Coronavirus: Frequently Asked Questions for Employers

The Coronavirus ("2019-nCoV" or "Coronavirus") has impacted the policies, procedures, and employment practices of many US employers. Below are some frequently asked questions and answers:

1. **Can an employer require that employees who test positive for Coronavirus disclose confidentially the test results to the employer?**

   Yes. The Americans with Disabilities Act ("ADA") permits an employer to require that an employee disclose health information with respect to whether the employee poses a direct threat to the health or safety of himself/herself or others. The Equal Employment Opportunity Commission states that there are four factors to consider in determining whether there is a direct threat: (i) the duration of the risk, (ii) the nature and severity of the potential harm, (iii) the likelihood that the potential harm will occur, and (iv) the imminence of the potential harm. Employers should also consider applicable state and local laws.

2. **Can an employer require that an employee disclose confidentially whether he or she has been exposed to others who have tested positive for Coronavirus?**

   Yes. Again, the ADA permits an employer to require that an employee disclose health information with respect to whether the employee poses a direct threat to the health or safety of himself/herself or others. While an employee may allege that he or she is "regarded as" having a disability, where there are "association" claims alleging that he or she is being discriminated against for associating with a person, the direct threat defense should be applicable and persuasive.

3. **Can an employer require that employees with symptoms of Coronavirus be tested?**

   Yes. Under the ADA's direct threat analysis, an employer that reasonably believes, based on an individualized assessment, that an employee has symptoms of a condition that poses a direct threat to the employee or others, which would include 2019-nCoV, can require that the employee undergo medical testing to determine whether the employee, in fact, is infected. Further, if the test is job-related and consistent with business necessity, employers may require medical testing.

   - Note, however, that in the case of employees represented by unions and covered by collective bargaining agreements, employers may have an obligation to notify their employees' bargaining representatives and to meet, confer, and possibly negotiate before implementing such mandatory testing.

4. **4. May an employer ask an employee to make a truly voluntary disclosure so that the employer may inform co-workers, managers, and supervisors that the employee has been exposed or is infected?**

   Yes. Under the ADA, a voluntary disclosure is permissible. However, disclosure to the Department of Health in the state/city where the employer is located or the Centers for Disease Control and Prevention ("CDC") may be mandatory. In this instance, the Department of Health or CDC would make contact with any individuals who may have been exposed. If the employee refuses to allow

a voluntary disclosure, the employer must maintain the confidentiality of his or her health information with respect to colleagues.

5. **May an employer inform co-workers, managers, and supervisors that a particular named employee has been exposed or is infected, without the employee's consent?**

   No. An employer's obligation is to take reasonable steps to protect the confidentiality of the positive test result by (i) not identifying the employee by name, and (ii) avoiding, to the extent reasonably feasible, making other references that would permit a manager or co-workers to guess that an employee has been infected. While the employer cannot prevent speculation in the workplace, it must take reasonable steps not to contribute to it. The employer should, however, generally inform co-workers who may have had contact with the employee that they may have been exposed and may wish to see a health care provider to monitor their health.

6. **May an employer ask an employee to leave the premises or stay out of work if there is a reasonable belief that the employee has recently returned from China and/or has been exposed to, or has contracted, Coronavirus?**

   Yes. If an employer has an actual reasonable belief that the employee has been exposed to or has contracted 2019-nCoV, then the employer may send that person home to protect the rest of the workforce. It is important to note that discrimination claims can arise if an employee is singled out based on some protected characteristic. Further, employers must maintain the confidentiality of an employee's health information.

7. **Must an employer pay an employee who is required to stay out of work because there is a reasonable belief that the employee has recently returned from China and/or has been exposed to, or has contracted, Coronavirus?**

   It depends. If an employee performs work for the employer while he or she is out of the office/facility, he or she must be paid. If the employee is an exempt employee, he or she must be paid for the entire workweek during which he or she performs more than a de minimis amount of work. If the employee is non- exempt, he or she must be paid for the time that he or she works. Also, depending on the employer's policy and/or state/city law, the employee may be entitled to use paid sick time or other paid time off (e.g., vacation, personal days, etc.). Otherwise, generally, the employee need not be paid for such time out of the office. However, employers may wish to be generous in this regard, so as to encourage employees who exhibit symptoms or who have been in contact with 2019-nCoV to stay out of the office/facility.

8. **May an employer restrict travel to China or other afflicted countries?**

   Yes, if travel is for business. No, if travel is personal. Employers in many states are prohibited from taking any adverse actions against employees for lawful off-duty conduct, which would include personal travel. Further, if an individual is traveling to an affected country, which happens to be his or her home country, the employee could allege national origin discrimination if he or she suffers an adverse employment action due to such travel.

9. **Can an employer terminate or otherwise discipline someone who refuses to come into work out of fear of Coronavirus?**

   It depends. If an employee reasonably believes that he or she is in imminent danger, an employer may not terminate or otherwise discipline that individual for refusing to come to work under the Occupational Safety and Health Administration's anti-retaliation guidelines. However, if an employee does not have a reasonable belief that he or she would be in imminent danger at the workplace, an employer can terminate or otherwise discipline due to the refusal to come to work.

   If multiple employees join together and refuse to come to work, the National Labor Relations Board would likely consider this to be "protected concerted" activity under Section 7 of the National Labor Relations Act, and take the position that termination or other discipline of the employees is prohibited. The employer could, however, replace the employees, since it has a right to continue operations to meet the demands of its customers and clients.

   To the extent that the employees are represented by a union and covered by a collective bargaining agreement, the employer would also need to consider whether the actions are protected under the contract.

10. **Do employers have to pay someone who refuses to come into work out of fear of Coronavirus?**

    No. Unless the employee is actually ill and required to be paid under paid sick leave laws, short-term disability programs, workers' compensation, or any other applicable company policies, there is no need to pay employees who do not come to work because of Coronavirus fears (unless they are performing work while out of the office, of course (see above)). However, such employees should have the same opportunity as other employees to utilize paid time off benefits, such as vacation or personal days.

11. **If a company is required to provide FMLA, could an employee with Coronavirus be eligible for FMLA leave?**

    Yes. If an employee is diagnosed with 2019-nCoV, or is required to care for an eligible family member with the virus, this would undoubtedly constitute a serious health condition under the Family and Medical Leave Act ("FMLA"). Once so diagnosed, an otherwise eligible employee would be entitled to FMLA leave as certified by the employee's (or the family member's) health care provider.