

Guidance for employers regarding the coronavirus outbreak

With coronavirus cases on the rise, the CDC (Centers for Disease Control and Prevention) has released guidance for employers outlining recommendations and best practices to protect their workplaces. Issues for employers relating to the coronavirus (and other contagious illnesses) include spikes in absenteeism due to actual illness, school and day care closures affecting working parents, and disruptions to public transportation. While the immediate risk of the virus for Americans is believed to be low, issues may affect individual workplaces due to employees who may have traveled, are planning to travel, or face other issues related to the virus and a potential workplace outbreak.

Strategies for employers

- Actively encourage sick employees to stay home. Employees who have symptoms of acute respiratory illness should stay home until signs of fever are gone for 24 hours. Employees who come to work and show signs of acute respiratory illness symptoms should be separated from other employees and sent home immediately.
- Advise employees to take certain steps before, after and while traveling. Employees who travel should stay up-to-date on the CDC's Travel Health Notices for the latest guidance and consistently check themselves for symptoms of acute respiratory illness.
- Develop a response plan. Employers should develop a plan for: 1, considering possible exposure and health risks to employees; 2, reviewing policies to ensure consistency with public health recommendations and applicable law; 3, creating flexible worksite and work hours; 4, identifying essential business functions to maintain business operations; and 5, establishing a process to communicate information to employees.
- Prepare for increased absences. Employers should be aware that employees may need to stay home because of illness. Employers should maintain flexible policies in compliance with applicable law that permit employees to stay home to care for themselves or for a sick family member. To prepare for potential absences, employers may gather information about employees by asking broad questions aimed at discovering whether employees anticipate being absent during a pandemic - whether because they are in a high-risk category, will have no alternative child care if schools or day care facilities close, or rely on public transpor-



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COMMENTARY

tation - as long as the questions are not limited to disability-related inquiries or other protected statuses and are asked of all employees.

- Perform routine cleaning. Employers should consistently clean common areas and frequently touched surfaces, including workstations, countertops and doorknobs.

Legal considerations

- Occupational Safety and Health Act. OSHA does not impose any affirmative duties on an employer to engage in prevention efforts. However, OSHA's "general duty" clause requires employers to protect their workforce from known hazards. Taking precautions to protect employees from the spread of the coronavirus arguably falls within this broad obligation. Such precautions may include routine cleaning, flexible hours and remote work policies, and separating employees with symptoms of acute respiratory illness from the workplace until 24 hours after the fever has subsided.
- Oregon sick time. Oregon law requires most employers to provide employees with protected sick time. This means that employees suffering from symptoms of acute respiratory illness may qualify for up to 40 hours of paid leave. Sick time may also be used for the care of a family member who needs care or treatment or to care for a child in the event of a school or day care closure by order of a public official due to a public health emergency.
- Fair Labor Standards Act. Employers are permitted to send employees with symptoms of acute respiratory illness home. There is no legal obligation to pay nonexempt employees that are sent home unless the employee has paid sick time available under Oregon law. Exempt employees who are able, willing and ready to work (even if sick) must be paid their regular salary unless they perform no work in a given workday. Additionally, if an exempt worker checks email from home, attends meetings via conference call, or otherwise performs work either in the office or remotely, then that employee must be paid their full salary for that day.

Depending on the employer's policy, the employee may be allowed or required to use PTO to cover partial day absences, but if the employee has exhausted all paid leave, he or she must be paid for the full day anyway.

- Family Medical Leave Act. The coronavirus would likely qualify as a "serious health condition" under FMLA and OFLA. Additionally, OFLA has a separate category of "sick child leave," providing protected leave to an employee needing to stay home to care for a sick child with a nonserious health condition.
- Americans with Disabilities Act. Employers should consider whether an employee with the coronavirus may qualify for protection under the ADA. Individuals with certain pre-existing disabilities are at high risk for complications if they get the virus. These individuals may be entitled to reasonable accommodations to limit their exposure, including telecommuting or a leave of absence. Under the ADA (as well as FMLA and OFLA), any medical information provided to an employer should

be treated confidentially, maintained separately from personnel files as medical records, and shared only on a "need-to-know basis." There is no need to identify individuals who contract the virus.

- Antidiscrimination statutes. Whatever actions employers take to deal with a pandemic, all individuals should be treated similarly to avoid claims of discrimination based on a protected category, including national origin (because this virus originated in China), sex (because women traditionally are the primary caretakers), or disability (because a disabled employee might be incorrectly viewed as "high risk").

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