

Preparing Your Workplace to Address Coronavirus Risks: FAQs for Employers

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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. Carefully tailoring an employer’s plan so as to act consistently with current public health guidance will help keep employees, patients, customers and clients safe as well as reduce an employer’s legal risks. If an employer has an on-site medical professional, partnering with such an expert regarding the implementation of such a plan is strongly advised.

What is the coronavirus and how does it spread?

The novel coronavirus causes coronavirus disease 2019 or COVID-19. Reported cases include respiratory illness with symptoms of fever, cough and shortness of breath. It is spread mainly from person to person either in close contact with each other or through the transmission of respiratory droplets when an infected person coughs or sneezes. The number of cases continues to grow, but for now, most cases continue to be mild.

What steps should employers take to reduce the risk of the coronavirus spreading in their workplaces?

There is no vaccine to prevent the coronavirus. The best way to prevent the spread of any respiratory illness in the workplace is to exercise commonsense measures. Health officials, including the CDC, recommend the following preventive measures:

- Sick employees should stay home from work until they are free of fever, signs of a fever, or any other symptoms for at least 24 hours without the use of fever-reducing or symptom-altering medicine.
- Wash hands vigorously with soap and water or an alcohol-based hand rub for at least 20 seconds.
- Avoid touching one’s face, especially eyes, nose and mouth.
- Exercise respiratory etiquette and cover one’s mouth when coughing or sneezing.
- Clean frequently touched surfaces.
- Maintain at least three feet of distance between oneself and others, including those who are coughing, sneezing or have a fever.

What steps should employers take to prepare for employee communications?

Employers should take steps to be prepared for communicating important health and safety information to all their employees whenever such information needs to be shared. Employers may need to reach employees while outside the workplace and outside regular working hours. Employers should ensure that they have up-to-date contact information for

all employees in case health and safety updates need to be communicated. Messaging regarding the coronavirus should come from a dedicated workplace representative to avoid the sharing of conflicting information and to prevent employee confusion and undue alarm.

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.

What should employers do if employees travel to affected areas (currently China, Iran, Italy, South Korea and Japan) but do not display any symptoms upon return?

Many employers are encouraging (but not requiring) self-quarantining regardless of whether the employee is symptomatic. Others are requiring employees to self-quarantine for up to 14 days (the commonly presumed incubation period for the coronavirus) after returning from these areas. As the list of affected countries continues to expand and risk levels continue to change, employers should carefully monitor and reevaluate their practices.

Requiring self-quarantining protects other employees. On the other hand, requiring self-quarantining for those who have traveled to affected areas may expose an employer to potential claims under the ADA, Title VII, or other anti-discrimination statutes, especially where a forced quarantine situation results in the employee's loss of income or other benefits. Such legal risks may be reduced where an employee is able to work remotely and thus is compensated during the quarantine period.

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.

Should employers inform employees if there is an identified case of COVID-19 in the workplace?

Yes. Employees should be informed of confirmed cases in the workplace. But employers must ensure that employee confidentiality is maintained as required under the ADA, the Health Insurance Portability and Accountability Act (“HIPAA”) and any other state or federal law.

Should employees be encouraged to wear face masks?

The CDC has not recommended that healthy persons wear face masks. Face masks are reported to have no benefit for a healthy person in preventing their exposure to the coronavirus, although masks may provide some benefit if worn by sick persons in limiting their spread of the virus to others. The CDC has urged people to stop buying masks because such consumer behavior is depleting necessary resources from health care professionals who need them.

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.

Is there a special risk for employees who handle packages or products shipped from an affected area?

The CDC has issued guidance that it is unlikely that the coronavirus can spread vis-à-vis products or packaging. Some employers may nevertheless decide to offer specific personal protective equipment (“PPE”) to those employees handling packages or products from affected areas, simply in an effort to mitigate employee fear or concern. In such cases, employees should be properly trained on the use and disposal of the PPE.

What other issues may employees working abroad face?

Consular offices may be closed due to the coronavirus outbreak. Currently, field offices in Beijing and Guangzhou are closed. Such closures may delay any communications with immigration officials.

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