Coronavirus and the Workplace – Compliance Issues for Employers

As the number of reported cases of the novel coronavirus (COVID-19) continues to rise, employers are increasingly confronted with the possibility of an outbreak in the workplace.

Employers are obligated to maintain a safe and healthy work environment for their employees, but are also subject to a number of legal requirements protecting workers. For example, employers must comply with the Occupational Safety and Health Act (OSH Act), Americans with Disabilities Act (ADA), Family and Medical Leave Act (FMLA) and Worker Adjustment and Retraining Notification (WARN) Act in their approach to dealing with COVID-19.

There are a number of steps that employers can take to address the impact of COVID-19 in the workplace. Employers should:

- Closely monitor the CDC, WHO and state and local public health department websites for information on the status of the coronavirus.
- Proactively educate their employees on what is known about the virus, including its transmission and prevention.
- Establish a written communicable illness policy and response plan that covers communicable diseases readily transmitted in the workplace.
- Consider measures that can help prevent the spread of illness, such as allowing employees flexible work options like working from home.

Some States such as New York, California, and Washington have issued stay at home orders either regionally or statewide allowing only critical sectors such as health care, grocery stores, and pharmacies to stay open.

Disease Prevention in the Workplace

Whenever a communicable disease outbreak is possible, employers may need to take precautions to keep the disease from spreading through the workplace. It is recommended that employers establish a written policy and response plan that covers communicable diseases readily transmitted in the workplace.

Employers can require employees to stay home from work if they have signs or symptoms of a communicable disease that poses a credible threat of transmission in the workplace, or if they have traveled to high-risk geographic areas, such as those with widespread or sustained community transmission of the illness. When possible, employers can consider allowing employees to work remotely. Employers may require employees to provide medical documentation that they can return to work.

Employers can consider canceling business travel to affected geographic areas and may request that employees notify them if they are traveling to these areas for personal reasons. Employees who travel internationally should be informed that they may be quarantined or otherwise required to stay away from work until they can provide medical documentation that they are free of symptoms. The State Department on Thursday, March 19th raised its travel advisory to the highest level, telling Americans to avoid international travel and calling for anyone who is abroad to return home or prepare to shelter where they are.

The Americans with Disabilities Act

The Americans with Disabilities Act ("ADA") protects applicants and employees from disability discrimination. It is relevant to COVID-19 because it prohibits employee disability-related inquiries or medical examinations unless:

- They are job related and consistent with business necessity; or
- The employer has a reasonable belief that the employee poses a direct threat to the health or safety of him-or herself or others (i.e., a significant risk of substantial harm even with reasonable accommodation).

According to the Equal Employment Opportunity Commission (EEOC), whether a particular outbreak rises to the level of a "direct threat" depends on the severity of the illness. Employers are expected to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location, and to make reasonable assessments of conditions in their workplace based on this information. On March 19, 2020, the EEOC updated its existing publication, titled Pandemic Preparedness in the Workplace and the ADA, to reflect that the COVID-19 pandemic currently meets the direct threat standard. This means that sending an employee home who displays symptoms of COVID_19 would **not** violate the ADA's restrictions on disability-related actions.

Regardless of whether an employee has COVID-19 or its symptoms, the ADA requires that information about the employee's medical condition or history, obtained through disability-related inquiries or medical examination, be collected and maintained on separate forms and in separate medical files and treated as a confidential medical record. Therefore, employers should refrain from announcing to employees that a coworker is at risk of or actually has COVID-19. Instead, employers should focus on educating employees on best practices for illness prevention.

Employers should also review the EEOC's answers to frequently asked questions (FAQs) about CODVID-19 and the ADA for additional information.

Employee Leave Requirements

If an employee, or an employee's family member, contracts COVID-19, the employee may be entitled to time off from work under federal or state leave laws. For example, 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 leave under the Family and Medical Leave Act (FMLA). An illness like COVID-19 may qualify as a serious health condition under the FMLA if it involves inpatient care or continuing treatment by a health care provider. Employees may also be entitled to FMLA leave when taking time off for medical examinations to determine whether a serious health condition exists.

Many states and localities also have employee leave laws that could apply in a situation where the employee or family member contracts COVID-19. Some of these laws require employees to be given paid time off, while other laws require unpaid leave. Employers should become familiar with the laws in their jurisdiction to ensure that they are compliant.

Some employees may wish to stay home from work out of fear of becoming ill. Whether employers must accommodate these requests will depend on whether there is evidence that the employee may be at risk of contracting the disease. A refusal to work may violate an employer's attendance policy, but employers should consult with legal counsel prior to disciplining such an employee. However, if there is no

reasonable basis to believe that the employee will be exposed to the illness at work, the employee may not have to be paid for any time that is missed.

Compensation and Benefits

If employees miss work due to COVID-19, whether they are compensated for their time off will depend on the circumstances. As noted above, employees may be entitled to paid time off under certain state laws if they (or a family member) contract the illness. In other cases, non-exempt employees generally do not have to be paid for time they are not working. Exempt employees must be paid if they work for part of a workweek, but do not have to be paid if they are off work for the entire week. Note that special rules may apply to union employees, depending on the terms of their collective bargaining agreement.

Employees may be entitled to workers' compensation benefits if they contract the disease during the course of their employment. For example, employees in the healthcare industry may contract the disease from a patient who is ill. Whether an employee is eligible for other benefits, such as short-term disability benefits, will depend on the terms of the policy and the severity of the employee's illness.

Layoff and Furloughs

As state and local governments continue imposing increasingly restrictive rules to help slow the spread of COVID-19, employers should be aware that the federal WARN Act may require them to provide written, advance notice of certain plant closings and mass layoffs. A WARN notice provides information about assistance available through the State Rapid Response Dislocated Worker Unit and allows transition time for affected workers to seek alternative jobs or enter skills training programs. In general, this requirement applies to businesses that:

- Have 100 or more full-time workers (not counting workers who have less than six months on the job and workers who work fewer than 20 hours per week) and plan to lay off at least 50 people at a single site of employment; or
- Employs 100 or more workers who work at least a combined 4,000 hours per week, and is a private for-profit business, private non-profit organization, or quasi-public entity separately organized from regular government.

Under the law, covered businesses must provide a WARN Notice to affected employees at least 60 days in advance of a plant closing or mass layoff. However, employers may qualify for one of three exceptions to this rule. More information about the WARN Act is available in the DOL's Employer's Guide to Advance Notice of Closings and Layoffs.

Employers should also become familiar with any state or local requirements related to plant closings or layoffs. For example, under a New Jersey law that goes into effect on July 1, 2020, certain employers in that state will be required to provide severance pay to laid-off employees.

Finally, employers be aware that employees who are laid off may be able to continue health coverage under federal COBRA rules or state continuation coverage laws.

Communicating with Employees

As part of their efforts to prevent the spread of COVID-19 in the workplace, employers should consider communicating information about the illness to employees. The CDC, WHO and OSHA have all created informational material on the virus and its symptoms, prevention and treatment that can be helpful for employees.