a doctor's note to return to work
- Allow use of available PTO and perhaps advancing additional PTO
- Determine whether absence is a qualifying event under the Family and Medical Leave Act (FMLA)
- Follow developments at the federal level regarding new paid leave and FMLA requirements
- Do state and local leave laws apply?
- Does an employee's condition rise to a disability under the ADA that would require a reasonable accommodation?
- Possible paid leave under state declaration of emergency

Considerations for Employee Absenteeism

- If employees are permitted/required to work remotely, there are multiple wage and hour issues to consider. Non-exempt employees only need to be paid for hours worked. If salaried exempt employees work anytime, they are entitled to full salary for the week.

Considerations for Employee Absenteeism - Workers' Compensation

- Possible eligibility if employees contract the flu in the workplace or performing company business
- Possible eligibility if employees injured while working at home
- Check whether your insurer needs to be notified if employee reports a possible case of Coronavirus

Considerations for Employee Absenteeism

- If an employee exhausts available leave or refuses to return to work and the Dealership needs to fill the position, the Dealership should carefully analyze potential legal issues
- Discrimination, retaliation, interference with leave rights, etc.
- Adverse publicity and employee morale
- Temporary v. permanent replacement
- Reinstatement rights
- Job security under a union contract

Emergency Paid Sick Leave Act

Two weeks of paid sick leave is available to employees if they are out in order to:

- Subject to a Federal, state or local quarantine or isolation order
- Self-isolate because they have Coronavirus
- Obtain a diagnosis because they are exhibiting symptoms
- Comply with an order by a healthcare professional to stay away from work
- Care for a family member facing the above, or
- Care for children if schools are closed or their caregiver is unavailable because of a public health emergency

Dealerships can finance this paid sick leave through accrued payroll tax deductions.

Emergency Paid Sick Leave Act

- For full-time employees, the paid sick leave is 80 hours. For part-time employees, it is equal to the average number of hours employees work over a two-week period
- There will be a poster requirement and employees must give reasonable notice
- Payroll tax reimbursement is lesser of employees “regular rate of pay” times 8 hours or \$511/day, for a total of no more than \$5110

Emergency Paid Sick Leave Act

- Act takes effect no later than 15 days after date of enactment
- Act expires on December 31, 2020
- Applies to employers with fewer than 500 employees
- Government will provide a tax credit equal to actual cost of leave plus cost of maintaining health care for employees on leave
- This paid sick leave is in addition to whatever such leave is already offered by the employer

Emergency Family and Medical Leave Expansion Act

Up to 12 weeks of paid family and medical leave available to any employee who has been employed at least 30 days if they are out in order to:

- Care for children under 18 if elementary or secondary schools are closed or their daycare is unavailable because of a public health emergency

Dealerships can finance this FMLA leave through payroll tax deductions

Emergency Family and Medical Leave Expansion Act

- Amount of paid leave must be the lesser of two thirds of an employee's regular rate of pay or \$200 per day and \$10,000 in the aggregate
- Act takes effect no later than 15 days after date of enactment
- Act expires on December 31, 2020
- Applies to employers with fewer than 500 employees

Emergency Family and Medical Leave Expansion Act

- Government will provide a tax credit to offset the costs
- Employees need to provide notice and the first 10 days are unpaid unless employees elect to apply accrued leave

Emergency Family and Medical Leave Expansion Act

- Secretary of Labor shall have the authority to issue regulations to exempt small businesses with fewer than 50 employees when the imposition of such requirements would jeopardize the viability of the business as a going concern.
- DOL and IRS are expected to issue guidance within 15 days after enactment which NADA will make available

Considerations if Dealership Must Close Completely or a Part Thereof

- If a Dealership must reduce its operations in part, which positions could work remotely?
- Which positions require a physical presence at the Dealership in order for the job function to occur?
- Which part of the operations could be suspended temporarily?
- Identify critical partners and suppliers

Considerations if Dealership Must Close Completely or a Part Thereof

- What are essential technology needs and who can support them, and how?
- If a partial or complete closure, what will be communicated to employees?
- If a partial or complete closure, what will be communicated to customers, when and how?

Frequently Asked Questions

Question

If Dealership thinks an employee may be infected, should it advise other employees of possible exposure?

Answer

Advise coworkers of the exposure generally in a manner that in no way would identify the sick employee.

Frequently Asked Questions

Question

Are Dealerships permitted to ask questions about an employee's illness to determine if the employee needs to go home?

Answer

Generally yes. You may ask if they are ill and if they are experiencing any of the Coronavirus-like symptoms

Frequently Asked Questions

Question

Can Dealerships require employees to come to work, even if they refuse due to fear?

Answer

Yes, if providing a safe workplace (no “imminent danger”), but seek advice if two or more employees refuse.

Frequently Asked Questions

Question

Who must be sent home if an employee tests positive?

Answer

This is fact-specific. Certainly, those employees who were in close contact with the infected employee should be sent home.

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Questions?

<https://www.nada.org/legalwebinar-suggestions/>

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