COVID-19 is Now a Pandemic – Should this Change Employers’ Response Strategies?

Thursday, March 12, 2020

In recent blog posts here and here, we discussed the impact coronavirus / COVID-19 is having on the workforce, and what employers should or should not be doing in response to the outbreak. On March 11, 2020, the World Health Organization’s (“WHO”) declared the coronavirus outbreak is a “pandemic.”[1]

Importantly, WHO’s declaration of a pandemic should not cause employers to alter preexisting reasonable protocols and precautions. Employers should continue to monitor the development of COVID-19 and communicate with their employees based on official sources and facts. In particular, employers should be cautioned against offering medical opinions and examinations or engaging in containment strategies not in line with guidance from the CDC and/or local authorities. However, employers are encouraged to regularly check for updates from the CDC and other state and local authorities, to determine if changing circumstances warrant changes in their existing protocols and precautions. In light of this development, this post addresses...
what a pandemic means for employers and how existing guidance has changed.

Medical Examinations.[2]

The Americans with Disabilities Act (“ADA”) protects employees from employer inquiries into an employee’s medical status or employer-conducted medical examinations. Taking an employee’s temperature can be considered a “medical examination” under the ADA, and is therefore generally prohibited. However, a medical examination is permitted if an employer can show it is job-related and consistent with business necessity, or that the employee poses a “direct threat” to the workplace[3]. Whether a medical condition poses a direct threat to the workplace is a fact-specific inquiry. [4] In the absence of a pandemic, a seasonal cold or flu would not rise to the level of a direct threat justifying a medical exam. In its flu pandemic guidance,[5] the EEOC states that, “if the CDC or state or local public health authorities determine that the illness is like seasonal influenza or the 2009 spring/summer H1N1 influenza, it would not pose a direct threat or justify disability-related inquiries and medical examinations.”

By contrast, if the CDC, state or local health authorities determine that a pandemic is significantly more severe, it could pose a direct threat under the ADA, providing legal justification for an employer’s medical examination. The assessment by the CDC or public health authorities would provide the objective evidence needed for a disability-related inquiry or medical examination.[6]

Although the classification of an illness as a pandemic may technically allow an employer to measure an employee’s temperature, employers should exercise caution before taking this step for the following reasons:

- Employees may be infected with coronavirus without having a fever. Employee temperature checks may therefore not be an accurate measurement of an infected workforce and ultimately may instill a false sense of security.
- As a practical matter, this may be difficult to administer, and may require employers to consider additional costs associated with this.
- Employers’ first steps should be sending sick employees home. The EEOC states that sending a sick employee home is not a disability-related action. Further, the EEOC states that employers may ask an employee if they are experiencing flu-like (or COVID-19) symptoms during a pandemic.

Employee Refusal to Work Based on Fear.

Many employers are facing a scenario where, regardless of policies put in place, employees are afraid to come into work. Employees are only entitled to refuse to work if they believe they are in “imminent danger.” Section 13(a) of the Occupational Safety and Health Act (OSHA) defines “imminent danger” as “any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.” OSHA further discusses imminent danger as where there is “threat of death or serious physical harm,” or “a
reasonable expectation that toxic substances or other health hazards are present, and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency.”

The threat must be immediate or imminent, which means that an employee must believe that death or serious physical harm could occur within a short time, for example, before OSHA (or potentially the CDC) could investigate the problem. At this time, most work conditions in the United States do not meet the elements required for an employee to refuse to work, even in light of the WHO’s recent declaration of a pandemic. However, this guidance is general, and employers must consider the specific circumstances of its workplace before determining whether it is permissible for employees to refuse to work. However, as noted within the CDC’s interim guidance, employers are encouraged to be flexible, and to consider whether telecommuting is feasible for its employees.

As the global community monitors the coronavirus outbreak, employers should continue to maintain communication with its employees, reinforce or amend sick leave policies, develop plans for its employees in the event of a state of emergency or lockdown, and consider telecommuting or remote work policies.

[1] A pandemic is a global “epidemic.”

[2] Coronavirus is likely not a disability because it is a temporary illness, however, that liability can extend for perceived disabilities or association under applicable state law.

[3] A “direct threat” is “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” (https://www.eeoc.gov/facts/pandemic_flu.html citing ADA)


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