

WHAT CAN AND SHOULD EMPLOYERS DO IN FACE OF THE CORONAVIRUS THREAT?

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FOR IMMEDIATE RELEASE

As the coronavirus continues to spread globally and, now, domestically, employers should be prepared to confront the myriad of employment and workplace issues posed by the virus, including limitations on travel, adjustments to leave policies, health and safety concerns and risks of discrimination claims. With the worldwide death toll currently at over 3100 (as of March 2nd) and climbing by the hour, federal officials have warned schools and businesses to prepare for a global pandemic. The U.S. government has enacted travel restrictions, the stock markets have dropped precipitously, foreign governments have closed schools, businesses and tourist sites, quarantines have been imposed worldwide and businesses have restricted travel and implemented remote working policies for employees. Employers should be guided by OSHA's "General Duty Clause," 29 U.S.C. Section 654, 5(a)(1), which requires employers to provide "employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to employees." Consequently, employers have an affirmative duty to protect employees from a pandemic virus. The following article will assist employers in protecting both employees and its business in the face of the worldwide coronavirus threat.

LIMITS ON TRAVEL/ FORCED LEAVE/ RETURN TO WORK

Some companies have already taken precautions like limiting travel to affected countries or large international conferences. Others have asked employees to stay home because they visited a country with a more serious outbreak. If an employee has recently traveled abroad, an employer may ask him or her to stay home for the virus's incubation period, which is generally up to 14 days. Employers can require the same of people who have had close contact with someone who visited an affected region. If the employee is feeling well enough to work, employers should encourage him or her to telework. Employers with unionized employees should review their collective bargaining agreements before requesting any employees take unpaid or administrative sick leave.

Even if an employee appears healthy at the end of an incubation period, an employer can require a medical exam in order to return to work. If there is factual evidence that someone has been exposed to the virus, an employer may ask that person to go through a medical or fitness for duty exam to determine whether they are ready to return to work. See below for tips on how to craft a fitness for duty form to avoid violation of law and/or discrimination claims.

LEAVE POLICIES

When an employee has been exposed to and contracted the virus, an employer should determine whether the employee is entitled to sick or personal leave under its policies, leave under the federal Family and Medical Leave Act or its state equivalents, or benefits under a workers' compensation policy.

Unless an employer offers paid sick leave, there generally is no obligation to pay workers who are taking sick leave or forced to be home under quarantine. Federal law requires that hourly workers are paid only for the time they work. There is no federal requirement for employers to provide paid sick leave. Roughly a dozen states and several cities – including California, Michigan, New Jersey, Washington, San Francisco and New York City – require employers to provide paid sick leave to certain employees. Some state laws also require employers to provide time off (sometimes paid) in the event of schools closing or a public emergency. If workers are seriously ill, take a while to recover, or need to care for a seriously ill family member, they may be entitled to unpaid leave under the Family and Medical Leave Act or its state equivalents. Or, if the illness is work-related – i.e., an employee caught the virus while away on business travel, the employee may be entitled to workers' compensation insurance.

The Center for Disease Control (“CDC”) has recommended that employers establish “nonpunitive” policies to encourage employees who are sick or exhibiting symptoms of coronavirus to stay home. Companies should consider developing more flexible and generous sick leave policies to counter this crisis. Paying workers in these situations will serve to incentivize employees to self-identify and self-quarantine, thereby benefiting the health and safety of the workplace and workforce, at large. At a minimum, employers who are not paying for quarantine periods should consider letting employees use any other paid time available, such as vacation or personal days. Note, however, that employers need not allow employees to stay home to avoid getting sick (except those with pre-existing conditions which may worsen).

POTENTIAL DISCRIMINATION CLAIMS

The virus’s origination in China could cause employers and employees to wrongly presume that people who are Chinese have a higher risk of exposure to the virus. Employers need to avoid making such presumptions and ensure that they treat all employees the same. Further, if employers become aware of their employees targeting members of a specific protected class, they need to take appropriate action, including reviewing and reiterating anti-discrimination, harassment, bullying and retaliation and conducting investigation where needed.

Similarly, employers need to be cautious to avoid discriminating against employees with the virus. Attempts to make sure employees are fit to return to work after they have taken a coronavirus-related leave must be legally compliant. Generic fitness-for-duty forms will need to be modified to ensure they pass the “job-related and consistent with business necessity” test. The fitness-for-duty form should focus on the direct threat and ask only whether the employee can return to work but should not request a medical diagnosis.

HEALTH AND SAFETY CONCERNS

All employers should assess the hazards facing their workforce, evaluate the risk of exposure, and implement controls to minimize and contain those exposures. Employers should help employees understand what coronavirus is, how it spreads, what their risk levels are, and how to prevent transmission and exposure. To that end, employers should post and circulate the guidance issued by the CDC and OSHA, including reminders to:

- Avoid contact with exposed individuals.
- Avoid travel to areas with high-risk of exposure to virus.
- Wash hands frequently for 20 seconds using soap and water or sanitizer.
- Avoid touching eyes, nose, and mouth with unwashed hands.
- Stay home when you are sick. Monitor for fever, cough and shortness of breath. Seek medical attention immediately if you may have been exposed.
- Cover your cough or sneeze with tissue, then dispose of the tissue properly.
- Clean and disinfect frequently touched objects and surfaces.
- At high risk workplaces, follow all PPE and bloodborne pathogens rules.

EMPLOYER TAKE-AWAY/ TO-DO LIST

Beyond raising awareness, employers should take these specific steps to reduce the likelihood of workplace contamination and exposure, as well as protect themselves from potential discrimination and other employment-related claims:

- Make hand sanitizer available to employees.
- If an employer wants to require employees to wear masks, they must provide training on how to use and maintain them. Employers should keep in mind that some employees may have medical conditions that are worsened by wearing a mask. For this reason, it may be more prudent to make masks available without requiring employees to wear them.
- Encourage sick or exposed employees to stay at home. Be flexible with sick leave and encourage telecommuting, where possible.
- Collaborate with your temp and contractor firms to do the same.
- Require employees to notify you if they are infected or exposed.
- Impose changes to and limits on travel. Follow U.S. government travel advisories due to coronavirus. Encourage video-conferencing and other tools instead.
- Develop or update an infectious disease outbreak response plan (see CDC website), which details how you will deal with exposed and infected workers and contaminated workplaces.

- In case of a workplace exposure, determine which people and areas were exposed. Send affected employees to medical care or home. Take appropriate steps to decontaminate the environment. Follow OSHA standards on personal protective equipment, respiratory protection, bloodborne pathogens, hazard communications and related issues.
- The CDC has said that if an employee's infection is confirmed, employers should tell his or her co-workers that they may have been exposed. Federal privacy laws, however, prohibit the employer from identifying the infected employee.
- Avoid discrimination. Apply policies consistently to all employees and avoid implementation of policies that discriminate against individuals within a protected class. For instance, ask all employees who travel (not just those of certain races or national origins) about recent travel locations.

Ansa Assuncao, LLP's legal team can advise employers on employment and legal issues arising from the coronavirus.

Please contact a member of our team for assistance.