

Employer Planning for Coronavirus

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March 11, 2020

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Q&A

**The webinar will be starting at approx. 12:00pm ET.
There is currently no audio until we start.**

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- ▶ practices in the areas of employment law, human resources counseling and employment litigation
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Introduction

- ▶ On February 11, 2020, the World Health Organization announced an official name for the disease that is causing the 2019 novel coronavirus outbreak, first identified in Wuhan, China.
- ▶ The new name of this disease is coronavirus disease 2019, abbreviated as COVID-19. In COVID-19, 'CO' stands for 'corona,' 'VI' for 'virus,' and 'D' for disease.
- ▶ As of March 10, there were 647 reported cases of coronavirus in the United States in more than 30 states. Worldwide, there have been more than 109,000 reported cases, most of which have been in China, Italy, Iran and South Korea.

Introduction

- ▶ Many employers have restricted non-essential travel.
- ▶ Schools have closed, conferences have been canceled, and some companies have urged all of their employees to work from home.
- ▶ There is fear and uncertainty in the public, financial markets, and in the workplace.

Discrimination Issues

Americans with Disabilities Act (ADA)

- ▶ Regulates disability-related questions that can be asked of applicants/employees.
- ▶ Governs types of medical examinations that can be imposed upon applicants/employees.
- ▶ Cannot exclude individuals with disabilities from the workplace unless individual presents a direct threat.
- ▶ Provide accommodations to employees with disabilities unless the accommodation causes an undue hardship.

Is coronavirus a disability?

- ▶ Not necessarily.
- ▶ Under the ADA, “disability” means:
 - A physical or mental impairment that substantially limits one or more major life activities; or
 - Record of such impairment; or
 - Being regarded as having an impairment.
- ▶ Almost certainly a perceived disability.
- ▶ Unlikely to be a disability unless a very serious case of COVID-19.
- ▶ Low bar to demonstrate “disability” and employers should simply treat it as such.

Can an employer terminate an employee with coronavirus?

- ▶ No — unless you enjoy defending disability discrimination lawsuits.
- ▶ No justifiable reason for employers to terminate employees with coronavirus (or those regarded as having coronavirus) solely because of their diagnosis or perceived diagnosis.

What should an employer do when an employee comes to work with coronavirus symptoms?

- ▶ Require sick employees to stay home.
- ▶ If employees comes to work sick (symptoms include fever, cough, difficulty breathing), separate the employee from other employees and send the employee home immediately.
- ▶ Employee should remain home until they are free of all symptoms (without the help of medication).

What should employers do if an employee wants to wear a mask in the workplace?

- ▶ Generally a decision for the employer.
- ▶ CDC advises that masks are generally ineffective for healthy people.
- ▶ Mask only needed if an employee is infected and needs to leave their house — but in such an instance, the employee should not be at work.
- ▶ Mask may be required if employee has another disability that requires use of mask (or employee works in health care field).

Can we take employees' temperatures?

- ▶ Not right now.
- ▶ Taking temperature = medical examination.
- ▶ Medical examinations are only permitted if they are job-related and consistent with business necessity.
- ▶ Can only require a medical test if there is objective evidence that:
 - An employee's ability to perform essential job functions will be impaired by a medical condition; or
 - An employee will pose a direct threat due to a medical condition.

Can we take employees' temperatures?

- ▶ EEOC position: If coronavirus becomes widespread in your community based on the assessment of the CDC or state/local health authorities, employers can measure employees' body temperature because having an infected employee in the workplace would present a **direct threat** to the health and safety of others.
- ▶ Recommendation: Don't take employees' temperatures unless government authority advises taking this step. Don't simply rely on media reports.
- ▶ If there is objective evidence that an employee is sick or may have a fever, don't bother taking their temperature — just send them home.
- ▶ Consult legal counsel.

National Origin Concerns

- ▶ High levels of COVID-19 in China, Italy, South Korea and Iran.
- ▶ Title VII of the Civil Rights Act prohibits discrimination against individuals based on national origin.
- ▶ Be alert for co-workers who make inappropriate or harassing comments to Chinese, Italian, South Korean or Iranian employees and strictly enforce your nondiscrimination and anti-harassment policies.
- ▶ If an employee returns from vacation, you can ask them if they traveled to one of the countries where the CDC is recommending people avoid travel.
 - If answer is yes, require the employee to stay home or work remotely.

Wage Considerations

Employee Pay

- ▶ Exempt vs. non-exempt
- ▶ Non-exempt workers:
 - Pay for time worked
- ▶ Exempt workers:
 - Pay in full-week increments
- ▶ Incentivizing workers to stay home?

Business Reductions

- ▶ Short-term furloughs
- ▶ Pay reductions
- ▶ Permanent layoffs

Leave of Absence Issues

Leaves of Absence

- ▶ Obligation to maintain a safe workplace — want to encourage infected/exposed employees to stay home.
- ▶ If an employee stays home and cannot work remotely, is the employee's job protected?
- ▶ Entitled to leave under applicable laws?

Federal and State Leave Laws

- ▶ FMLA leave?
 - Covered employer and employee?
 - If symptomatic or has to care for a family member
 - Not if asymptomatic
 - Not if staying home to avoid getting sick

- ▶ State family/medical leave law?

- ▶ State sick leave law?
 - May also cover absences for ill family member or because of closure of school or daycare

Other Leaves of Absence

- ▶ Have unused vacation or sick days?
 - Waive notice and documentation requirements?
- ▶ Provide additional vacation/sick days/PTO?
- ▶ Provide unpaid leave?
- ▶ Entitled to ADA leave as a reasonable accommodation for a disability?

Confidentiality

What should an employer do if an employee has COVID-19 or a presumptive diagnosis of COVID-19?

- ▶ Notify all potentially impacted employees (i.e., all employees who worked closely with the employee during the prior 14 days) of the potential exposure.
- ▶ Send the potentially impacted employees home for 14 days.
- ▶ Do not reveal the identity of the infected employee (unless you have permission from the infected employee).
- ▶ If an employee is working from home due to illness/quarantine, take steps to protect the reason an employee is out of the office from co-workers.
- ▶ Contact local health department and, if necessary, vendors/customers.

Handling Confidential Information

- ▶ Take all reasonable steps to protect the privacy and medical information of an employee with COVID-19.
- ▶ In general, employers are required to maintain all information about employee illness as a confidential medical record.
 - Medical documents kept separate from personnel file.
 - Stored in locked filing cabinet or protected electronic file.

Telecommuting Considerations

Planning

- ▶ Communication
- ▶ Equipment
- ▶ Security
- ▶ Increased IT capabilities

Issues

- ▶ Productivity
- ▶ Confidentiality
- ▶ Equipment
- ▶ Cybersecurity
- ▶ Performance supervision/management
- ▶ Designated work area
- ▶ Safety and health concerns
- ▶ Recording time worked

Written Agreement

- ▶ At-will language
- ▶ Temporary nature
- ▶ Equipment
- ▶ Confidentiality
- ▶ Injuries
- ▶ Recording time worked

Travel Restrictions

Can employers prohibit or require business travel?

- ▶ Employers **can** restrict or prohibit business-related travel.
- ▶ Employers **can** generally require employees to travel for business to locations that are not high risk, but should they?
 - May have to reasonably accommodate certain employees.
 - Consider morale issues.

Can employers prohibit personal travel?

- ▶ Employers **cannot** prohibit travel for personal reasons.
 - Off-duty conduct laws.
 - May caution employees about risks of traveling to high-risk areas.
 - May ask employees to disclose their travel destinations.

Can employers require employees to self-quarantine?

- ▶ Can employers require employees returning from travel to high-risk countries to self-quarantine?
 - Be consistent — don't impose the requirement only on employees of certain national origins.
 - Follow CDC and medical guidance.

Changes to Working Conditions

What if an employee is scared to come to work?

- ▶ Under the Occupational Safety and Health Act, employees can refuse to work if imminent danger exists.
 - Difficult threshold to meet as it requires objective evidence of imminent death or physical harm. Unlikely to be the case in most work environments, but examine on a case-by-case basis.
- ▶ Be careful if employees act/protest together in an effort to avoid coming to work due to fear of virus. This activity could be considered engagement in protected concerted activity and protected by the NLRA.
- ▶ Address on a case-by-case basis.
- ▶ Recommendation: Let the employee work from home if they can.

Two Few Employees

- ▶ Plan for employees who are unable to come to work because:
 - They have COVID-19;
 - A family member has COVID-19; or
 - They are otherwise unable to get to work because public transportation or schools have closed.
- ▶ Determine critical positions and functions within your organization.
 - Adjust schedules to ensure essential functions are completed.
 - Give employees different work assignments.
 - Extend hours or require mandatory overtime of healthy employees.
 - Require employees to work at different locations if you have multiple locations.
- ▶ Bargain with union, if applicable collective bargaining agreement.

Too Many Employees

- ▶ If coronavirus leads to a drop in business, an employer may need to make tough decisions and reduce employee rosters.
 - Furloughs
 - Reduction in pay
 - Termination
 - Consider potential WARN issues
 - Consider severance agreements

Conclusion

- ▶ Communication is key.
 - Designate a single point of contact to control the message.
 - Set up an emergency communication system.
 - Educate employees about COVID-19 and its symptoms.
 - Personal hygiene
 - Social distancing
 - Importance of staying home when sick
 - Importance of avoiding close contact with sick people
- ▶ Sanitize offices and equipment.
- ▶ Encourage social distancing.
 - Use of video conferencing instead of face-to-face meetings when possible
 - Business travel restrictions
- ▶ Prepare for continuity of operations.
- ▶ Keep apprised of CDC and WHO updates.

Questions & Answers

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Troutman Sanders and Pepper Hamilton Announce Plans to Combine

Troutman Sanders and Pepper Hamilton LLP have agreed to merge effective April 1, 2020. Troutman Pepper will offer expanded capabilities and practice strengths, with a hallmark focus on client care.



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