



INSIGHT

Employment Law Questions Related to the COVID-19 Pandemic

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As the number of confirmed cases of Coronavirus Disease 2019 (COVID-19 or coronavirus) in the United States continues to increase, private employers need to continually evaluate the emerging risks.

Following are recent questions to which our attorneys have responded, along with an explanation of the various legal implications.

Q. How should an employer communicate with its employees regarding COVID-19?

It is critical that employers provide timely and fact-based information to their employees. Employers should not only ensure all reasonable measures are taken to minimize the risk of the coronavirus being spread within their workspaces but also regularly communicate their efforts to their employees.

To this end, it is recommended that employers let employees know they are closely monitoring information from the appropriate authorities, including the **U.S. Centers for Disease Control and Prevention (CDC)**, the **World Health Organization (WHO)**, state and local governments, and public health agencies. A lack of communication may lead to heightened fear and rumors.

Communications also should be empathetic. Employers should assure their employees that the company's highest priority is the health and well-being of their personnel.

Q. May an employer lawfully prohibit employees from traveling to locations where the CDC has restricted nonessential travel?

The CDC's most current **guidance** provides that employees "may be asked to stay home for a period of 14 days from the time they left an area with a widespread or ongoing community spread ..."

Consistent with the CDC guidance existing as of the date this article is written, an employer would be justified instructing employees to work from home (where practicable) or otherwise not come to work for up to 14 days based on the employer's determination that the employee poses a direct threat based on the risk associated with where the employee traveled.

As of the date of this article, in response to concerns related to the coronavirus, President Trump issued proclamations (the Proclamations) on **January 31, 2020**, **February 29, 2020**, **March 11, 2020**, and **March 14, 2020**, that suspended entry into the United States for most foreign nationals who have been in China, Iran and the Schengen Area – which consists of 26 European countries with the highest number of coronavirus cases outside of China, the Republic of Ireland and the United Kingdom – at any time within the 14 days prior to their attempted entry into the United States.

Those permitted entry into the United States from countries identified in the Proclamations, including legal permanent U.S. residents and immediate family members of U.S. citizens, will be directed to a limited number of airports where screenings can take place. As a result,

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employees could be subject to travel delays that may prevent them from returning to work as planned and perhaps even longer than their accrued PTO benefits allow.

An employer cannot lawfully prohibit an employee from traveling for personal reasons to an area where there is a large community spread of the coronavirus. Indeed, many states prohibit an employer from discriminating against employees for their lawful, off-duty conduct, which would include travel to a location that is not prohibited by law.

Employers should require employees to report to their employer where they are traveling and the dates of travel. Such a policy should caution employees that they may be subject to a quarantine or the inability to return to work for a period of time after returning from their travels based on guidance from the CDC, WHO, and state and local public health agencies.

That being said, an employer can deny employees time off for such travel. An employer may cite objective concerns about the employee's ability to return to work within a reasonable amount of time or before the employee's accrued PTO expires. An employer also can cite costs incurred by the employer following an employee's required 14-day quarantine following such travel.

Any practices restricting employees' non-essential personal travel, and restrictions imposed on employees following their travel to high-risk areas, should be applied consistently based on the CDC's travel advisories.

Employers also may request that employees advise when individuals with whom they have close contact travel to high-risk areas in order to determine if the exposure has resulted in the employee posing a direct threat to others in the workplace. The **CDC's Interim Guidance for Businesses and Employers** advises that employees who are well but have sick family members at home notify their supervisor and refer to the **Interim U.S. Guidance for Risk Assessment and Public Health Management of Healthcare Personnel with Potential Exposure in a Healthcare Setting to Patients with Coronavirus Disease (COVID-19)**.

Q. Can an employer lawfully prohibit an employee from returning to work until 14 days has passed since the employee was exposed to the virus, provided the employee remains symptom free?

In the Equal Employment Opportunity Commission's (EEOC's) technical assistance, **Pandemic Preparedness in the Workplace and the Americans with Disabilities Act**, prepared in connection with the H1N1 influenza pandemic in 2009, the EEOC noted that an individual with a disability who poses a direct threat despite a reasonable accommodation is not protected by the nondiscrimination provisions of the Americans with Disabilities Act (ADA).

The EEOC cautions that "[assessments] of whether an employee poses a direct threat in the workplace must be based on objective, factual information, not on subjective perceptions ... [or] irrational fears about a specific disability or disabilities." (Internal quotations omitted.)

The EEOC also recognizes that "during a pandemic, employers should rely on the latest CDC and state or local public health assessments, [and even though the] public health recommendations may change during a crisis and vary between states, [the EEOC instructs employers] 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."

Irrespective of the legal parameters, it is understood that an employer may have compelling business reasons, such as addressing concerns of its personnel, clients or patients, to prefer an employee take time off or work remotely following an employee's travel to an area with a widespread or ongoing community spread or exposure to the virus. Concerns such as these are particularly common for employers in the health care industry when employees have direct patient contact.

An employer must approach these discussions with its employees carefully in order to avoid being seen as violating the ADA by "regarding" an employee as disabled. This becomes especially sensitive when an employee does not want to work from home or has a job where all or most of the essential duties cannot be performed from home.

Q. Can an employer require an employee to submit a doctor's note upon the employee's return to work after exhibiting symptoms of the coronavirus?

In its **Pandemic Preparedness**, the EEOC states that an employer may require employees who were absent from work during a pandemic to provide a doctor's note certifying their fitness to

return to work. The EEOC explains such inquiries are permitted by the ADA either because they are not disability-related or if the pandemic was truly severe, they would be justified under the ADA. The EEOC recognizes, however, that because doctors and other health care professionals may be too busy during a pandemic to provide documentation, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp or an email.

Q. Is an employer required to pay wages to an employee who has *not* been diagnosed with the coronavirus and who is not coming to work (e.g., pending test results, during a quarantine) and who cannot perform all or most of his/her job duties remotely because of the nature of the work?

Under the federal Fair Labor Standards Act (FLSA), employers are required to pay employees who are not exempt from overtime (e.g., employees paid hourly or otherwise entitled to overtime pay) only for hours they actually work.

For employees exempt from the FLSA's minimum wage or overtime pay requirements, an employer jeopardizes its ability to treat employees as exempt if it does not pay employees for a reason not otherwise permitted by the Department of Labor.

As related to the current pandemic, there are three permissible deductions an employer may take from an exempt employee's wages without jeopardizing the employee's exempt status: (1) if the employee is absent from work for one or more full days for personal reasons other than sickness or disability, (2) for absences of one or more full days due to sickness or disability if the deduction is made in accordance with a *bona fide* plan, policy or practice or providing compensation for salary lost due to illness, and (3) if the employee is absent for a full workweek. Therefore, if an employer sends employees home early or decides to close for an entire day, the employer is obligated to pay exempt employees for the full day in order to maintain the employees' exempt status.

The only additional situations where an employer does not jeopardize losing an employee's exempt status by not paying the exempt employee his/her full salary is if the employer shuts down operations and the employee does not perform any work for at least one week, or the employee chooses to take a day or more off from work for personal reasons other than sickness or disability.

Employers should consult their applicable state and local laws, which may be more restrictive and require employers to pay employees for a minimum number of hours if an employee is sent home early. Also, an employer should consult its own policies and applicable contracts or collective bargaining agreements.

Legal requirements aside, paying an employee his/her regular wages (at least until and unless the employee tests positive for the coronavirus or during a quarantine) or foregoing disciplinary action based on absenteeism caused by the coronavirus may incentivize employees who have been exposed or are symptomatic to stay home, thereby reducing the risk that the virus will spread in the workplace, which may improve morale and public relations.

Q. Does an employer have to provide its employees time off from work as a result of their children's schools closing? What are an employer's obligations if the building in which its office is located is closed or a quarantine is in effect?

In addition to the FLSA discussion above, employers should note that many state and municipal paid sick leave laws permit employees to use paid sick leave when their place of business is closed by order of a public official due to a public health emergency, or they have a child who needs care because their school or place of care is closed due to a public health emergency.

Q. What obligations does an employer have if it decides to shut down its facility (even temporarily)?

Under the federal Worker Adjustment Retraining Notification (WARN) Act, employers with 100 or more employees are required to provide 60 days' advance notice of a temporary shutdown if the shutdown will (1) affect 50 or more employees at a single site of employment and (2) result in at least a 50 percent reduction in hours of work of individual employees during the month of the shutdown.

Sixty days' notice is not required if the shutdown is a result of a "natural disaster" or "unforeseeable business circumstances." It is not clear whether the "natural disaster" or "unforeseeable business circumstances" exceptions will apply to the coronavirus pandemic. As such, employers should consult with an attorney experienced in the WARN Act to guide them when making such decisions. Even if it is determined these exceptions do apply, notice of a shut-down must be communicated as soon as practicable.

Employers also should consult their applicable state laws – many of which have "mini-WARN Acts" that apply to smaller employers and contain more rigorous notice requirements. For example, under New York law, private-sector employers who have (1) 50 employees located in the state of New York, not including part-time employees, or (2) 50 employees who work a total of 2,000 hours per week in the state of New York, including overtime hours earned by employees on a regular basis, must provide 90 days' advance notice. Similarly, under California law if a facility employs 75 or more persons (or has done so within the preceding 12 months), 60 days' notice is required, even for a temporary work stoppage, unless the stoppage is because of a "physical calamity or act of war."

Q. What should an employer consider if employees refuse to come to work because of fear of exposure to the coronavirus?

Notwithstanding an employer's leave of absence policy or PTO benefits, employees who are afraid to come to work out of concern that they will contract the coronavirus are not entitled to leave under the Family and Medical Leave Act (FMLA) or any sort of accommodation (e.g., work from home) under the ADA.

Union and nonunion employees who refuse to work because of safety concerns in the workplace could be deemed to be engaging in concerted activity protected under the National Labor Relations Act (NLRA) so long as they have a "good faith" belief that their health and safety are at risk – even if they are mistaken. The NLRA prohibits employers from retaliating against employees who engage in protected concerted activity.

Under the Occupational Safety and Health Act of 1970 (OSHA), employees can refuse to perform work if (1) where possible, they asked the employer to eliminate the danger and the employer failed to do so; (2) they refused to work in "good faith," meaning that they genuinely believed that an imminent danger existed; (3) a reasonable person would agree that there is a real danger of death or serious injury; and (4) there is not enough time due to the urgency of the hazard to get the imminent danger corrected through regular enforcement channels, such as requesting an OSHA inspection. An employer cannot retaliate against an employee for expressing a safety concern.

Because the exposure and risks associated with the coronavirus pandemic are changing, an employer should consult with a qualified attorney in making the determination that an employee's fear is reasonable in light of then-existing guidance from the CDC and state and local public health agencies.

Q. What considerations should an employer take into account if employees report the need to be absent from work either because they tested positive for the coronavirus or because they have to care for a family member with the coronavirus?

Now is a good time to review your obligations under the ADA and FMLA.

If an employee reports that he/she has tested positive for the coronavirus but believes that after some time the employee can perform the essential duties of the particular job from home in quarantine, an employer should engage in an interactive process with the employee to determine whether such accommodation could be made without causing an undue burden on the employer or posing a direct threat to others. An employer has the burden to prove that a reasonable accommodation poses an undue hardship. Such decisions should balance the fact that modern technological and communication platforms make telecommuting "easier" against competing considerations such as an employer's need to physically supervise work, employees' need to physically interact with each other or clients to do their job, and potential limitations on an employer's ability to allow sensitive data outside its offices or network systems.

Employers covered under the FMLA (e.g., a private employer with 50 or more employees) must comply with the Act's requirements to provide eligible employees with up to 12 weeks of job-protected unpaid leave (taken intermittently or at once) for *inter alia* (1) the employee's

serious health condition that makes the employee unable to perform the functions of his/her job, or (2) the need to care for the employee's spouse, child or parent who has a serious health condition.

An employee is eligible for FMLA benefits if he/she has worked for the employer for at least 12 months, has worked at least 1,250 hours of service for the employer during the 12-month period immediately preceding the leave, and works at a location with at least 50 employees within 75 miles.

Under the FMLA, an employee is entitled to the continuation of the employer's group health insurance coverage during the FMLA leave on the same terms as if the employee were continuing to work. The employer should continue to contribute to the employee's premium in the same amount it did prior to the FMLA leave. An employee can be required to pay his/her share of the premium during the FMLA leave, either by deduction from his/her wages during any time that the FMLA period is paid (e.g., when PTO is applied concurrently to the FMLA period) or by requiring the employee to make payments toward the premium during an unpaid FMLA leave.

Note that if an employee is unable to return to work due to his/her own serious health condition related to the coronavirus or another serious health condition at the end of the 12-week FMLA leave, the employee may be entitled to a limited amount of additional time off as a reasonable accommodation under the ADA. At the conclusion of the 12-week period, however, the employee would lose his/her FMLA benefits and job protection.

A few additional considerations to note:

- Certain states have their own FMLA requirements that are more generous than the federal Act.
- Certain states and municipalities have paid sick leave requirements.
- On March 14, 2020, the U.S. House of Representatives passed the "Families First Coronavirus Response Act" (H.R. 6201), which provides for paid family leave. It now heads to the Senate. Wilson Elser is tracking this legislation. and will write about it in detail in a separate alert.
- Employers should be mindful if employees have company-provided short-term or long-term disability insurance benefits.

Q. What can employers disclose about an employee's health condition?

When an employer receives medical information about an employee, that information must be kept confidential. An employer may acquire confidential medical information about an employee (1) in response to the employer's disability-related questions or directed medical examination based on the reasonable belief that the employee poses a direct threat, (2) during the course of the interactive process accommodation, (3) when an employee has exercised his/her rights under the FMLA or (4) when an employee voluntarily discloses such information.

The ADA permits an employer to disclose confidential medical information about an employee only to supervisors and managers if it relates to (1) necessary restrictions on the work or duties of the employee and necessary accommodations, (2) first aid and safety personnel if an employee's disability might require emergency treatment and (3) government officials investigating compliance with the ADA, if requested.

The EEOC has instructed in its **Pandemic Preparedness** technical assistance that the general personnel files of employees should not contain any "medical-related material." The EEOC differentiates between notice that an employee has taken sick leave or had a doctor's appointment, which is not considered to be covered medical information, and information regarding an employee's diagnosis or symptoms, which is considered covered medical information. The EEOC's **Technical Assistance Manual on the Employment Provisions of the ADA** provides that an employer "should take steps to guarantee the security of [an employee's] medical information," including keeping the information "in a medical file in a separate, locked cabinet, apart from the location of the personnel files" and access should be restricted to specific persons.

An employer's obligations to maintain an employee's medical information do not end when an individual is no longer an employee. The regulations interpreting the FMLA also require

that records and documents relating to medical certifications of employees or their family members for purposes of the FMLA shall be maintained as confidential medical records kept separate from personnel files.

Considering the above, if an employer learns that an employee has tested positive for the coronavirus, it should immediately advise its workforce and any impacted customers/patients without disclosing any identifying information about the employee. In addition, in the event the coronavirus impacts an employer's workforce, the company should immediately contact its local public health agency to determine the appropriate course of action, including quarantines, a facility shut-down and appropriate remediation measures (*e.g.*, cleaning of contaminated spaces).

Q. May an employer ask an employee if the employee is experiencing symptoms of the coronavirus or require an employee to get tested for the coronavirus?

The ADA prohibits employers from making disability-related inquiries or requiring medical examinations of current employees unless they are job-related or consistent with business necessity.

A disability-related inquiry or medical examination of an employee is job-related and consistent with business necessity when (1) an employee's ability to perform essential job functions will be impaired by a medical condition or (2) an employer has a reasonable belief based on objective evidence that an employee poses a direct threat to the employer or others.

Generally, questions about where an employee has traveled and whether an employee potentially has been exposed to the coronavirus are generally not disability-related inquiries. However, an employer should ensure that questions regarding employees' travel plans and exposure are asked consistently and without discrimination. For example, an employer should not direct questions about travel plans only to Chinese employees based on information that the coronavirus started in China.

If an employee reports that he/she is going to be absent from work, the EEOC's **Pandemic Preparedness**, provides that an employer is permitted to ask the reason for the absence, including if the employee is experiencing certain symptoms (*e.g.*, cough, fever). According to the EEOC, during a pandemic such inquiries, even if disability-related, are justified by a reasonable belief based on objective evidence that the pandemic poses a direct threat. During a pandemic that is widespread in a community as determined by the CDC or local health authorities, an employer may be justified measuring employees' body temperatures.

Where an employer believes that an employee poses a direct threat because of his/her medical condition, the employer may require that the employee be examined by a qualified health care professional of the employer's choice and at the employer's expense.

Unless an employer determines that an employee is a direct threat or will be absent for FMLA-qualifying reasons, the employer should not press further for details if an employee's absence is for medical reasons.

Based on information from the CDC or state or local public health agencies, an employer may have sufficient objective information to conclude that an employee who traveled to an area where there is a coronavirus outbreak or who was exposed to the coronavirus will pose a direct threat to him/herself or others. In this circumstance, employers may make disability-related inquiries, including asking the employee if he/she is experiencing coronavirus-like symptoms.

Q. Are there other discrimination or harassment issues employers should consider?

Title VII prohibits discrimination and unlawful harassment based on protected classes, including race, color and national origin. The ADA contains similar prohibitions based on a person's disability. Employers should make certain that their company's culture is not adversely affected by the fear and stress associated with this pandemic.

To this end, in its **Interim Guidance for Businesses and Employers** the CDC advised, "To prevent stigma and discrimination in the workplace, use only the guidance described below to determine risk of COVID-19. Do not make determinations of risk based on race or country of origin, and be sure to maintain confidentiality of people with confirmed COVID-19."

To avoid running afoul of Title VII or ADA, employers should be careful that they apply their policies consistently and based on reasonable, objective facts as they exist at the time employment decisions are made. For example, it would be unlawful to exclude or segregate Chinese employees who do not otherwise present a direct threat simply because the coronavirus began in China. Similarly, a policy that excludes from the workplace only employees returning from certain countries but not others where there is a comparable coronavirus outbreak could give rise to a national origin discrimination claim.

In addition, employers should take immediate action to prevent statements or even jokes targeted at a person's protected class, such as those targeted at Chinese or Italian employees because the coronavirus began in China or is particularly prevalent in Italy.

Employers are encouraged to consult with the employment law attorneys at Wilson Elser before entering these discussions with employees.

The foregoing is for informational purposes only and shall not be construed as legal advice. Please contact Wilson Elser's national Employment & Labor practice for specific guidance. Our attorneys are available to help employers navigate the various developing issues and laws that impact the current coronavirus epidemic.

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