Coronavirus in the Workplace

Safety Considerations for Employers with Employees Returning from Coronavirus-Infected Areas

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The death toll from the Wuhan coronavirus (2019-nCov) has officially passed the 2002 and 2003 SARS outbreak. While the recovery rate for infected individuals is encouraging, many infectious disease experts believe the viral outbreak will likely develop into a pandemic. A growing number of cases have been identified outside of mainland China, including in the United States.

Employees returning from infected areas pose a potential risk to the workplace. Employers should pay close attention to the legal implications of their actions when carrying out coronavirus prevention and containment measures. The situation is dynamic and could likely get worse before it resolves.

Implications under the Americans with Disabilities Act (ADA)

The ADA normally operates to preclude employers from making disability-related inquiries. However, employers are free to ask employees if they are experiencing influenza-like symptoms, such as fever or chills and cough or sore throat. Because these inquiries touch on general temporary seasonal flu symptoms, they are not considered precluded "disability-related" inquiries under the ADA.

Further, employers may ask employees returning from travel about potential exposure to the coronavirus. If an employee displays signs of coronavirus-like symptoms, the employer can send the employee home.

Cautious employers may also consider mandatory quarantine for potentially exposed employees. This could be viewed as discrimination (likely, a "regarded as disabled" claim assuming the employee is not actually showing any symptoms) under the ADA if the employees do not meet an

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ADA exemption. Reasonable alternatives, such as allowing voluntary quarantines or a paid leave of absence during the two-week incubation period, may circumvent entanglement with the ADA. As these scenarios are often fact- and circumstance-specific, employers are encouraged to seek expert legal counsel before implementing a mandatory quarantine policy.

What does OSHA require?

The Occupational Safety and Health Act requires employers furnish a place of employment that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm." However, there are no specific OSHA standards that cover the coronavirus outbreak.

At this point, it is advisable for employers to take the following precautions:

Educate employees on the signs and symptoms of the coronavirus, as well as precautions that can be taken to minimize the risk of contracting the virus.

Follow normal flu season protocol. Provide hand sanitizer and hand washing stations, flu masks and facial tissues; encourage employees to wash hands with soap and water for at least 20 seconds; and clean and disinfect frequently touched objects and surfaces.

Minimize unnecessary meetings and

visitors who may have traveled to infected areas, and assess the risks of exposure by identifying workers who may have recently traveled to, come in direct contact with or are scheduled to go to infected areas.

Implement travel guidelines and procedures that require approval for travel to infected areas, and consider cancelling all work-related travel to infected areas where employees may be exposed.

Allow sick employees to work from home or take leave as appropriate.

Leave considerations under FMLA/OFLA

A confirmed coronavirus case would likely be considered an FMLA-qualifying serious health condition that would allow an employee of a covered employer (generally, an employer with 50 or more employees) to take job-protected FMLA leave to care for themselves or a close relative (a parent, spouse or child).

Similarly, contraction of the virus would likely qualify as a "serious health condition" under OFLA.

However, if an employer requires a potentially exposed employee to take time off work as a precaution, the time away from work cannot be charged as FMLA, OFLA or under the employer's sick leave policy.

Best practices

An employer may consider asking a potentially exposed employee to stay home during the virus incubation period. Unfortunately, the incubation period is long — 14 days. As noted above, neither FMLA, OFLA, nor sick leave are triggered unless the employee actually contracts the virus.

One solution is to offer telework to potentially exposed employees during the incubation period. This ensures employees do not miss out on work due to their

potential exposure. Employers should be mindful to include telecommuting employees in all normal work functions (meetings, decisions, projects, etc.) where possible so as not to isolate them during the incubation period.

Be aware that telecommuting requests may increase from non-exposed employees in response to exposure concerns. OSHA's whistleblower protections permit employees to refuse work assignments when they have a reasonable fear for safety or health at work. Whether a fear is "reasonable" is highly fact-sensitive and requires careful analysis. Some employees may have preexisting medical conditions which make them more susceptible to the coronavirus, making telecommuting during an outbreak a reasonable accommodation under the ADA.

If telecommuting is unavailable but an employer would still like to request an employee stay home, the employer should consider paying the employee while they are required to sit out so the employee does not suffer any economic damages as a result of their exclusion from work.

The appropriate response to the coronavirus outbreak requires thorough consideration. This is a dynamic situation that implicates numerous state and federal laws. Employers should be cognizant of their company's needs and consult legal counsel as needed.

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