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COVID-19 and Employment Law: The New "Normal"

Written by Sarah R. Marmor

The COVID-19 pandemic has shifted the landscape for U.S. employers in myriad ways in the last month, and some of the rules applying to disability law, workplace safety, and employee health considerations have followed suit – although not as much as some may think. The EEOC already had in place guidelines addressing influenza pandemics, and those have been updated based on specific elements of this latest crisis, and this is a good resource for employers and employees alike. https://www.eeoc.gov/facts/pandemic_flu.html

This bulletin reminds employers about the law relevant to employer inquiries concerning the health of their employees and provides some relatively simple "rules of the road" in navigating legal obligations to healthy and stricken employees. Some of this may seem like common sense, but there are traps for the unwary (or the panicked), and as always we recommend consulting with company HR and legal counsel when setting policies or addressing particular cases.

The ADA Bars Disability-Related Inquiries and Medical Examinations (With Key Exceptions)

The Americans with Disabilities Act was created to protect the ability of people with disabilities or perceived disabilities from discrimination in the workplace. To that end, the Act prohibits making disability-related inquiries or requiring medical examinations unless "such examination or inquiry is shown to be job-related and consistent with business necessity." 42 U.S.C § 12112(D)(4).

Neither COVID-19 nor the flu currently has been established as a disability within the meaning of the ADA. Both are considered transitory, but the EEOC has declined to state definitively whether COVID-19 is a disability under the law. In any event, employees may have underlying conditions that would qualify as disabilities (e.g. lung disease, heart conditions) and the law in most circuits is clear that an employee need not have an actual disability to be covered by the prohibition against inquiries that could reveal a disability or medical examinations that are not job-related or consistent with business necessity. And to fit within those exceptions to the rule, an employer must have some objective evidence that the employee may not be able to perform the essential functions of a job before being able to ask about their physical or mental condition – or to subject an employee to a medical exam in order to start or return to work.

Rules of the Pandemic Road

Employers cannot assume that the current pandemic has changed this fundamental rule. That said, the EEOC has made it clear it will follow the recommendations of the CDC during the present crisis and has clarified that employers can and should play a role in ensuring employees are safe to work on their

premises. While many employees are working remotely at this time, some states may well ease restrictions in the coming months despite the expectation that the virus will linger for months and even years until a hoped-for vaccine is created. Therefore, employers would do well to note what they can and should not do.

To keep this as simple as possible, here is a list of the rules of the road. As always in law, there are nuances and potential pitfalls – and the rules could change based on legal challenges or medical advice from the CDC.

1. Employers can take employees' tempuratures and send employees home who have symptons of COVID-19

2. Employers should not use oral thermometers to do so.

3. Employers can ask employees about their symptoms – e.g. whether they have fever, chills, cough, shortness of breath, or sore throat.

4. They also can ask if the employee has come into contact with an infected person.

5. Employers should not share the results with others and should always keep employees' health information private.

6. Employers may not ask employees who do not seem to have symptoms about any underlying health conditions that may make them vulnerable to COVID-19.

7. However, employees may voluntarily share this information and seek reasonable accommodations to protect against exposure while working. Telework is one obvious example of such accommodation.

8. Employers can adopt rules for the workplace to protect against spread of infection – for example, handwashing and proper coughing etiquette.

9. Employers still must accommodate requests for reasonable accommodations of disabled employees, but the EEOC has recognized that the interactive process for resolution of new requests could be delayed at this time.

10. Just because telework makes sense for employers now does not mean employers are locked into this accommodation once the crisis passes. Each employee's job functions must be assessed and if telework later becomes untenable, an employer may refuse to agree to telework if appropriate.

11. An employer may require employees who have been unable to work to provide a doctor's note certifying fitness to return to work; however, given the strains on medical providers, the employer should accept certifications from local clinics even if they are simply an email, a form, or a stamp.

12. Employers cannot disclose the names of employees who are ill with COVID-19, but they can warn fellow employees who may have come into contact with an infected colleague so they can take their

own precautions. This is likely to create some frustration for employees, but privacy laws bar sharing the personal health information of anyone without written authorization.

A Word About OSHA

Many non-industrial employers may not have considered whether OSHA applies to COVID-19 matters in the workplace. Here, too, the landscape is evolving. OSHA requires employers to record work-related injuries, and there has been significant debate as to whether an employee with COVID-19 is a "recordable illness." So far, OSHA's position has been that it can be if the infection is the result of performing work-related duties. The question whether an employee was infected at work or elsewhere is tricky, and likely to be the subject of significant debate in the coming months. As to actually reporting COVID-19 cases to OSHA, the agency currently takes the position that only cases where an employee contracted the illness from work and passed away should be reported. Again, this is likely to be the subject of significant debate as the source of infection may not easily be identified. Finally, so far, OSHA has not issued new sanitation or other guidelines about how to protect employees from infection on the job. This means for most office-based employers, so long as the buildings in which the offices are owned or rented engage in reasonable regular cleaning and sanitation, there should not be a basis for OSHA concerns, at least for now.