Coronavirus Continues to Spread: What Employers Should Be Doing

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In our recent blog post, we discussed the effects that the coronavirus has on the workforce, and what employers should, or should not do in response to a virus outbreak. In light of the coronavirus’s continued impact on the workforce, this post reviews the CDC’s newly issued guidelines for businesses, and dives deeper into how employers can lawfully navigate the Americans with Disabilities Act (ADA), sick time laws, and other leave laws, while keeping maintaining the safety of their workforce.

Coronavirus is continually dominating news cycles and has been spreading rapidly throughout Europe and the Middle East. As of the date of this post, there are 400 confirmed cases in Italy and 12 deaths. In the Middle East, Iran has reported 245 cases with 26 confirmed deaths. So far, there are 15 confirmed cases in the United States as of the date of this post, but statistics are adjusted daily. Notably, the 15th case is the first in the United States of unknown origin, meaning the infected individual had not have relevant travel history or exposure to another known patient[1] The mayor of San Francisco declared a local state of emergency in the city this week, but stresses that the coronavirus has not been spreading there. The decision to declare a state of emergency allows the city to be reimbursed by state and federal governments for any money it spends on preparedness for an outbreak. At this time, the CDC still maintains that the risk to the American public remains low at this time.

CDC’s Interim Guidance for Businesses and Employer to Plan and Respond to Coronavirus Disease

The CDC also recently issued interim guidance for businesses and employers to respond to the virus, which overlap significantly with the Occupational Safety and Health Administration’s (OSHA) guidance on coronavirus[2], and with our initial blog post on the issue. That interim guidance aims to “help prevent workplace exposure to acute respiratory illnesses” and provides planning consideration in the event of a more widespread outbreak of coronavirus. Notably, the CDC issues the following disclaimer
To prevent stigma and discrimination in the workplace, use only the guidance described below to determine risk of the [coronavirus] infection. Do not make determinations of risk based on race or country of origin, and be sure to maintain confidentiality of people with confirmed coronavirus infection.

The following is a summary of the CDC’s main guidance points:

- **Actively Encourage Sick Employees to Stay Home**

The CDC encourages employees with symptoms of acute respiratory illness such as fevers or cough to stay home until they are without symptoms for at least 24 hours. The CDC has previously noted that coronavirus is most contagious while an individual is exhibiting symptoms. For this reason, it is crucial that employees be sent home or refrain from coming into work if they have any symptoms of the virus. The EEOC has noted that during a pandemic, employers may send employees home who become ill with flu-like symptoms, specifying that this is not a disability-related action. Sources suggest that the World Health Organization is on the precipice of declaring the coronavirus a pandemic, however as of the date of this post, no such declaration has been issued.

The CDC also reiterated that employees be made aware of Company sick time policies, including that the policies permit employees to stay home to take care of sick family members. In Massachusetts for example, the state sick time law permits the use of sick days not only for an employee’s own illness, but also for the illness of the employee’s child, spouse, parent, or parent of a spouse.

Interestingly, the CDC recommends that employers *not* require a note from employees who are sick with acute respiratory illness to validate their illness because health care providers may be extremely busy responding to other health needs. Such guidance may conflict with employer certifications around leave laws, state sick time laws, and the ADA. For example, under the federal Family and Medical Leave Act, employers can require certification from an employee’s (or employee’s family member’s) health care provider based on a serious health condition. In Massachusetts, the sick time law permits an employer to require documentation from a medical provider if an employee is out of work for 3 consecutive days, or within 2 weeks of leaving their job. Similarly, under the ADA, employers are permitted to request notes from health care providers or can even request medical testing to assess the extent of an impairment if an employee requests a reasonable accommodation under the law. Employers will have to consider whether to temporarily suspend such policies in response to coronavirus, or whether to continue requesting medical certifications as permitted by applicable law. In either
event, employers must maintain consistent policies, and are cautioned not to treat employees with similar symptoms differently.

The CDC also encourages employers to remain in communication about coronavirus with businesses that provide temporary or staffed employees to your workforce. Often times, these employees may be governed by the policies of another business. Employers must be conscious of conflicting sick time policies or notification procedures when using contractors or temporary employees. Connecting with staffing agencies during cold and flu season in general is a prudent step.

- **Separate Sick Employees**

If an employee arrives to work showing signs of an acute respiratory illness (such as cough or shortness of breath) or becomes sick during the day, the CDC recommends that the employee be separated and sent home immediately. Again, employers must ensure that they train their supervisors on how to identify such symptoms and ensure that employees are being sent home for the right reasons.

Sending employees home, but subsequently not requesting a doctor’s note with respect to a respiratory illness (as the CDC suggests), may pose a unique set of issues for employers reacting to coronavirus. Many employers are concerned with whether or not a sick employee returning to work is clear to come into the workplace. Under the ADA, employers are permitted to request an employee to undergo a medical examination when the examination is “job related and consistent with business necessity”, i.e., when an employer believes the employee will pose a direct threat to the workforce due to a medical condition. The EEOC’s guidance on disability-related inquiries and medical examinations of employees notes that the ADA’s statutory language makes clear that such restrictions apply to *all* employees, not just qualified individuals with disabilities. A “direct threat” means a significant risk of substantial harm that cannot be eliminated or reduced by a reasonable accommodation. Direct threat determinations must be individualized assessments based on (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur, and (4) the imminence of potential harm. 29 C.F.R. §1630.2(r). Employers therefore may be permitted to request clearance from a medical provider prior to an employee returning to work if they were exhibiting signs of coronavirus, but before doing so, we strongly recommend that employers consult with counsel on an ADA-related inquiries or requests so they can make that individualized assessment properly.

- **Emphasize staying home when sick, respiratory etiquette, and hand hygiene by all employees**
The CDC encourages employers to promote respiratory etiquette and hand hygiene as the most effective ways to prevent illness spreading. For example, providing tissues and no-touch disposal receptacles for employees or providing soap, water and alcohol-based hand rubs in the workplace can ensure proper etiquette is maintained. Notably absent from the CDC’s list of recommendations is the use of face masks. Again, face masks in the workplace, whether encouraging or banning the use of such masks, brings a host of issues and legal implications to consider. The EEOC states in their Pandemic Preparedness in the Workplace and the Americans with Disabilities Act guidance, that employers may require the use of face masks during a pandemic. Currently, coronavirus has not been classified as a pandemic. In fact, U.S. health officials continue to maintain that the risk to the American public remains low. Even if coronavirus were a pandemic, employers would have to carefully administer the use of face masks, and consider alternatives for employees with disabilities, such as latex gloves, gowns for wheelchairs, etc., and would be required to adopt clear cut policies around the use of masks.

- **Perform Routine Environment Cleaning**

While somewhat intuitive, some of the most important preventative measures for illness containment are ensuring that workplaces are routinely cleaned. The CDC makes clear that no additional disinfection beyond routine cleaning is recommended at this time.

- **Advise Employees before Traveling to Take Certain Steps**

As discussed in our previous post, the CDC recommends checking its travel health notice for the latest guidance and recommendations for each country prior to travel. Travel to and from China has ground to a halt, however the CDC still recommends air crews review their website prior to traveling or returning from China. The CDC also recommends employees check themselves for any symptoms of acute respiratory illness before starting travel. Again, while the EEOC’s guidance has been limited to classified pandemics, it has stated that an employer need not wait until an employee develops flu like symptoms after travel to ask questions about exposure during a trip. This is not a disability-related inquiry. Employers may also encourage employees to work remotely as an effective illness-controlling strategy. Additionally, employees with disabilities that may put them at higher risk of complications during an illness outbreak of pandemic levels, may request to work remotely as a reasonable accommodation.

- **Additional Precautionary Measures in Response to Coronavirus**

The CDC encourages employees who are well but who have a sick family member at home with coronavirus to notify their employer and refer to CDC guidance for how to conduct a risk assessment of their exposure. Again, we urge employers to proceed with
caution in the face of an employee with a sick family member, and to follow official
guidance from the CDC. Generally, an illness such as coronavirus would not qualify as a
“disability” under the ADA given that it is a temporary illness, however the ADA
prohibits discrimination against an employee for association with an actual or perceived
disability. Employers are encouraged not to make assumptions about employees or
employee family members, and to continue to apply their policies in a uniform fashion.

**CDC’s Plan for Possible Coronavirus Outbreak in the U.S.**

The CDC makes clear that, for the general American public, (including workers in non-
health care settings where work tasks are unlikely to increase the risk of exposure to
coronavirus), the health risk from coronavirus remains low. Even so, the CDC
recommends that businesses consider adopting outbreak response plans if a coronavirus
outbreak does occur in the U.S.

Employers are encouraged to review the following objectives in creating a plan: (1)
reducing virus transmission among employees, (2) protecting people who are at higher
risk for adverse health complications, (3) maintaining business operations, and (4)
minimizing adverse effects on other entities in their supply chains.

Before enacting any response to what could be a larger outbreak, the CDC instructs
employers to first consider a number of factors. For example, employers need to
evaluate the severity of the virus in the community in which their business is located.
State and local health officials will have guidance specific to their communities that
employers should follow in addition to the CDC’s guidance. Employers should also
prepare for a possible increase in the number of employee absences due to their own
illness or a family member, particularly if schools in their geographic area are shut down
due to the virus. The CDC also recommends cross training personnel to perform
essential functions to keep businesses operating even when key staff are absent, or to
explore flexible work arrangements such as telecommuting. The CDC warns employers
to be prepared to change their business practices if needed to maintain critical
operations, to consider cancelling large work-related meetings or events, and for
businesses with more than one location, to provide local managers with the authority to
take appropriate actions as outlined above. If employers do decide to create an outbreak
response plan, the plans should be flexible to account for a rapidly changing scenario,
and should be shared with employees after being vetted by counsel.

As the global community continues to anticipate the outbreak of coronavirus, employers
should monitor the CDC’s website for official guidance, develop a response plan, and
consult with counsel before making employment-related decisions about the virus.
Importantly, the CDC cautions employers to anticipate rumors, anxiety and
misinformation from a scared workforce. At this time, it is most crucial that employers
continue to provide current and accurate information to their workforces to avoid the spread of panic. Employers should coordinate with counsel and their internal human resources department to craft appropriate communication and prepare for employee questions and concerns around the coronavirus.

[1] The 15 reported cases in the U.S. exclude those who evacuated patients from Wuhan, China, or the Diamond Princess cruise ship. The 15 cases in the U.S. stem from either travel to China or close contact with another infected person, though the newest case does not have a clear source. There are currently 60 total cases in the United States including those Americans evacuated directly from Wuhan and the Diamond Princess cruise.

[2] OSHA has stated that while the common cold and flu are exempt from OSHA recording requirements under 29 CFR 1904, coronavirus is a recordable illness when a worker is infected on the job. For more information regarding OSHA standards on coronavirus, please review OSHA’s website here.

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