(Last Updated March 13, 2020)

Employer – Coronavirus 2019

As the global COVID-19 outbreak continues to escalate, it has significantly impacted global and domestic markets, international and domestic travel and supply chains, and has understandably generated fear and anxiety in the workplace.

Proactively addressing COVID-19 and responding in the event of an expanded outbreak requires planning and implementation based on the best available scientific and medical recommendations while ensuring full compliance with applicable laws, particularly employment laws.

Employer Best Practice Recommendations

Communicate and Educate. Regardless the size of an employer or the number of offices, work locations, or jobsites, communication and education is critical to minimize employee concerns and workplace disruptions. At this stage, employees must know that company management is monitoring the outbreak and will act with the employees' best interests in mind. Communications should be brief and fact-based from reputable sources.

A good starting point is the CDC website, which, among other informational items, provides posters presently available in English, Spanish, and Simplified Chinese with information concerning COVID-19, its symptoms, how it is spread, and prevention tips, among other helpful information.[1] Employers with vision-impaired employees and/or employees not fluent in the available poster languages must communicate the same information to those employees or run the risk of claims of discrimination or failure to accommodate under the ADA, Title VII, or other applicable employment laws.[2] Most managers and/or executives are not medical professionals or infectious disease experts and should not pretend to be such. Rely on the experts, coordinate education efforts with federal, local, and state health departments.

Encourage Prevention Through Hygiene and Sanitation. The CDC's knowledge about how COVID-19 is spread is based on what is presently known about similar coronaviruses. The virus is thought to spread primarily from person-to-person between people in close contact with one another and respiratory droplets produced when a person coughs or sneezes. It is possible, though not specifically known, that a person can contract COVID-19 through contact with a surface or object that has the virus then touch his or her mouth, nose, or possibly eyes.[3]

To prevent the spread of the virus through known and likely means, employers should place posters provided by the CDC and/or other agencies or health departments encouraging proper hand hygiene

[1] https://www.cdc.gov/coronavirus/2019-ncov/communication/factsheets.html
[2] The CDC provides videos containing much of the same information as the posters, which can be a valuable resource for vision-impaired employees. https://www.cdc.gov/coronavirus/2019-ncov/communication/videos.html
[3] https://www.cdc.gov/coronavirus/2019-ncov/about/transmission.html

and coughing and sneezing etiquette at locations in the workplace where they are likely to be seen.[4] As with any communication to employees, employers must take steps to ensure the message is effectively conveyed to disabled or non-English speaking employees. In addition, employers should also consider providing alcohol-based sanitizers and/or wipes, tissues, and no-touch trash receptacles for use by employees throughout the workplace, including locations where groups of employees are likely to gather (i.e., conference rooms, break rooms, etc.).

Employers should routinely clean all frequently touched surfaces and objects in the workplace, including workstations, countertops, keyboards, telephones, and doorknobs. At this time, the CDC does not recommend using any specialized cleaning agents; employers should utilize cleaning agents commonly used for such purpose. Employers must, however, be mindful to ensure all cleaning and/or sanitation measures are accessible to and by employees with disabilities. For example, steps must be taken to ensure hand sanitizer is located within the prescribed reach range for employees in wheelchairs and must provide alternative sanitizer for employees who, because of a disability, have an intolerance to alcohol-based products if soap and water is not readily available.

Consider Modification of Sick Leave and Leave of Absence Policies. Employers should actively encourage employees with possible COVID-19 symptoms, or those who have been in contact with persons with such symptoms, to stay home. The CDC suggests employers consider relaxing sick leave and/or leave of absence policy requirements for a medical provider's note following absences because "healthcare provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely way."[5]

This recommendation, however, implicates both the FMLA. Employees are entitled to FMLA protections whenever absent from work for a serious health condition, which, among other conditions, includes any illness resulting in a period of incapacity for three or more consecutive full calendar days that involves continuing treatment by a health care provider. Thus, a person with COVID-19 symptoms who visits a doctor for his or her condition and who is either prescribed medication or directed to remain away from work for a period of three or more days will likely qualify as an individual with a serious health condition under the FMLA. Most FMLA-covered employers require that employees returning to work from an FMLA-qualifying absence submit a fitness-for-duty certification. Fitness-for-duty certification is permitted, but not mandated, by the FMLA.

Ultimately, what action employers take in response to the CDC's recommendations requires the exercise of discretion influenced by the circumstances. For example, in a workplace inundated with employees exhibiting symptoms of acute respiratory illness, especially where such illness is widespread in the subject community, it may make practical and logistical sense to suspend the relevant aspects of the employer's sick leave, leave of absence, or FMLA policies. If, however, modifications to applicable policies are made, those modifications must be applied uniformly to all impacted employees without regard to race, gender, ethnicity, or any other protected classification under federal, state, or local law.[6]

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[4] https://www.cdc.gov/handwashing/posters.html (CDC)
[5] https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/guidance-business-response.html
[6] Other policy modifications may include permitting leave to seasonal or probational employees who may not otherwise be entitled to paid or unpaid (non-FMLA) leave, permitting use of paid vacation leave for unpaid sick leave when policies otherwise would prohibit such use, or permitting the use of sick leave without a doctor's visit where policy would otherwise require it. The goal of such modifications would be to prevent a potentially infected employee from infecting others in the workforce.

Evaluate Alternative Work Arrangements. Employers should closely monitor CDC and/or local health agency recommendations on social distancing and evaluate what steps can be taken to increase the physical distance among employees and between employees and others. The most obvious strategies for social distancing are: (1) working from home and (2) staggered shifts/furloughs. Both, however, come with practical, logistical, and legal hurdles.[7]

1) **Working from Home/Telecommuting**: Employers should evaluate which members of their workforce can effectively fulfill his or her job functions working remotely. In addition to these practical considerations, employers must be mindful of additional risks inherent with telecommuting. For instance, if the employee is a non-exempt hourly employee under the FLSA, procedures must be implemented for the employee to account for or record his or her working hours and meal and rest periods mandated by state law or a collective bargaining agreement? Under the FLSA, non-exempt employees must be paid for all time spent working.

   Exempt employees must be paid their full salary for any workweek in which the employee performs more than a *de minimis* amount of work. If the employee works from home because of an illness and is not working full time, the FMLA's reduced schedule and/or intermittent leave provisions may be applicable. Telecommuting also invites potential ADA issues. For example, if a vision-impaired employee was provided a special monitor at the workplace or a hearing-impaired employee utilized a TTY phone in the workplace, such accommodations (or other reasonable accommodations that would enable the employee to perform the essential functions of his or her job) must be made available while telecommuting.

   Working from home also invites concerns regarding state law compliance. For instance, employers must evaluate any obligation imposed by state law to reimburse or compensate an employee for his or her mandated business use of a personal cell phone or wifi network while telecommuting.

   Working from home also begs the question of how an employer can enforce various company policies, such as its technology/computer usage policies. Telecommuting also raises data security concerns and requires employers to know whether the employee will be able to securely access company networks and data, whether the employee's personal devices have up-to-date virus and malware protection, or whether the employee's personal network is sufficiently protected from attack.

   These are but a few of the many issues telecommuting presents for employers, all of which should be thoroughly addressed before implementing a work-from-home strategy to minimize exposure to COVID-19 or any other infectious disease.

2) **Staggered Shifts/Furloughs**: Where available, staggered shifts and/or furloughs present an opportunity for employers to distance employees who would otherwise be working near one another. The first and most obvious question an employer considering such measures must answer is whether operations and/or production can be maintained with fewer employees working at a given time.

   In unionized facilities, an employer must consider limitations imposed by a collective bargaining agreement and whether staggered shifts, or any strategy implemented to address

[7] When feasible, employers should also consider video or telephone conferencing as an alternative to in-person meetings.

COVID-19, represents a unilateral change in work conditions, mindful of the risk that changes imposed without bargaining unit input could result in an unfair labor practices claim under the NLRA.

Employers usually can furlough nonexempt employees and reduce work hours and pay without liability, absent a fluctuating workweek salary schedule under the Fair Labor Standards Act (FLSA) or as required by a collective bargaining agreement. Employers do not have to pay nonexempt employees for hours not worked.[8]

Exempt employees cannot be furloughed for less than a full workweek under the FLSA or they might lose their exemption. If an exempt employee performs any work in a workweek, the employer must pay the employee for the full workweek. If the furlough is less than a full workweek, the employer can require that exempt employees use paid time off (PTO) so that employees receive full pay for the workweek. If an employee does not have enough PTO available, the employer must pay the employee for the time. An employer may furlough an exempt employee for a full workweek without pay and without affecting the FLSA exemption.

A furloughed employee should not be permitted to work, including checking emails and voicemails. Employers should inform employees (acknowledged in writing) that they are not authorized to work during the furlough period, without advance written approval that identifies the specific type or hours of work approved.

An employer should also analyze how a temporary work reduction will affect an employee's eligibility for health insurance, retirement, PTO or other benefits. Some of these benefits will be governed by plan documents. The company can have more flexibility to modify PTO or other company policies. Changes to any benefits or policies should operate prospectively.

The federal Worker Adjustment and Retraining Notification (WARN) Act and some state mini-WARN Acts may require advance notice of mass layoffs or plant closing, including furloughs. The specific laws should be reviewed, but generally the WARN Act applies to employers with 100 or more full-time workers (not counting workers who have less than 6 months on the job and workers who work fewer than 20 hours per week) who are furloughing at least 50 people at a single site of employment. The WARN Act requires at least 60 days' notice for layoffs. But, temporary layoffs of less than six months are not considered to be employment losses under the federal WARN Act.

Additionally, employers who choose to furlough employees or impose staggered shifts to facilitate social distancing should be mindful of state unemployment benefits that may be available to employees in a furlough/staggered shift situation and should encourage effected employees to seek those benefits. Moreover, on March 12, 2020, the U.S. Department of Labor announced new guidance outlining flexibilities that states have in administering their unemployment insurance programs to assist Americans affected by the COVID-19 outbreak. A press release states: "Under the guidance, federal law permits significant flexibility for states to amend their laws to provide unemployment insurance benefits in multiple scenarios related to COVID-19. For example, federal law allows states to pay benefits where: (1) An employer temporarily ceases operations due to COVID-19, preventing employees from coming to work;

[8] The U.S. Department of Labor, Wage and Hour Division has published online resources addressing frequently asked FLSA and FMLA questions likely to arise from the COVID-19 outbreak. *See* https://www.dol.gov/agencies/whd/pandemic.

(2) An individual is quarantined with the expectation of returning to work after the quarantine is over; and (3) An individual leaves employment due to a risk of exposure or infection or to care for a family member. In addition, federal law does not require an employee to quit in order to receive benefits due to the impact of COVID-19."

Adjust Business Travel As Necessary. The U.S. government has placed a moratorium on foreign nationals who have visited numerous locations around the world within the past 14 days from entering the country. American citizens, lawful permanent residents, and their families who have visited impacted foreign countries within the past 14 days will be allowed into the country, but will be redirected to one of 11 designated airports to undergo health screening and, depending on their health and travel history, may be subject to some limitations on their movement for 14 days from the time of arrival. Similarly, the U.S. Department of State has issued travel advisories ranging from Level 4: Do Not Travel to Level 2: Exercise Increased Caution for countries experience concentrated outbreaks of COVID-19. Finally, other countries have likewise imposed travel restrictions on foreign travelers entering those countries, including Americans. As a result, employers are encouraged to cancel or postpone non-essential business travel to and from areas where COVID-19 has been confirmed and/or those countries with existing travel limitations

For many businesses, however, such travel to impacted countries is essential and necessary to sustain operations. In such instances, employers should ensure employees review and understand current CDC travel guidance,[9] ensure employees have necessary contact information to secure medical care in a foreign country including contact information for the local U.S. consulate office which can help locate healthcare services and should consider providing employees additional protections such as personal protective equipment. To the extent an employer adjusts its travel policies, it must administer that policy in a non-discriminatory manner.

For instance, prohibiting employees in certain protected classes (i.e., pregnant, disabled, those recently returning from FMLA leave) from traveling to high-risk countries while requiring other employees to continue such travel could lead to claims of discrimination or retaliation under applicable federal or state employment laws. On the other hand, employees in those classifications may be entitled under the ADA, Pregnancy Discrimination Act, or state law, to a reasonable accommodation that would require excusing them from certain high-risk travel.

Employees returning from overseas travel to countries with restrictions may be subjected to government screening and, if mandated, isolation and/or quarantine. In such instances, employers should consult with counsel to discuss proper application of leave policies in accordance with applicable law and to ensure compliance with state and federal wage and hour laws.

Ensure a Safe Workplace In Compliance With Applicable Workplace Safety Laws. Section 5(a)(1) of the Occupational Safety and Health (OSH) Act, 29 U.S.C. § 654(a)(1), generally known as the General Duty Clause, requires employers to provide every employee "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death and serious physical harm."

[9] https://www.cdc.gov/coronavirus/2019-ncov/travelers/index.html

Neither OSHA nor any of the 28 OSHA-approved state plans offer guidance or regulations specific to COVID-19 or other infectious disease, with one exception.[10] The California Division of Occupational Safety and Health (Cal/OSHA) Aerosol Transmissible Diseases standard (Title 8 CCR; Section 5199),[11] which is only mandatory for certain healthcare employees in the state, provides useful guidance aimed at preventing employee illness from infectious diseases that can be transmitted by inhaling air. Similarly, OSHA's Personal Protective Equipment (PPE) standards (29 CFRC 1910, Subpart 1), which require the use of gloves, eye and face protection, and respiratory protection in certain industries may also prove useful in developing strategies to combat the spread of COVID-19. In the event an employer requires the use of PPE, it must be mindful of the possible need to provide accommodations for employees with disabilities (i.e., latex allergy) or firmly held religious convictions requiring religious garb or grooming requirements that are incompatible with certain PPE.

ADA Answers to Frequently Asked Questions. When employers begin pandemic planning, questions frequently arise regarding what information employers can require from employees and what employers can do with that information. The ADA prohibits employers from making "disability-related inquiries," which is any inquiry that is likely to elicit information about a disability. Thus, employers may not ask employees if they suffer from any of the conditions identified by the CDC that would place them at high-risk from COVID-19.

Employers may, however, survey employees to elicit information to plan for absenteeism in a manner that does not violate the ADA. Specifically, employers may ask employees, *without identifying the specific factor that applies to them*, whether in the event of a COVID-19 outbreak they would: (1) need to care for a child if day-care centers or schools were closed; (2) need to care for dependents if other services were unavailable; (3) be unable to travel to work in the event public transportation was unavailable; or (4) whether the employee or the employee's family falls into a category identified by the CDC as high-risk for COVID-19.[12] Similarly, the ADA does not prohibit employers from requiring employees displaying COVID-19-like symptoms to go home because a transitory illness likely does not qualify as an ADA-qualifying impairment and, if the symptoms were severe enough to constitute a disability, the action would be permitted under the ADA's "direct threat" provisions.

Employers are also permitted to ask employees who call in sick if they are experiencing COVID-19 symptoms, i.e., fever, coughing, shortness of breath, etc. Such information, however, must be maintained in confidence and kept in a confidential medical file separate and apart from the employee's personnel records. The ADA, HIPAA, and the FMLA, as well as various state laws, impose strict confidentiality requirements pertaining to employee health information. Thus, in the event an employee has a confirmed test for COVID-19, employers may not disclose any identifying information to the workforce but would be wise to inform the workforce that there has been a confirmed case at the employee's location, provide risk assessment protocol from the CDC,[13] reiterate prevention protocol, and implement any other preventative measures necessary to prevent further spread.

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[10] OSHA has, however, launched a COVID-19 webpage that provides infection prevention information specifically for workers and employers and is actively reviewing and responding to any complaints regarding workplace protection from COVID-19. *See* https://www.osha.gov/SLTC/covid-19/.

[11] https://www.dir.ca.gov/title8/5199.html

[12] https://www.eeoc.gov/facts/pandemic_flu.html

[13] https://www.cdc.gov/coronavirus/2019-ncov/php/risk-assessment.html

Additional Considerations. Employers should consult guidance issued by the CDC, OSHA, local health departments, and other governmental agencies regularly because understanding of COVID-19 and the proper response to an outbreak are rapidly changing. Employers should also review all existing disaster response plans and/or continuity of operations plans to identify any gaps in the plans with respect to pandemic responsiveness.

If an employer does not presently have a continuity of operations plan or disaster response plan in place, it should begin developing one now. An effective continuity of operations plan will address what is necessary to keep business functioning; the roles of essential employees and key contacts; a chain of command company-wide and at each business location in the event of a pandemic or other disaster; employee cross-training needs to ensure efficient operations in the event of a reduced workforce; infrastructure needed to support telecommuting; essential local, state, and federal resources; a means of contacting employees to activate and deploy the plan; vendor, supply chain, and client/customer contracts and obligations and the impact, if any, a pandemic or other disaster will have on those relationships and obligations; alternative suppliers; prioritizing customers; and, among many other factors, the business and legal impact of temporarily suspending some or all operations.

Every employer is different and there is no one-size-fits-all solution to a potential COVID-19 pandemic. What is reasonable and effective for a small business in middle America will not be reasonable or effective for a large employer with multiple domestic and foreign locations. An appropriate response to the threat of a COVID-19 outbreak must be determined on a case-by-case basis considering a variety of factors in reliance on guidance from the experts – CDC, WHO, local health departments, and legal counsel.

Additional Information

If you have any questions regarding this Client Alert, please contact your Kutak Rock attorney or one of the authors listed below. For more information regarding our practices, please visit us at www.KutakRock.com.

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