

Services

HR Consultation &
Training
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Professionals**Sonni Fort Nolan**

St. Louis:
314.480.1963
sonni.nolan@huschblackwell.com

Kate M. Leveque

St. Louis:
314.345.6263
kate.leveque@huschblackwell.com

Brittany M. Falkowski

St. Louis:
314.480.1608
brittany.falkowski@huschblackwell.com

Julianne P. Story

Kansas City:
816.882.8220

Workplace Issues and COVID-19

Author: Sonni Nolan

Contributors: Kate Leveque, Brittany Falkowski, Julianne Story and Tracey Oakes O'Brien

Employers are important stakeholders in adopting policies and strategies to help curb the spread of Coronavirus (COVID-19), which has been increasing worldwide and in the United States. On March 11, 2020, the World Health Organization determined that COVID-19 is now considered a global pandemic.

To aid employers in the effort to aggressively contain the virus without running afoul of applicable laws, the EEOC released a technical assistance guide for employers that was originally issued in the wake of the H1N1 pandemic. As a threshold matter, the EEOC guide makes clear that the existence of a pandemic influenza more severe than the seasonal flu or the H1N1 influenza expands an employer's right to safeguard its workplace. Additionally, an employee with a disability which poses a direct threat to the workplace can also expand an employer's right to protect the workplace.

While there is a technical argument that the EEOC Guidelines do not apply because the Centers for Disease Control (CDC) has not yet declared a pandemic, the EEOC guidelines are aimed at "pandemic planning and preparedness" and specifically reference the WHO and Department of Health and Human Services, CDC as definitive sources on what is a pandemic. Some confusion by the public exists because the CDC has not officially declared a pandemic. Because the WHO has declared a pandemic, it is not unreasonable to consider the EEOC guidelines as applicable in this situation, and we believe the risk of liability for complying with the EEOC's guidelines is low because of (1) general fears, (2) consistent reports in news outlets supporting the WHO's declaration, (3) cautions about containment, (4) some controversy concerning information shared by the CDC and (5) the OSHA obligations for a safe workplace and

business continuity/public health. Additionally, the CDC's acknowledgment this week that the U.S. is also experiencing community spread supports the WHO's pronouncement that the virus has spread globally. If you have any questions about how the Guidelines apply to your workforce, it is important to seek legal counsel. Below are some key questions and answers to guide your strategies to better maintain the health of your workforce and protect your operations.

1. Is COVID-19 classified as a pandemic?

Yes. As of March 11, 2020, the World Health Organization (WHO) has classified the COVID-19 virus as a global pandemic. A pandemic describes how widespread COVID-19 is but not its severity.

2. Is COVID-19 more serious than the seasonal flu or H1N1 influenza?

Unknown, but likely. In March 2020, the WHO's director-general described COVID-19 as causing a "more severe disease" than the seasonal flu and as a "unique virus with unique characteristics." We know that the virus spreads from person to person and is easily transmitted between persons, but unlike the seasonal flu, it is containable. The CDC has not been clear on the issue of severity because of the possibility of asymptomatic cases which are likely underreported due to the lack of testing. The lack of transparency in some regions also impacts the validity of the numbers. Refer to the CDC's link regarding future information on the severity of the illness.

3. Does the Americans with Disabilities Act (ADA) and Title VII limit an employer's actions in the current COVID-19 outbreak?

Yes. The ADA regulates employer disability-related inquiries and medical examinations for applicants and employees, prohibits the exclusion of employees from the workplace unless they present a direct threat to the workplace, and requires reasonable accommodation to individuals with disabilities. Title VII prohibits discrimination against individuals based on protected characteristics such as race and national origin.

4. When is an employee a direct threat to the workplace, allowing employers to adopt expanded measures to protect the health and safety of the workplace?

It depends. To determine whether an employee is a direct threat because of a medical condition, an employer must assess the level of the threat the employee's medical condition poses to the workplace. An employee's medical condition poses a direct threat to the workplace if the severity of the condition presents a substantial risk of significant harm to the health and safety of others in the workplace that cannot be eliminated through a reasonable accommodation based on objective evidence. A direct threat is judged by the severity of the condition and the likelihood of harm. In the context of a severe form of pandemic influenza, the EEOC explains that it is the existence of a direct threat as announced by health authorities that expands employers' ability to

require medical exams, make health-related inquiries and exclude workers from the workplace. The CDC provides a direct threat assessment decision-making chart. The chart was last updated on 2/28/20, and the current spread of the virus appears to require broader considerations not included in the chart.

The severity of COVID-19 is still unknown, so employers will need to assess the threat presented by an employee's medical condition to determine whether they are a direct threat to the workplace. The EEOC previously has taken the position that the ADA protects employees against actions based on a perceived risk of a future disability or serious illness. In an Eleventh Circuit case, the EEOC argued that an employee who traveled to Ghana during an alleged Ebola outbreak was protected by the ADA because her employer unlawfully perceived her as having the potential to become disabled by the illness. The Eleventh Circuit disagreed stating that the ADA only protects persons with current disabilities or impairments, not "a potential future disability that a healthy person may experience later." According to the Court's decision, the ADA does not prohibit employers from taking employment actions based on a "potential future disability that a healthy person may experience later."

Despite the Eleventh Circuit's holding, an employer's task of evaluating an employee's condition to determine the existence of a direct threat to the workplace can be complex in the context of the current COVID-19 outbreak. In addition to the EEOC's position on potential future impairments, other federal laws, privacy issues, and state and local laws may limit the inquiries an employer may make to conduct a direct threat assessment. Declared states of emergencies recently announced by certain regions also do not suspend employment laws. As a result, employers should seek the advice of legal counsel to help formulate a direct threat assessment to address the particular circumstances facing the employer.

5. Can an employer inquire about an employee's absence from work or send a visibly sick employee home?

Yes. Questions to employees about their absence from work, asking about cold or flu symptoms, or advising an employee to leave work when they are visibly sick are not disability-related inquiries.

6. Can an employer inquire about an employee's personal travel history or future travel plans, including location and duration?

Yes. However, employers should ensure that all employees are being asked to disclose information about travel history/plans and ensure that inquiries are not based on national origin or race of the employee.

7. Can an employer prevent an employee from traveling to areas experiencing an outbreak for personal reasons?

No, an employer may not prevent an employee from traveling to a high risk area for personal reasons.

An employer may be able to deny leave based on where an employee is planning to travel. However, we recommend that employers proceed with caution. To the extent an employee shares future travel plans, an employer may be able to deny leave based on a legitimate nondiscriminatory business reason such as the destination or the subsequent cost to the business of a subsequent quarantine. The employer should treat all employees similarly and ensure that its actions are not based on national origin or the race of the employee.

Employers can and should proactively communicate with employees regarding recommendations issued by the CDC and OSHA about travel that may result in quarantine upon the employee's return to safeguard the workplace from exposure to the virus. Such communications include informing employees of:

- Recent COVID-19 developments while providing reassurance to employees that the employer is monitoring the developments to protect the workplace and workers from exposure;
- A requirement that employees must inform the employer if a close family member with whom they have had contact has traveled to a high-risk area in order to assess a direct threat to the workplace;
- The identity of a designated contact person to whom employees must direct inquiries related to COVID-19 and must contact if an employee is exposed or becomes infected with COVID-19;
- CDC travel advisories, and that travel to an infected area may negatively impact an employee's ability to return to the U.S. or to work without avoiding quarantine, and that they may encounter difficulty accessing medical care in affected countries. In addition, some countries are requiring visitors from the U.S. to also submit to a quarantine upon arrival.

8. Can an employer ask employees whether they will be unavailable to work during this pandemic?

Yes. According to the EEOC, such inquiries are lawful so long as they don't require disclosure of a disability. Such inquiries can be achieved through the use of a survey that is designed to elicit unavailability for work during a pandemic by including both non-medical and medical reasons without identifying an employee's specific reason. For example, a survey question regarding availability can lawfully ask whether an employee would be unavailable due to any one or more multiple reasons such as school closures, transportation issues, or a serious condition of the employee or family member that the CDC designates as a high risk for complications with the COVID-19 virus.

9. Can an employer require medical exams of job applicants?

Yes. After a conditional offer of employment, employers may require a medical exam if all entering employees in the same job type are required to undergo an identical medical exam and are all subject to the same inquiries.

10. Can an employer conduct medical exams of current employees?

It depends. According to the EEOC, an employer cannot require medical exams of asymptomatic employees if a pandemic is comparable to the seasonal flu. In the current situation, a pandemic has been declared and while some evidence exists that COVID-19 is more severe than the seasonal flu, the CDC has not characterized COVID-19 as more severe. Given the similarity in symptoms between the seasonal flu and COVID-19 and the stated objective by the CDC to contain the virus, an employer, which has objective evidence and a reasonable belief that an individual has been exposed to or infected with COVID-19, could require an employee to submit to a medical exam to determine whether they are infected with COVID-19.

Alternatively, the employer can require the employee to quarantine at home for the 14-day quarantine period recommended by the CDC. The employee must inform the employer of all of their contacts during the previous 14-day work period, and the contacts must be informed of the exposure or potential exposure and be sent home for the quarantine period. The employer must maintain the confidentiality of the identity of the infected employee. The employer must also execute all proper cleaning protocols to clean the affected areas of the workplace.

11. Can an employer test its employees for fever?

It depends. In the event of a severe form of pandemic influenza or a widespread pandemic influenza in the community as assessed by state, local or federal authorities an employer may test for fever. At this point, the CDC has not announced the severity of COVID-19, but COVID-19, a novel virus, is widespread. While testing for a fever is considered a medical exam, employers are permitted to check their employees for fever by measuring their body temperature if a pandemic influenza becomes widespread in the community as assessed by state and local authorities or the CDC.

Employers should weigh the benefits of monitoring temperatures and consider that the existence of an elevated temperature may be evidence of an illness, but not necessarily COVID-19; that the device used by the employer may not accurately measure the employee's temperature; and that some infected individuals are also asymptomatic. However, if COVID-19 is widespread in the employer's area, temperature testing may be appropriate and one of multiple methods used to screen individuals for possible infection to protect the workplace. Employers should properly document their direct threat assessment.

12. Can employers require employees to adopt infection control practices?

Yes, hand washing, coughing and sneezing etiquette, and proper hygiene practice such as tissue disposal do not implicate the ADA. During the pandemic, employers may require employees to work remotely or to wear personal protective equipment (PPE). If an employee with a disability needs an accommodation with regard to the PPE, the employer should accommodate the employee absent an undue hardship.

13. Can an employer require employees to obtain a medical exam after the end of the incubation or quarantine period before returning to work?

Yes, according to the EEOC, employees who appear symptom free at the end of their quarantine period may be required to confirm they are not infected with COVID-19 and are fit to return to work. The CDC and EEOC, however, warn that employers should not require a health care provider's note for employees who are ill with an acute respiratory illness to validate their illness or to return to work. Health care offices may be extremely busy and unable to provide a note in a timely manner. Additionally, subjecting healthy employees to a health care provider's office may expose the healthy employee to illness. At the time of writing this post, only the state of Washington has implemented drive-through testing, but the types and number of people that can be tested is limited due to the unavailability of testing kits. As the availability of testing kits increases, drive-through testing may present a good option. Until then, employers may want to utilize company doctors for return to fitness notes, if available. As a practical matter, if an employee has been in quarantine for 14 days and asymptomatic, medical documentation certifying an employee's fitness to return to work may be waived due to the lack of good options for obtaining a return to fitness note. Any medical documentation received should be maintained as confidential and in a file separate from the personnel file.

14. Can an employer exclude an employee from the workplace after travel to a high-risk area or possible exposure to the COVID-19 virus?

Yes, an employer should require employees who have traveled to a region experiencing widespread, ongoing community spread or who have been exposed to an infected person to quarantine or work remotely from home during the incubation period recommended by the CDC. Refer to the CDC website for additional information. For travel to locations not experiencing a severe outbreak where the risk is lower, employers should engage in a threat assessment to support a conclusion that an employee is a direct threat to the workplace and must be excluded. Refer to the answer to question 10 above regarding assessment of a direct threat.

UPDATED QUESTION AND ANSWER ON MARCH 12, 2020 AT 12:56 PM:

15. Is there anything else employers should consider before an employee undertakes necessary international travel?

Employers should be aware that if their employees travel to other countries they may be required to self-quarantine for 14 days upon arrival to the country. For example, the Argentine Ministry of Health announced that anyone coming from the U.S. will be required to quarantine for 14 days upon arrival in Argentina. The Ministry of Health stated that their guidelines may change with little or no notice and failure to quarantine may be considered a criminal offense.

In addition, the CDC has announced that although a country may not be on the list for do not travel due to a widespread outbreak it may have limited medical care and that should be considered when traveling internationally. Venezuela has been identified as one of those countries.

16. Can an employer request that employees who are at a high risk for complications from the COVID-19 work from home?

Employers may encourage employees who are at a high risk for complications to work remotely. The CDC describes individuals who may be at a high risk for complications [here](#) and [here](#).

17. Can an employer exclude from the workplace employees who exhibit symptoms of COVID-19 or the flu?

Yes, employees who are exhibiting symptoms of an acute respiratory infection must be separated from co-workers and should be sent home. Employers can also request that the employee receive a medical exam and be tested for COVID-19 if they are exhibiting symptoms consistent with the virus or flu. Refer to the answer to the answer to question 10 regarding other actions an employer must take with regard to other employees. Refer to OSHA's website regarding isolation and decontamination procedures.

18. Should employers exclude from the workplace all employees who have been exposed to COVID-19 by a co-worker who tests positive for COVID-19?

Yes, all co-workers who are exposed to an infected employee should be informed of the exposure, be sent home for the quarantine period recommended by the CDC, and be instructed to contact their health-care provider. The employer must maintain as confidential the identity of the infected employee. Learn more from our discussion regarding specific steps an employer must take in the event of a workplace exposure. Refer also to the link to OSHA's website as indicated in the answer to question 16.

19. Should employers maintain the confidentiality of medical records related to employees' medical exams and health disclosures?

Yes, the ADA and various state and local laws contain prohibitions on disclosing confidential medical information concerning employees. Companies should take all appropriate measures to maintain the confidentiality of medical information associated with infected individuals or exposed individuals while also providing notice to employees who may have been exposed. Any health information received from an employee by an employer must be maintained in a file separate from the personnel file.

20. Can employees refuse to travel due to COVID-19 concerns?

It depends. Employers should carefully consider an employee's request not to travel due to COVID-19 concerns. Presently, the CDC has issued travel warnings for specific countries. Refer to the CDC travel health notices [here](#). The employer should respect the federal government's travel warnings. Businesses should refrain from all non-essential travel to countries with a State Department level 4 – Do not travel warning or a CDC level 3 – avoid nonessential travel warning. Employers should exercise heightened caution for travel to CDC level 2 areas- Practice Enhanced Precautions. As the virus spreads, travel advisories for additional

countries will increase. Employers can permit use of video-conferencing or other tools as an alternative means of conducting business in the affected regions.

OSHA regulations entitle employees to refuse to work only if an “imminent danger” exists in the workplace that could reasonably be expected to cause death or serious physical harm before the danger is eliminated. For health hazards to be classified as imminent dangers, there must be a reasonable expectation that the health hazard exists and that exposure will shorten life or cause substantial reduction in physical or mental efficiency. The harm caused by health hazard does not need to happen immediately. Employers should consult with legal counsel regarding the existence of an imminent danger.

Employers should also engage in a discussion with employees who are reluctant to travel to gain an understanding of their specific concerns. By following CDC recommendations and creating an environment that allows employees to freely voice their concerns, both the employer and employee can engage in a meaningful dialogue to dispel fears and concerns that are fear-driven. Employers should be guided by the circumstances existing in the travel areas, transportation methods to be used, the level of the outbreak in arriving at their decisions, and the likelihood of exposure to the virus.

To the extent that the employee has a disability or whose disability would place them in a category for high-risk of complications from COVID-19, employers can accommodate the employee by allowing them to conduct business remotely if feasible, or to use vacation or emergency leave, if available.

21. Can employees refuse to report to work during an outbreak of COVID-19?

It depends. At the present time, and depending on the location of the employer, many places of employment do not pose an imminent danger to employees. The circumstances could change depending on the level of an outbreak at the employer’s location, the existence of an exposure at the workplace, or other circumstances. Engage in the discussions with concerned employees as indicated in the response to question 19.

Employers should recognize that OSHA’s general duty clause places an obligation on the employer to provide employees with “a workplace free from recognized hazards... likely to cause death or serious physical harm.” As a result, employers should adopt OSHA and CDC policies and practices to maintain the safety of the workplace and the health of employees as referred to earlier in this post. See also OSHA’s Guidance on Preparing Workplaces for COVID-19.

22. Can employees voluntarily choose to use face masks or NIOSH approved face-pieces that reduce the threat of exposure to COVID-19 by protecting the wearer?

To dispel confusion, a face mask refers to surgical masks that protect others from exposure to potentially infected respiratory secretions of the person wearing the mask. NIOSH approved face pieces or respirators protect the person wearing the face piece from potentially infected respiratory secretions spread by others.

It depends. Employees may choose to use a face mask or face piece, so long as the employer does not find the use of the face mask or face piece to cause an additional hazard. At this point the CDC is not recommending the use of face masks or face pieces except for a limited number of workers (see question 22, below).

Regarding voluntary use of a face mask or face piece, the employer is not required to pay for the face mask or face piece or to provide training to the employee. However, if an employer has an employee who wishes to wear a face mask or face piece while on the job, the employer is required to provide specific information to the employees found at section 29 C.F.R. 1910.134 Appendix D of the OSHA regulations. Appendix D requires the employee to read and comply with all manufacturer instructions, to choose the correct respirator certified by NIOSH for protection against the contaminant of concern, to use respirators properly, and to protect against accidental use by others or sharing of respirators. Employers should also review an OSHA 2018 Standard Interpretation letter that is a direct response to the voluntary use of face pieces.

23. Can employers with public-facing businesses prevent employees from wearing a face mask or face piece?

Possibly. See the answer to questions 21 and 23. For guidance relating to your particular circumstances, seek legal counsel.

24. When is a face piece required as personal protective equipment (PPE) for employees?

According to OSHA, employers are obligated to provide their workers with PPE needed to keep them safe while performing their jobs. The types of PPE required during a COVID-19 outbreak will be based on the risk of being infected with the virus while working and the job tasks that may lead to exposure.

Workers, including those who work within six feet of patients known to be, or suspected of being, infected with COVID-19 and those performing aerosol-generating procedures, need to use respirators. Refer to the link to OSHA's Guidance on Preparing the Workplace for COVID-19 as provided in response to Question 20, above.

Conclusion

The WHO and CDC have recognized that the COVID-19 virus will continue to spread, and some current evidence indicates that it causes a more severe disease than the seasonal flu. The WHO has urged leaders to "pull out all stops" to contain the virus. On a positive note, the Wall Street Journal reported on March 6, 2020 that an employer in a small town in Germany successfully contained the virus after one employee who tested positive infected 16 additional employees. You can read about the company's aggressive efforts [here](#). U.S. employers should recognize that COVID-19 is a unique virus and take the actions necessary to prevent an outbreak at their workplace. If an outbreak should occur, employers should take steps to aggressively contain it. Communication, a preparedness plan and a quick response are the key to successfully confront this novel outbreak and to protect the workplace.

Contact us

If you have questions about this update or how we can help your preparedness, please contact Sonni Nolan or your Husch Blackwell attorney.

Resources

- Centers for Disease Control: Stop the Spread of Germs (Spanish)
- Centers for Disease Control: Stop the Spread of Germs (English)
- U.S. Equal Employment Opportunity Commission: What You Should Know About the ADA, the Rehabilitation Act and the Coronavirus
- Centers for Disease Control: About Coronavirus Disease (COVID-19)
- World Health Organization: Coronavirus Disease (COVID-19) Outbreak
- United States Department of Labor: COVID-19 Control and Prevention

Husch Blackwell has launched a COVID-19 response team providing insight to businesses as they address challenges related to the coronavirus outbreak. The page contains programming and content to assist clients and other interested parties across multiple areas of operations, including labor and employment, retailing, and supply chain management, among others.