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Coronavirus and the Workplace: What Employers Need To Know

Law and the Workplace Blog on **January 28, 2020**

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News that cases of the newly-identified 2019 Novel Coronavirus (also referred to as COVID-19, 2019-nCoV, or SARS-CoV-2, but more commonly known simply as the "Coronavirus") continue to spread has prompted employers to think about employee safety and ways to address prevention in the workplace, as well as planning for contingencies that may arise in the face of quarantines and other measures being put in place as a response to the virus. The situation is rapidly evolving, and it is never too early for employers to consider how they can address employee concerns, help prevent an outbreak, or address one if it occurs. Employers should also be aware of legal pitfalls that they may encounter when attempting to protect their employees from the virus.

The following addresses some of the key questions employers may have regarding the Coronavirus threat. Employers should also note that the CDC has released guidance specifically addressed to businesses outlining recommendations and best practices on protecting the workplace. You can read more about this latest guidance on our recent blog post. The CDC also has released specific guidance for the healthcare industry, airline industry, and maritime industry as it relates to the Coronavirus.

In addition, the CDC recently released guidance regarding cleaning and disinfection for community facilities (including workplaces) with suspected or confirmed cases of the Coronavirus. Among other points, the guidance recommends closing off areas used by the symptomatic/diagnosed persons and waiting as long as practical before beginning cleaning and disinfection to minimize the potential for exposure for persons conducting the cleaning. Specifically, the guidance suggests waiting up to 24 hours before beginning cleaning and disinfection wherever possible.

What is the Coronavirus and How Is It Transmitted?

According to the CDC, the initial reports of the illness originated in Wuhan, China, where people likely contracted the virus from animals at a seafood and animal market. Experts believe that the virus is spreading from human-to-human when an infected person coughs or sneezes, similar to the spread of a cold or flu. However, it is still too early to know how easily the virus is transmitted between people, or whether other forms of transmission may be occurring (e.g., surface transmission or through other bodily fluids).

On January 30, 2020, the first case of person-to-person transmission in the United States was reported. Presently, the number of confirmed cases diagnosed in the United States is reported be at over 2500.

Community spread – defined by the CDC as person-to-person transmission in which some people have been infected who are not sure how or where they became infected – is now believed by the CDC to be occurring in the United States, as well as in China, South Korea, Hong Kong, Italy, Japan, Iran, Singapore, Thailand, Taiwan, and Vietnam. The CDC has released guidance addressing best practices toward preventing spread of the Coronavirus in communities, including at home, in schools, and at large community events.

What Are the Primary Symptoms of the Coronavirus?

In the confirmed cases of Coronavirus thus far, affected individuals have reported mild to severe respiratory symptoms, fever, cough, shortness of breath, and breathing difficulties. In severe cases, the virus has led to pneumonia and kidney failure and has resulted in an increasing number of deaths. The majority of which have occurred in Wuhan; however, the Philippines reported the first death outside of China on February 1, 2020, and subsequent deaths have since been reported in other parts of the world. On February 29, 2020, the first U.S. death from Coronavirus was reported in Washington. The CDC believes at this time that symptoms may appear within two to fourteen days after exposure. However, some infected individuals have shown little to no symptoms.

How Can Spread of the Coronavirus Be Prevented?

Because there is presently no Coronavirus vaccine available, the CDC is recommending standard precautions to avoid the spread of respiratory viruses, such as washing hands with soap and water for at least 20 seconds, or, if soap is not available, using hand sanitizer; avoiding close contact with people who are sick; staying at home when you are sick; and disinfecting frequently touched objects and surfaces.

What If My Employees Travel For Business?

On January 30, 2020, the **World Health Organization (WHO)** declared a global health emergency over the spread of Coronavirus. Subsequently, on March 11, 2020, the WHO declared the matter a global pandemic (read more on our blog about the declaration here).

As of March 11, the **CDC** has issued a **level 3 travel notice** (the highest threat level) recommending that people avoid all nonessential travel to **China, South Korea**, **Italy**, **Iran** and the **26 countries in Europe's Schengen area** (for a list of those covered countries, click here).

The CDC also has issued a **level 2 travel notice** for **all international travel**, advising high risk travelers, such as older adults and/or those with chronic medical conditions, to practice heightened precautions while traveling or consider postponing nonessential travel all together.

The **U.S. State Department** also maintains travel advisories for U.S. residents traveling abroad. Following the WHO's pandemic declaration, the State Department issued a **global Level 3 health advisory**, urging U.S. citizens to **reconsider all travel abroad** . In addition, specific advisories are in place for certain locations, including **Level 4: Do Not Travel** advisories for **China** and **Iran** and for the regions of Lombardy and Veneto in **Italy.**

On January 31, 2020, **U.S. Health and Human Services Secretary Alex Azar** stated that a public health emergency has been declared in the United States and, effective 5:00pm EST on Sunday, February 2, 2020:

- ???all U.S. citizens returning to the United States who have been in Hubei province in the two weeks before their return will be subject to up to 14 days of mandatory quarantine; and

- U.S. citizens returning from the rest of mainland China in the two weeks prior will face a health screening at a select number of ports of entry and will also be subject to up to 14 days of “monitored self-quarantine” to ensure they pose no health risk.

Subsequently, on January 31, President Trump signed a proclamation suspending the entry into the U.S. of foreign nationals who have traveled in China in the last 14 days. Foreign nationals who are the immediate family of U.S. citizens or permanent residents presently are exempt. On February 29, this entry restriction was expanded to include foreign nationals who have traveled in Iran within the last 14 days.

Following the WHO’s pandemic declaration, President Trump also announced a 30-day ban, beginning at midnight on March 13, 2020, on foreign nationals traveling to the United States from the 26 countries in Europe’s Schengen area (as discussed above). Members of the U.S. military, their spouses and children, health professionals combatting the spread of the Coronavirus, diplomats, air or sea crew, and the spouses, parents, or siblings of U.S. citizens or permanent residents are exempt from these travel restrictions. Click here for more information.

With all of these rapidly changing developments in mind, employers whose employees travel to and from affected areas should consider the following:

- **Consider limiting travel to affected areas.** The General Duty Clause of the Occupational Safety and Health Act (also referred to as OSHA) requires employers to furnish “employment and a place of employment which are free from recognized hazards that are causing or likely to cause the death or serious physical harm to … employees.” Although OSHA has not promulgated specific standards covering the Coronavirus, requiring employees to engage in business travel to China, South Korea, Italy, Iran, or the Schengen area countries in Europe (or any other areas in which the risk of contagion is heightened) could create risk under the General Duty Clause, particularly in light of the CDC and State Department travel warnings and the actions being taken by the U.S. government to impose quarantine measures on returning travelers. For that reason, employers whose business may involve travel to the above-noted areas (or other areas that become subject to travel restrictions or otherwise experience an increase in the spread of the virus) should strongly consider other available options for employees for the duration of the threat, such as videoconferencing.

By the same token, employers should also be prepared to respond to employees who may express concerns about traveling to affected areas due to the virus. While an employer generally has broad discretion to decide the duties and requirements of a job and to discipline employees who fail to fulfill those requirements, as a practical matter employers may wish to consider offering employees reasonable alternatives to such travel.

Finally, while employers may implement restrictions on work-related travel to affected areas, employers should tread more carefully when attempting to police *personal, non-work-related* travel. That said, recent decisions in the Seventh, Eighth, and Eleventh Circuits have held that the disability discrimination protections of the ADA *do not apply* where an employer takes an employment action based on the *potential* for an employee to become ill and disabled in the future. Specifically, the Eleventh Circuit found no liability under the ADA where an employer terminated an employee who requested time off to travel to Ghana to visit family because of the perceived risk that the employee would contract the Ebola virus, due to recent outbreaks of the disease in neighboring countries. While courts have tended to take this view, it is worth noting that the EEOC has argued on at least one occasion that an employer acting on a potential future health condition may be viewed as "regarding" an employee as disabled as long as the condition otherwise qualifies as a disability under the law. For this reason, employers should consider the risks (as well as the practicalities) relating to imposing a ban on personal, non-work-related travel to affected areas. However, as discussed further below, employers may require employees engaging in travel to these areas to remain out of the workplace for at least 14 days upon their return.

- ??? **Consider Additional Limitations on Travel for Non-Immigrant Visa Employees.** As it is reasonable to expect that limitations on travel to the United States for non-immigrants may evolve beyond what is specified in the current executive orders as to China, Iran, and parts of Europe, special consideration should be given to implementing a policy of not putting non-immigrant visa employees at risk. Expiration of non-immigrant visa status should be carefully monitored and consideration should be given to initiating extensions of stay as early as legally possible. Applications for extension of stay in most categories may be filed up to six months in advance of the expiration date, and in a number of categories a pending application for extension of stay authorizes ongoing employment beyond the current visa status expiration date. Planning for visa status should incorporate as a prime objective wherever possible to defer

scheduling of visa appointments outside of the United States at any embassy or consulate.

- **Provide relevant safety information to employees.** Employers whose employees travel to affected areas should provide information to their employees about how the Coronavirus is transmitted, its symptoms, and how to avoid exposure – utilizing trusted and reputable sources such as the CDC. Employers would be well advised to also provide these employees with resources and contact information for local health departments and the CDC.
- **Understand that employee travel may be interrupted.** In light of the steps being taken by countries to manage the spread of the Coronavirus, travelers should expect to face travel delays and cancellations, and may be subject to heightened testing or even quarantining measures. As such, employees who will be traveling should be encouraged to review the latest guidance from the State Department, CDC, and local authorities in the location they will be traveling to, in order to ensure that all possible measures are being taken to minimize or eliminate interruptions.

What Should I Do if an Employee Has Recently Traveled to an Affected Area or Otherwise May Have Been Exposed to the Coronavirus?

Employers should remember that the Americans with Disabilities Act (ADA) places certain restrictions on the kinds of inquiries that can be made into an employee's medical status. Specifically, the ADA prohibits employers from **making disability-related inquiries** and **requiring medical examinations**, unless (1) the employer can show that the inquiry or exam is job-related and consistent with business necessity, or (2) where the employer has a reasonable belief that the employee poses a **direct threat** to the health or safety of the individual or others that cannot otherwise be eliminated or reduced by reasonable accommodation.

According to Pandemic Preparedness Guidance published in 2009 by the Equal Employment Opportunity Commission (EEOC) in the midst of the H1N1 influenza outbreak, whether a particular outbreak rises to the level of a "direct threat" depends on the severity of the illness. Employers should look to the most up-to-date assessments being made by the CDC or other public health authorities, as they relate to the employer's location, to determine the severity level of an illness and, in turn, whether an employee who potentially has been exposed to the illness may constitute a "direct threat." Employers should not rely on speculation or unofficial information when making determinations about whether there is a direct threat in a particular circumstance.

All this being said, employers should keep in mind the following when it comes to employees who have traveled to affected areas or otherwise may have experienced potential exposure to the Coronavirus:

- **Employers need not wait until an employee returning from travel develops symptoms to inquire about exposure to the Coronavirus.** Inquiring about whether an employee has traveled to an affected area or about possible exposure to a contagious illness during such travel would not constitute a disability-related inquiry. However, as discussed below, the extent to which an employer may act on the information received will depend on the most recent information available from the CDC and other public health officials. Further, employers inquiring into whether employees have traveled to affected areas should do so of all employees known or believed to have recently traveled, rather than directing such inquiries only to employees of certain races, ethnicities, or national origins. Finally, employers should be mindful to keep confidential all medical-related information received from an employee, in accordance with the ADA.
- **Employers may require employees who have traveled to affected areas or otherwise experienced potential exposure to stay home.** As discussed above, both the CDC and the U.S. State Department have issued warnings recommending against travel to China, South Korea, Italy, Iran, and parts of Europe and heightened warnings for all international travel. In light of these developments, an employer may require an employee who is returning from travel to key affected areas to stay home for a period of time to ensure that no symptoms develop during the stated incubation period. And even in the absence of a formal "self-quarantine" policy, if an employee has traveled to an affected area and/or has reported possible contact with an affected person and/or is demonstrating Coronavirus symptoms (see further below), an employer can require the employee to stay home until cleared to return to work. Employers considering implementing such measures are advised, however, to consult with counsel, as certain considerations including anti-discrimination, wage and hour, and leave policies may be implicated. Employers should also continue to monitor the CDC website and other news sources for further developments.

What Should I Consider if an Employee is Diagnosed with the Coronavirus or Has Been in Close Contact With a Confirmed Case?

The CDC recommends that employers make their employees aware of potential workplace exposure so that employees can seek medical advice and take appropriate steps to prevent further transmission (e.g., by closely monitoring themselves for symptoms). As such, upon learning of a confirmed or suspected case of Coronavirus affecting an employee or other individual who has been in recent close contact with the workplace, employers should be prepared to communicate with its workforce in a timely manner about the situation. In making such communications, however, employers must remain mindful of confidentiality requirements under the ADA (and any applicable state and/or local laws) that limit employers from revealing an employee's medical information. Employers therefore are advised to consult with counsel in crafting such communications. Employers also may wish to consult with applicable state and/or local health authorities on how best to respond to the situation, including what, if any, specific information such agencies may recommend communicating to employees. Additionally, employers – particularly those managing a confirmed case in the workplace – may also wish to engage in heightened cleaning/disinfection efforts, both as a means of reducing risk of further exposure and as a proactive step to help manage employee concerns regarding the situation. As noted above, the CDC has issued guidance on the cleaning and disinfection of areas where symptomatic individuals have been present.

What Other Things Should Employers Be Thinking About When it Comes to the Coronavirus?

- **Employers may – and should – send employees home if they exhibit potential symptoms of contagious illnesses at work**. The EEOC has stated that sending an employee home who displays symptoms of contagious illness would not run afoul of the ADA's restrictions on disability-related actions because: (i) if the illness ultimately turns out to be relatively mild or "run of the mill" (such as seasonal influenza), then it would not have constituted a covered disability in the first place; and (ii) if the illness does turn out to be severe (such that it may constitute a disability under the law), then the actions would be warranted under a direct threat analysis. In either case, an employer can send an employee home who is displaying symptoms of contagious illness, even if this is against the employee's wishes. Employers should also consider making clear in their policies that employees who have symptoms of a potential contagious illness must not report to work while they are sick.
- **Determine whether the FMLA or other leave laws may apply.** An employee who is experiencing a serious health condition or who requires time to care for a

family member with such a condition may be entitled to take unpaid leave under the federal Family and Medical Leave Act (FMLA) or state-law analogues. Employees may also be eligible for leave as a reasonable accommodation under the ADA or related state or local law, if the underlying condition constitutes a qualifying disability. However, employees generally are not entitled to take FMLA or reasonable accommodation leave to stay at home to *avoid* getting sick (though an exception may exist where a preexisting medical condition is likely to be worsened by exposure to a contagious disease; certain paid sick leave laws – discussed next – may also cover certain the need for certain preventative care). In addition, employees in certain jurisdictions also may be entitled to paid sick leave if needed to care for themselves or a sick family member in the event of an illness, seek preventative care, or if their workplace or a child's school or day care is closed due to a public health emergency. Employers should consult with counsel regarding which leave law(s) may be applicable to a given employee or in a given situation.

- **Consider whether OSHA requirements may apply.** While, as noted above, OSHA has not promulgated specific standards covering the Coronavirus, it has issued a notice as well as specific Guidance on Preparing Workplaces for COVID-19, indicating that employers should be aware of the following general standards to which employers may be subject under OSHA:
  - *General Duty Clause*: As discussed above, the OSHA General Duty Clause requires employers to furnish "a place of employment which [is] free from recognized hazards that are causing or likely to cause the death or serious physical harm to … employees." To that end, there are some readily achievable steps that employers can take to prevent the spread of the Coronavirus (and other contagious illnesses) within the workplace, such as: providing hand sanitizer and disposable surface wipes to employees, ensuring that surfaces and eating areas are disinfected regularly, and encouraging employees who are sick to stay home. Employers also may start to consider certain policy changes they may wish to implement in response to the Coronavirus should the situation become more severe in the U.S., such as allowing employees to work from home.
  - *Personal Protective Equipment*: OSHA requires that protective equipment, clothing, and barriers be provided whenever it is necessary to prevent employees from being exposed to environmental hazards. Employers are required to assess the workplace, determine if hazards are present, and if so, select and have employees use protective equipment. Employers whose employees may encounter individuals infected with the Coronavirus, such as those in the healthcare and travel industries, should begin to consider what

protective equipment would be necessary to protect its workforce should the virus begin to spread within the United States.

- *Recordkeeping and Reporting Requirements*: OSHA requires that certain employers keep a record of certain work-related illness and injuries (often referred to as an OSHA Form 300 log). While there is a regulatory exemption for recording instances of the standard cold and flu, OSHA has deemed the 2019 Novel Coronavirus a recordable illness when a worker is infected on the job. In addition, certain employers may be subject to reporting requirements under state and local law if they have a reasonable belief that a significant disease is present in the workplace.
- *Employers in Higher-Risk Industries*: While, again, OSHA has yet to issue any standards or controls specific to Coronavirus, employers operating in industries where employees may be at a potential increased risk of exposure should prepare for the possibility that heightened requirements may be put in place. The OSHA Guidance on Preparing Workplaces for COVID-19 also sets forth different Coronavirus-related risk categories for workers in various industries and provides specific guidance around workplace safety for those industries.

OSHA has also released a substantial amount of general guidance on the Coronavirus and how it may impact the workplace, which can be found on OSHA's website here.

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Employers, particularly those whose employees may be likely to encounter the Coronavirus, should consult with counsel to determine whether any of the above precautions may be necessary.

Information about the Coronavirus is constantly developing, so employers also should continue to refer to the CDC, WHO, and OSHA websites for the latest on appropriate precautions, including changes to travel notices.

Employers should also monitor their state and city health agencies and government websites for information about more localized considerations regarding the Coronavirus, including declarations around states of emergency or other measures being put in place to contain the spread of the virus.

We will continue to monitor this situation and report on any updates as they develop.

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Proskauer's cross-disciplinary, cross-jurisdictional Coronavirus Response Team is focused on supporting and addressing client concerns. Visit our Coronavirus Resource Center for guidance on risk management measures, practical steps businesses can take and resources to help manage ongoing operations.

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