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Q&A - Understanding and Effectively Implementing the Required and Best Practices Associated with Reopening Your Business

Disclaimer: Nothing in this document should be interpreted as legal advice. This presentation is intended to be informational only and to help you identify certain legal issues that may arise due to COVID-19. You should consult with your attorney to understand the specific legal issues and potential solutions for your circumstances.

Question 1: On slides 4 and 5 Workplace Requirements -- can you clarify whether these are "required" or whether they are mere suggestions?

Answer: First, the Center for Disease Control (CDC) has thus far issued only guidelines, not requirements. CDC communications are recommendations only. That said, those guidelines, along with any state health department guidelines, arguable have established a standard of care to which employers may be held if an employee were to contract the virus in the workplace and sue the employer for negligence. Second, many of these workplace requirements are based on recommendations from the Occupational Safety and Health Administration (OSHA). Accordingly, failing to follow them, whether or not an employee gets COVID-19, could subject the employer to fines under that law. Third, some state and local governments have imposed requirements for certain workplaces so, as with all the topics we will discuss in this webinar, employers must regularly review their pertinent state's department of health website and, particularly if the employer is in a metropolitan area, review the local government's coronavirus website. Given the foregoing, unless an employer has a particular reason why it cannot or does not want to implement these workplace practices, it is most advisable for the employer to follow them.

Question 2: May employers lawfully ask questions about and consider the health and/or risk to an employee's family members?

Answer(s): With certain limited exceptions, if an employer were to ask questions about and consider the health and/or risks related to COVID-19 to an employee's family members, the employer potentially would be exposing itself to legal risk. The law protects an employee from discrimination based on her/his relationship with a person with a disability (even if the employee does not have a disability). Also, the Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits the use of genetic information in making employment decisions in any aspect of employment. Accordingly, if the answers to an employer's questions about an employee's family member(s) reveal that the family member has a disability or reveals some hereditary health condition, the employer will have been put on notice that the employee is in a protected class under the pertinent disability discrimination law (i.e., the ADA or a state's or local government's equivalent) and GINA. Because of this, while employers should always make decisions based on legitimate, non-discriminatory reasons, this employer who has asked questions about the employee's family members will have to be all the

more careful when making any adverse employment decisions concerning the employee to ensure the employer will not be accused of or found liable for disability discrimination or violating GINA based on the employee's relationship with his/her disabled family member. Thus, it is not advisable for employers to ask for information about an employee's family members – except that the employer may ask generally if an employee has been in close contact with someone who has COVID-19 or a presumptive case of it.

Question 3: May an employer lawfully refuse to allow an employee to come back to work if the employee lives with someone in a high-risk category, i.e., an elderly person?

For the same reasons provided in response to question 2, making an employment decision – i.e., refusing to allow an employee to come back to work - based on the employee's relationship with someone with a disability or the employee's familial relationship with someone with a hereditary medical condition could expose the employer to liability under the ADA (or its state or local equivalent) and/or GINA. This is especially the case if not being permitted to return to the workplace could be considered an adverse employment action. This is not to say that, if an employee informs his/her employer that the employee is concerned about coming back to work because he/she lives with a high-risk person, the employer cannot consider this and allow the employee to telework or take leave until the risk mitigates. In this circumstance, employers are encouraged to allow teleworking or leave to the extent possible.

Question 4: Is it legal for the company to ask employees who submit a vacation request questions where they are going and with whom they are vacationing? If the employer is not comfortable with the answers, may the employer prohibit the employee from returning to the workplace for 14 days after the vacation? If so, is the company then required to pay for the 14 days the employee is not working?

Answer: The CDC recognizes that people can be at a higher risk of contracting COVID-19 if they travel because they could be going to a hot spot and/or their mode of transportation is such that they cannot practice social distancing. Because of this, there is some reasonable justification for the employer implementing this practice. Also, as a general matter, there is nothing inherently illegal about it. That said, there is a potential pitfall. If decisions will be made simply based on the employer's comfort level and not on objective criteria, the employer may, albeit inadvertently, make those decisions inconsistently and in a way that seems to reveal an underlying preconceived (and perhaps not well-grounded) notion that travel to one place versus another place puts the employee at too great of a risk of exposure. Therefore, if an employer wishes to implement this practice, the employer should establish specific parameters that it will consider, which are based on the most current communications from the CDC and the employer's state and local governments, and apply those parameters as consistently as possible.

Question 5: If an employee does not report having symptoms, but then comes in to work and the employer observes that the employee is coughing or otherwise appears to be ill, may the employer ask about the symptoms? And then what should the employer do?

Answer: In this situation, the employer lawfully may ask about the symptoms provided they are related to COVID-19. For example, the employer may ask about whether the employee took his/her temperature before coming to work and the result of that screening, how long the employee has had the symptoms, whether the employee has experienced any other symptoms that can indicate COVID-19, and whether the employee can point to some other cause for the symptoms other than COVID-19. Whether or not the employer should send the employee home because of the information gathered in this communication will depend on the particular facts and circumstances. If an employer encounters the situation where an employee seems to be exhibiting symptoms of COVID-19 but claims they are related to something other than the virus, the best practice may be for the employer to consult with legal counsel about the most advisable response.

Question 6: Related to sending an employee home if he/she has an elevated temperature, does the employer have to pay the employee for the time he/she is at home when the employee is unable to telework?

Answer: It depends. The employee could qualify for different types of paid leave, whether or not the elevated fever was COVID-19 related. For example, the Families First Coronavirus Response Act (FFCRA) provides paid leave to eligible employees who are unable to work or telework due to certain COVID-19 related reasons. Also, certain states and/or local governments have paid sick leave laws that may entitle the employee to compensation while not working due to a health condition. Further, an individual with an elevated temperature may become ill to the point at which they have a "serious medical condition" under the non-FFCRA portion of the Family and Medical Leave Act (FMLA). Moreover, the employee may be able to use paid time off under the employer's policies. All of these potential sources for paid leave should be considered before determining that the employee will not be compensated for the time spent at home.

Question 7: Regarding confidentiality, if an employee is screened for a fever and has one and the employer sends the employee home because of it, does the employer violate the employee's privacy rights and/or breach confidentiality laws simply because the employee's coworkers may surmise that the employee failed the screening by simply seeing the employee leaving the workplace after the screening?

Answer: While we are unaware of any agency or court precisely answering this question, we believe the most likely answer is the following: Even if other employees think they know why an employee is leaving the workplace after being screened for COVID-19 symptoms, an employer is not *per se* violating the employee's privacy or unlawfully revealing confidential information simply by sending the employee home for failing the screening. The employer has a duty to act reasonably in this regard. In contrast, if, for example, the employer

announces the reason to others, otherwise shares the results with coworkers, or is careless with the maintaining of the information, the employer may be liable for breaching confidentiality laws. In sum, employers should make their best efforts to ensure that the confidential information has not come from them. That is why, as far as the logistics of screening, employers may want to use a tent or designated space where they will screen one employee at a time.

Question 8: How should an employer respond if an employee asks why a coworker was sent home after screening or if the employee insists she/he needs to know who may have the virus?

Answer: The employer should not reveal the reason the individual was sent home or the identity of the person who may have the virus or its symptoms. An example of an appropriate response to questions asking for such information is to explain to the inquiring employee that the employer does not discuss other employees and/or has a duty to maintain the confidentiality of all employee's health information. Also, while an employer must notify employees of a suspected or actual case of COVID-19 in the workplace if the employees were in close contact with an infected coworker, the employer, even then, should not name the ill coworker or avoidably disclose any other information that may reveal the identity of the person. Instead, the employer should notify these employees that they have been in close contact with a coworker with a confirmed or suspected case of COVID-19 so they must leave the workplace and should consult with their healthcare providers. The CDC and many state health departments provide information on the next steps the employees must take after being sent home for a potential exposure to COVID-19.

Question 9: Can an employer lawfully prohibit a high-risk individual from working because that individual is high-risk? What should an employer do if the high-risk individual insists on working?

Answer: First, with certain potentially applicable limited exceptions, employers may not lawfully "involuntarily" exclude workers from the workplace because they are at an increased risk of experiencing a serious COVID-19 illness when those workers are at a high-risk because of their age or a health condition that could be considered a disability. Second, if an employee self-identifies but insists on working, under a very narrow defense in the ADA called the "direct threat defense," the employer may have grounds to ask the employee to obtain a doctor's note verifying that the employee can work and/or require the employee to telework. Whether or not these actions would be permissible and advisable would turn on the particular facts and circumstances and, as such, an employer faced with this situation who is concerned about allowing the employee to return to the workplace should obtain legal advice on how best to proceed.

Question 9: Can you speak about the employee who ordinarily would be required to come to work (either because the employer is an essential business or the employer has opened up) but the employee has a medical condition for which the employee now requires leave as an accommodation?

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Answer: The ADA and its state and local equivalents still apply. This means that, if an employee has a medical condition that could be considered a disability under those laws, employers have an obligation to engage in an interactive process with the employee to determine if an accommodation can be offered to that employee to enable her/him to perform his/her job. For example, a high-risk individual may have a condition that did not require an accommodation before COVID-19 but now does require one because of the great risk COVID-19 poses to that individual if he/she comes into the workspace. That employee may be entitled to work from home as an accommodation or to some sort of leave. The way in which an employer should discuss these possibilities with the employee can be delicate and employers must be mindful of certain things, such as not asking for more medical information than is necessary. An employer who is unfamiliar with the interactive process and is faced with a situation such as this should consult legal counsel about how to proceed.

Question 10: What if an employer provides services that only can be provided on-site such that there is no work from home option and the employee cannot come to work out of fear of contracting the virus?

Answer: Any time an employer thinks that an accommodation cannot be provided, the employer needs to realize that, under the ADA, the burden is not high for an employee to show that a reasonable accommodation exists, while the burden is very high for an employer to show that no accommodation could be provided without undue hardship. This is the case even though the EEOC specifically has acknowledged that, because of COVID-19 related business closure and stay-at-home orders, employers may more easily be able to show that accommodations are cost prohibitive (and, therefore, an undue burden) when the employer's revenue has plummeted. As a general matter, even if the company is a barbershop or salon and the employee cannot come to work because mere exposure (under any circumstances) would pose too high of a risk to the employee, the employer should consider all of the possible sources for leave listed on slide 12, including giving the employee a period of unpaid leave to enable the employee to come back (this could be considered a reasonable accommodation). In the end, though, if none of these leaves are available and the employee really cannot perform his/her job with a reasonable accommodation and the leave is indefinite, the employer is not required to pay the employee during the leave and may not be required to keep the individual employed. Before making any adverse employment action related to this employee, the employer should obtain legal advice to ensure it is complying with all applicable laws.

Thank You

If you have additional questions, please feel free to contact:

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