

US employers must consider multiple legal requirements when addressing coronavirus concerns

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Introduction

COVID-19, the 2019 novel coronavirus (“COVID-19” or the “coronavirus”) is naturally on the minds of US employers as the number of cases in the US continues to rise. Although the Centers for Disease Control (CDC) is still advising that most people in the US have a low immediate risk of exposure, that could change and employers are well advised to consider some basic questions that could arise in the future. We pose and answer some of those basic questions below. Remember that individual situations can vary and it is always best to seek legal advice based on the particular jurisdictions where your employees work. Some states, such as New York, New Jersey and California have state laws that exceed or vary from the requirements of federal law.

What are an employer’s duties to provide a safe workplace?

The Occupational Safety and Health Act (“OSHA”), and state law equivalents, require employers generally to provide a safe working environment. When employees are likely to be exposed to a workplace hazard like COVID-19, employers are required to conduct a hazard assessment and take several additional steps to satisfy their duty to provide a safe workplace.

OSHA also contains anti-retaliation provisions that prohibit employers from taking an adverse employment action against an employee who complains about workplace hazards.

If an employee does not want to come to work due to fear of the coronavirus, an employer should consult with counsel to determine whether there is a sufficient factual basis to implicate the employer’s duties under OSHA, and state law equivalents, to take additional steps to make the workplace safe. A simple or generalized fear that coming to work may increase the employee’s risk of being infected is not likely to be a justifiable basis to refuse to come to work. Depending on the factual circumstances, there could be scenarios where the employee’s refusal may be reasonable until the employer has taken the steps required by OSHA. This determination will depend on the risk of exposure present in the particular workplace.

OSHA’s injury reporting requirements do not cover colds or flu. It is possible, however, that the Occupational Safety and Health Administration may determine, as it did with the H1N1 virus, that COVID-19 is different from the common cold or flu, resulting in employer reporting obligations.

The Occupational Safety and Health Administration has issued [guidance](#) to assist employers in maintaining a safe workplace during a flu pandemic. That guidance will be useful to employers with respect to the coronavirus.

The Occupational Safety and Health Administration has also issued [guidance](#) with respect to the coronavirus, noting that most American workers are not at a significant risk for infection, but that the exposure risk may be elevated for workers who interact with potentially infected travelers from abroad, including workers in health care, death care, laboratories, airline operations, border protection, and waste management, and business travelers who travel to areas, such as China, where the virus is spreading. While there is no specific OSHA standard addressing potential occupational exposure to COVID-19, certain standards, such as those governing personal protective equipment and bloodborne pathogens, may apply depending on the hazards to which workers may be exposed.

What are an employer’s obligations under the Americans with Disabilities Act?

The American’s with Disabilities Act (“ADA”) prohibits an employer from discriminating against employees who have covered physical, mental or emotional impairments, but are otherwise qualified to perform the essential functions of their jobs with or without reasonable accommodations. Generally, seasonal flu and other conditions with short durations are not considered disabilities under the ADA.

But complications from the virus could lead to a condition being a covered disability. Of particular importance in the context of the coronavirus, the ADA also protects those regarded or perceived as having a disability. The CDC has reported that individuals with underlying health problems are impacted more severely by the virus. If the virus impacts or is associated with an underlying health problem, the regarded as disabled provision of the ADA may be implicated. Many states have similar laws, which may provide more extensive protection. The ADA impacts an employer's ability to screen employees for coronavirus and also impacts an employer's obligation to provide reasonable accommodations to employees who have the virus or are perceived to have the virus.

Fever screening has been reported in media as one method of detecting whether someone has the virus. Holding aside whether fever screening is an effective method of detection, the ADA limits an employer's ability to make disability-related inquiries and its right to conduct medical examinations. A fever screening is likely to be viewed as both a disability-related inquiry and a medical examination. Those are only permitted if job-related and consistent with business necessity. Inquiries and medical exams are permitted if the employer reasonably believes the employee poses a direct threat. That reasonable belief must be based on objective evidence. Whether that test can be met will vary depending on the particular facts of a given situation, in particular various exposure risks in the workplace, the industry and the geographic region of employment. As a result, there is no one answer to when fever screenings are permissible. The EEOC's flu pandemic guidance discussed below suggests that fever screenings are not permissible unless the virus is pandemic (requiring some health organization to declare a pandemic), is widespread in the community as assessed by state or local health authorities or the CDC, and the symptoms are more severe than the seasonal flu.

It is, however, likely permissible to ask high risk employees, for example those who have traveled to areas where the virus is especially prevalent, to voluntarily screen themselves. It is also permissible to require employees to report any contagious illness, if the employee is not required to identify the illness.

It is also likely permissible to require employees who show symptoms of the virus to stay at home and to require a fitness for duty exam before allowing the employee to return to work.

Employers contemplating mandatory quarantines of employees exhibiting symptoms of the virus should, however, be very cautious. Mandatory quarantines could violate the ADA. Employer's should consult counsel before mandating a stay at home quarantine.

The EEOC had not issued ADA guidance with respect to the coronavirus, but its [earlier guidance](#) on influenza pandemics, has directly applicable guidance. That guidance explicitly permits encouraging employees to telework as an effective infection-control strategy. Telework is also a reasonable accommodation for employees that are at high risk of complications from the virus in order to reduce their chances of infection during a pandemic. Whether that reasonable accommodation is required for a particular employee will depend on the circumstances and should be discussed with counsel.

In addition, the EEOC's guidelines permit employers to require infection control practices such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal. None of those requirements implicate the ADA.

What are an employer's obligations under the FMLA?

The Family and Medical Leave Act ("FMLA"), requires covered employers to provide job-protected leave for eligible employees with serious health conditions and to care for certain family members with serious health conditions. An illness caused by a pandemic virus may or may not qualify as a serious health condition, depending on the circumstances, and whether the employee develops complications. If a particular employee's or family member's illness does qualify as a serious health condition, the employee will be entitled to up to 12 weeks of unpaid leave.

Several states also have FMLA equivalents, some of which are more generous and may require paid leave.

Employers cannot force employees who do not exhibit symptoms to take FMLA leave. If an employer forces such an employee to go home, the time at home cannot be counted against the employee's FMLA leave entitlement.

What are an employer's obligations under the Fair Labor Standards Act?

When employees miss time from work related to the virus, particularly exempt employees, employers need to be mindful of Fair Labor Standards Act requirements. If an employer has a bona fide sick leave plan or policy, exempt employees may have their pay reduced for full day absences due to illness, even if the employee has not yet qualified for the plan or has already exhausted all sick leave under the plan. However, where the employer initiates the absence by sending an exempt employee home, the employer cannot reduce the employee's pay, unless the employee misses an entire week of work.

Do employees have any rights under the National Labor Relations Act?

Employees who engage in concerted activity related to their working conditions, such as advocating for greater employer action with respect to the virus, may be protected from adverse employment actions under Section 7 of the National Labor Relations Act, whether or not they are represented by a union. As a result, employers should consult with counsel before disciplining employees who engage in such activity.

What are an employer's obligations under the Health Insurance Portability and Accountability Act?

Employers should also be aware of the limitations under the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule. HIPAA's privacy rule imposes certain requirements on covered entities and their business associates with respect to patient's protected health information (PHI). Under HIPAA, covered entities are generally health plans, health care clearinghouses and health care providers that conduct one or more covered health care transactions electronically. Business associates are persons or entities (other than members of the workforce of a covered entity) that perform functions or activities on behalf of, or provide certain services to, a covered entity that involve creating, receiving, maintaining, or transmitting protected health information. Business associates also include subcontractors that create, receive, maintain, or transmit protected health information on behalf of another business associate. Although many employers are not covered entities or business associates, employers that sponsor self-funded group health plans may be covered entities and, regardless of whether an employer is a covered entity, it is important for employers to be aware of HIPAA's privacy requirements.

On February 3, 2020, the Office for Civil Rights (OCR) of the Department of Health and Human Resources (HHS) issued [guidance](#) to covered entities and business associates on how to balance the needs for protecting patient privacy while safeguarding the health of the public.

This guidance makes clear that PHI may be shared in certain cases, subject to certain requirements:

Information shared by covered entities without patient consent

Covered entities may share a patient's PHI without the patient's consent:

- As necessary to treat the patient or a different patient.
- At the direction of a public health authority or foreign government agency acting in collaboration with the public health authority.
- With persons who are at risk of contracting or spreading the disease or condition, if authorized by law, as necessary to prevent or control the spread of disease or otherwise carryout public health interventions or investigations.
- For example, a covered entity may disclose PHI to the CDC on an ongoing basis information regarding prior and prospective cases of patients exposed to or suspected or confirmed to have COVID-19.

Information shared by covered entities with consent or other action

Covered entities may share a patient's PHI with a patient's family, friends, relatives, or other persons identified that were involved in the patient's care. This may include sharing PHI with the police, press, public at large or, in certain cases, disaster relief organizations. The OCR guidance sets forth detailed guidance on steps that should be taken before sharing such information, including in certain cases obtaining verbal or written consent of the patient or his or her representative.

Information shared by health care providers

Health care providers may share PHI with anyone to prevent or lessen a serious imminent threat to the health and safety of the public, consistent with applicable law and the provider's standards of ethical conduct.

Minimum necessary standard

Covered entities must take reasonable measures to limit disclosure of PHI to only the "minimum necessary" to achieve the purpose of disclosure.

Safeguarding PHI during emergencies

Covered entities must implement reasonable safeguards to protect PHI against "intentional and unintentional uses and disclosures"

Business associates

Business associates (and their subcontractors) may make disclosure on behalf of a covered entity in accordance with these rules, to the extent provided in the business associate agreement.

What should I be doing now?

CDC guidance

The CDC has issued [guidance](#) on the coronavirus for employers. The guidance recommends strategies for employers to implement immediately. These strategies, along with recommended strategies from an employment law perspective, are discussed below.

There are several things employers can do now:

Encourage safe and healthy workplace practices

Encourage employee to wash their hands frequently, especially after coughing, sneezing, or blowing their noses. Alternatively, use an alcohol based hand sanitizer. Advise employees to avoid touching the eyes, nose and mouth with unwashed hands and to avoid close contact with people who are sick. Finally, employers should ensure frequently touched surfaces are clean and disinfected periodically.

Update all relevant policies

Employers should ensure all policies related to leaves, managing absenteeism and providing accommodations in the workplace are up to date. This will facilitate managing employees who do not or refuse to report to work. Consider issuing policies that explain what employees should do if they show symptoms of the virus.

Respond to sick employees properly

Employers should actively encourage sick employees to stay home and, per guidance from the CDC, should separate sick employees from healthy employees.

Respond to symptomatic employees properly

If an employee is exhibiting the typical symptoms of the coronavirus, or is asymptomatic but has been in contact with an infected person, he or she should not be allowed access to the workplace and should be sent home and advised to seek medical advice as soon as possible from his or her primary-care provider, local public health office or by any other means recommended by the CDC. If an employee is confirmed to be infected with COVID-19, the employer should inform other employees of their possible occupational exposure to COVID-19 while maintaining ADA confidentiality.

Consider the feasibility of alternative working options

If possible, to reduce the risk of transmission when there is reason to believe that coming to work will increase that risk, consider in advance who can be permitted to work from home and for what periods of time. Consider limiting employee business travel to areas where the virus is prevalent.

Advise traveling employees properly

Employees who must travel should be advised to take certain steps before traveling, including checking the CDC's Traveler's Health Notices for the latest guidance on the country and city that they are traveling to; checking themselves for symptoms of acute respiratory illness before starting travel and notifying their supervisors and staying home if they are sick; notifying their supervisors if they become sick while traveling and promptly calling a healthcare provider if needed; and following the employer's policy for obtaining medical care abroad.

Promote awareness

Develop a communication plan with recommendations for employees. Disseminate it and update it regularly.

Protect privacy

Should an employee reveal that the employee or a family member has the virus, keep this information confidential.

Stay informed

Employers should continue to stay updated on any new information published by public health authorities.

Plan for a potential US outbreak

Employers should also take steps to plan for a potential COVID-19 outbreak in the US. These steps may include identifying potential work-related exposure and health risks to employees, planning for continued business operations, restricting nonessential travel, exploring policies regarding flexible or alternative work options, reviewing policies to ensure they are consistent with public health accommodations, and setting up a COVID-19 disease outbreak response plan.

Given the increasing threat of COVID-19 in the workplace, we expect that additional guidance will be issued from a number of governmental agencies in the near future. We encourage you to check the [CDC website](#) frequently for updated guidance on COVID-19 in the workplace.

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