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Employer COVID-19
Frequently Asked Questions

Employers in the United States should continue to prepare for a widespread outbreak of COVID-19, commonly referred to as the coronavirus, as new cases are confirmed daily. These preparations include assessing work-related travel (as well as employee personal travel) and implementing more expansive work-from-home policies.

Although COVID-19 is new, the steps employers should take are not unlike the approaches recommended to address the annual flu season as well as prior outbreaks such as H1N1 (the "Swine Flu"), Severe Acute Respiratory Syndrome ("SARs") or Ebola.

Employers should carefully monitor recommendations from the U.S. Centers for Disease Control and Prevention ("CDC") and other public health agencies in connection with the creation of workplace plans and strategies. As this is an evolving situation, best practices for the workplace will continue to develop as conditions change.

What employment laws should employers consider when making decisions regarding the coronavirus?

Employers should consider the Occupational Safety and Health Act ("OSH Act"), the Americans with Disabilities Act ("ADA"), Title VII of the Civil Rights Act ("Title VII"), the Pregnancy Discrimination Act ("PDA"), the Family and Medical Leave Act ("FMLA"), state workers' compensation laws and any federal or state anti-discrimination or disability laws as employers develop plans regarding the coronavirus. Employers have a legal obligation to provide a safe and healthy working environment free from serious recognized hazards under the OSH Act. Taking reasonable steps to prevent the spread of communicable diseases, like COVID-19, may fall under this requirement. Employers should consider potential discrimination claims that could arise under the ADA, Title VII or the PDA. The ADA protects individuals who are disabled or who are regarded as disabled. The Equal Employment Opportunity Commission ("EEOC") has stated that while the ADA's requirements continue to apply, they do not interfere with or prevent employers from following CDC guidelines and recommendations regarding the coronavirus. The EEOC also has indicated that its previously issued guidance regarding the H1N1 pandemic is applicable here. Similar to the EEOC's approach during the H1N1 pandemic, employer actions that might be viewed as discriminatory under other circumstances (such as requiring an employee to remain at home for a period of time upon returning from travel to certain countries) would not run afoul of the ADA when taken to limit workplace exposure to the coronavirus. This is because either COVID-19 will not be considered a disability because the resulting illness is mild or, alternatively, if COVID-19 becomes more severe and/or widespread, an employer's actions to limit the spread of the coronavirus will likely be deemed justified given the direct threat posed to other employees, customers, patients or the public at large.

Employers should also take care not to discriminate against employees based on their national origin. Accordingly, employers should establish consistently applied and clearly communicated practices with regard to self-quarantining of employees. For instance, consistent and science-based practices should be followed when employees return from travel to certain countries facing significant outbreaks, rather than singling out employees on an ad hoc basis who may have visited their countries of origin. Recent reports suggest a heightened concern regarding possible workplace discrimination against employees of Asian descent.

While pregnant women may be more susceptible to viral respiratory infections or severe illness, the CDC has released no guidance establishing that such individuals are more susceptible to COVID-19 than the general population. Employers should thus ensure they are not engaging in disparate treatment of pregnant employees.

In addition to discrimination concerns, employers should consider what reasonable accommodations they may need to provide employees under the ADA or the PDA.

Employers also should be prepared to grant FMLA leave to employees who test positive for (or display symptoms of) COVID-19 or who require leave to care for an individual with COVID-19.

Lastly, employees who contract COVID-19 in the scope of their employment may be entitled to make claims under their employers' workers' compensation policies.

Should employers cancel work-related travel?

As of March 6, 2020, the CDC recommends avoiding all nonessential travel to China, Iran, Italy and South Korea and has issued travel alerts recommending that travelers practice enhanced precautions in Japan. These travel advisories extend to layovers in the affected areas. Moreover, entries into the United States of foreign nationals who have been in China or Iran in the 14 days prior to entering the United States have been suspended in many circumstances.

Employers should consider these travel advisories when formulating their business travel plans. Many employers are suspending all business travel to the affected areas. Employers face potential risk when requiring employees to travel to areas where the CDC and other federal agencies have advised against non-essential travel. Other employers are limiting or suspending all non-essential travel or canceling in-person attendance at conferences or meetings in light of the potential spread of the coronavirus.

In assessing work-related travel plans, employers should ensure that they do not single out certain groups (e.g., limiting a pregnant employee's travel due to the risk of exposure to the coronavirus, but allowing other employees to travel).

Should employers cancel large conferences or other community events?

Employers planning events should stay informed about local coronavirus risks. The CDC is recommending event organizers and staff review existing emergency operations plans and focus on prevention strategies, such as frequent handwashing and encouraging both staff and patrons who are sick to stay home. If events are proceeding, the implementation of flexible refund policies may help encourage sick individuals to stay home. And organizers should have supplies that help prevent the spread of viruses such as soap, hand sanitizer and facial tissue available to employees and attendees.

Organizers should also establish criteria with the venue and local public health officials to determine under what specific circumstances events will be postponed or canceled.

What should employers do when they suspect an employee was exposed to the coronavirus and is symptomatic?

An employer should send such an employee home and advise him or her to seek immediate medical attention. The employee should be required to remain at home until he or she no longer displays symptoms and is not contagious. The decision to discontinue home isolation should be made on a case-by-case basis, in consultation with health care providers and state and local health departments.

Are employees sent home due to exposure to the coronavirus (self-quarantined) entitled to paid leave?

Employers typically are not legally obligated to provide paid leave to employees who are sent home due to suspected COVID-19 infection or exposure unless state or local paid sick leave laws apply. However, employers should consider allowing employees to utilize paid leave under any available employer leave policies. If the employee is able to perform his or her job remotely, and is physically able to work, employers should consider allowing remote work during such self-quarantine period, even if such remote

work is not consistent with the employer's regular practices. Employers should consult with counsel to determine whether and when to offer paid or unpaid leave to employees facing quarantine situations. And any modification of an employer's routine policies and practices to address this unique circumstance should be implemented consistently.

I am concerned that employees may become infected if they travel, whether for work or on personal vacation. Can I institute a travel ban for employees?

A ban on nonessential work-related travel may be appropriate if employee travel would take them to areas where there is elevated risk of exposure or would otherwise cause unnecessary and elevated risk of exposure (e.g., certain airline or train travel). Situations should be evaluated on a case-by-case basis, considering guidance from the CDC and other organizations, the nature of expected travel and whether ready alternatives to travel might be available, such as videoconferences, postponement, and the like.

As to personal travel by employees, state or local laws may impose restrictions on an employer's ability to control what employees do during their off-duty time. However, employers may require an employee to inform the employer if they are traveling to an area with a known outbreak. Employers should also let employees know that, upon their return, they may be prohibited from coming to work for a period of time until the incubation period for COVID-19 has passed. As COVID-19 spreads across the U.S. and other regions, employers should consult the CDC or medical resources to make determinations based on the most up-to-date information.

When employees work from home, are they entitled to a reasonable accommodation under the ADA, the PDA or other equal employment opportunity laws?

Employees are entitled to reasonable accommodations that will enable them to perform the essential functions of their positions. For example, if an employee has been provided the accommodation of a low-vision screen reader on his or her work computer, that employee should have access to such a screen reader as a reasonable accommodation when required to work at home.

Can employers ask employees if they have traveled to one of the affected areas?

Yes. Given the ongoing travel advisories and the recommendations of the CDC and other federal agencies regarding travel to affected areas and self-quarantining to limit the spread of the coronavirus, there is likely low risk in requiring employees to disclose their recent travel destinations.

Can employers require a return to work or fitness for duty exam to allow employees to return to work?

Employees who have been diagnosed with COVID-19 should only discontinue isolation after consulting health care providers and state and local health departments. Employers may require the employee to provide proof that isolation can be discontinued before the employee returns to work.

But for employees who have not been diagnosed with COVID-19, it practically may be difficult to receive a return to work exam given that there has been a shortage of testing kits to test for COVID-19. The CDC has also recognized that health care offices may be busy and it may be difficult for an employee with acute respiratory illness to validate their illness or return to work. Employers must take care to treat employees with similar symptoms in a consistent manner.

What should an employer do if an employee fears coming to work due to possible exposure in the workplace?

Creating and implementing consistent plans for preventing and addressing potential workplace exposure and communicating such measures clearly and effectively will go a long way to reducing employee fears of workplace exposure. Employers should assess the specific risk in the workplace on a case-by-case basis. Currently, federal guidance is focused on encouraging those who are sick (or may have been

exposed to the coronavirus) to stay home. In the event of a more particularized risk, such as an actual case of exposure to the coronavirus in the workplace, employers may wish to encourage (or require) working from home or offer more lenient work from home options to its employees.

An employee is sick, and I want to have him tested for COVID-19 before he returns to work. Can I do that? Do I have to pay for the testing and doctor's visit? What information am I entitled to receive about the results of the test?

Employers may seek to have an employee tested for COVID-19, subject to the availability of tests, if there is good cause to believe that the employee may pose a direct threat to the health and safety of others, such as if the employee became sick after traveling to high-risk areas or show symptoms of infection with COVID-19.

Employers must balance their obligation under occupational safety and health laws to provide a workplace free of any recognized hazards with obligations under disability discrimination laws that prohibit employers from requiring employees to undergo medical examinations, unless the medical examination is job related and consistent with business necessity. A medical examination is permitted under disability discrimination laws if necessary to ensure that the workplace is free from direct threats to the health and safety of the employee or others, *i.e.,* significant risk of substantial harm to the health or safety of one's self or others that cannot be eliminated or reduced by reasonable accommodations.

Whether an employee who is sick poses a direct threat to the health and safety of themselves or others should be determined on a case-by-case basis, considering factors such as (i) when the employee became sick, (ii) symptoms known to the employer, (iii) whether the employee has traveled recently to an area with a known outbreak, and (iv) whether the risk can be eliminated or reduced by requiring the employee to work from home for a period of time. Under the current circumstances, where an employer can demonstrate that an employee has symptoms of COVID-19 or has other risk factors of exposure to the virus, an employer may be justified in requiring a medical examination before the employee returns to work. However, the value of such an examination may be limited in the absence of more wide-spread availability of COVID-19 tests. It therefore may be more pragmatic for an employer to require that the employee self-quarantine until he or she is well or, in the case of suspected exposure, until the two-week presumptive incubation period has passed.

To the extent a medical examination is required, it should be limited to whether the employee may return to work without posing a direct threat to the health and safety of themselves or others. If the employer requires that the employee be examined by a health care professional of the employer's choosing, then the employer must bear the cost of the exam. Employees may be entitled to compensation for time spent being tested at the employer's direction, particularly if the employee is required to leave work to be tested or is tested during normal working hours.

What about specific guidance for health care employers?

The CDC has issued specific guidance to try to prevent the spread of the coronavirus into, among, and between health care facilities, including monitoring patients and employees for fever or respiratory systems, encouraging employees to stay home if they have symptoms of respiratory infection and identifying which employees will care for patients with COVID-19. It is critical for health care facilities to have a plan in place to respond to any outbreak. There are potentially severe risks to patients facing health challenges if they are being cared for by employees who have been exposed to the coronavirus.

We are going to shut down a facility because of concerns about COVID-19. Do we need to pay hourly employees while the facility is closed? What about salaried employees?

Under federal law, employers are required to pay nonexempt, hourly employees only for hours they actually work. Absent employer policies or contractual agreements to the contrary, these employees are

not entitled to be paid during a shutdown of a work location. Of course, nonexempt employees must be paid for all hours worked at a remote location during a shutdown. Also, if the shutdown occurs in the midst of an employee's shift, employers may be required under certain state laws to pay nonexempt employees for a minimum number of hours for that workday. For example, as described above, New York law requires that an employee be paid for at least four hours or their regularly scheduled shift (whichever is less) if they report to work by request or permission of the employer. California has similar requirements.

With limited exceptions inapplicable to this situation, federal law requires that exempt, salaried employees (and nonexempt, salaried employees who are paid based on the fluctuating workweek method) must be paid their full salaries for any week in which they perform work. These employees accordingly must be paid their full weekly salary if an employer shuts down its location in the middle of the workweek. However, federal law does not require these employees to be paid their salary in any workweek in which they perform no work. Employers accordingly would not be obligated to pay such an employee in weeks in which the facility is closed unless the employee continues to work remotely during this period.

Employees entitled to nondiscretionary or productivity bonuses who are prevented from making progress toward the bonus during a work shutdown may be eligible for a prorated bonus based on principles of state contract law.

Employers may require employees affected by a shutdown to utilize paid leave if such action is consistent with applicable company policies, employment contracts or collective bargaining agreements.

We permitted an employee to work from home because the employee is concerned about possible contraction of COVID-19. Another employee learned about the arrangement and wants to do the same thing. Can we deny the request because we are concerned that all employees will start working from home?

As a general rule, there is no requirement that an employer allow all employees to telecommute. However, employers should ensure that federal and state laws mandate that flexible workplace policies are administered in a way that does not discriminate against an employee because of the employee's race, color, sex, national origin, religion, age, disability, sexual orientation, gender identity, veteran status and other characteristics. An employer thus should be prepared to offer a legitimate, nondiscriminatory explanation for why it may choose to allow some employees to work from home and not others, and ensure that they consistently apply this reasoning uniformly to all employees.

An employer should also consider possible implications under disability laws when deciding whether, and in what circumstances, it will allow employees in certain jobs to work from home. Under disability laws, employers have an obligation to provide reasonable accommodations to employees with disabilities unless doing so will present an undue hardship. Intermittent or temporary telework arrangements may be a reasonable accommodation for employees with disabilities where an employee can successfully perform the essential functions of a job without coming to work.

By allowing temporary telework arrangements in response to COVID-19, an employer may undermine its ability to decline temporary telework arrangements as a reasonable accommodation to persons with disabilities. Therefore, employers should carefully consider the precedent set by allowing employees to telework in response to COVID-19 when the essential functions of their position cannot be adequately performed at home. If the employer allows employees to telework where it would not otherwise do so because of the unique challenges posed by the COVID-19 outbreak, it should make clear in its communications that the telework accommodation is being granted due to the extraordinary circumstances posed by the virus.

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We have told employees in affected areas to work from home until further notice. Can we monitor their email and phone activity to ensure that they are actually working?

Most employers maintain specific policies that allow them to monitor emails and communications for any work-related reason. These employers can monitor email and call activity consistent with their policies. In the absence of such policies, employers generally can monitor work email provided that there is a valid business purpose for doing so and employees do not have a reasonable expectation of privacy in using the employer's system.

Can we fire an employee who refuses to come to work because of concerns about contracting COVID-19?

Occupational safety and health laws prohibit employers from terminating an employee who refuses, in good faith, to expose themselves to a dangerous job condition and who has no reasonable alternative but to avoid the workplace. However, the condition causing the employee's fear must be objectively reasonable—not simply the potential of unsafe working conditions. The Employee may also be protected from discharge under Section 7 of the National Labor Relations Act if their refusal is part of a concerted protest against unsafe working conditions.