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CONSTANGY BROOKS, SMITH & PROPHETE LLP

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What does coronavirus mean for employers?

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The new coronavirus disease (COVID-19), which according to The Centers for Disease Control and Prevention was first detected in Wuhan City, Hubei Province, China, has been dominating the news this year – and for good reason.

As of yesterday, the CDC reported that an outbreak of this respiratory disease has been detected in 50 locations internationally, including about 14 confirmed in the United States. In January of this year, the World Health Organization declared the outbreak a "public health emergency of international concern." This constantly evolving situation has left employers with many questions about what to expect.

What exactly is COVID-19?

According to the CDC, "the virus which causes this respiratory disease is named 'SARS-CoV-2,' and the disease it causes has been named 'coronavirus disease 2019' (abbreviated 'COVID-19')." The WHO describes coronaviruses as "a large family of viruses that cause illness ranging from the common cold to more severe diseases." This novel coronavirus is a new strain that was not previously identified in humans. The CDC says that the complete picture regarding the scope of COVID-19 is still unknown, but the confirmed and reported cases range from mild to severe, including some reported cases of death. For more information about the coronavirus, you can visit the CDC **here**, or the WHO **here**.

What should employers consider?

The Occupational Safety and Health Act of 1970, along with state and local laws, provides that an employer has a general duty to provide a working environment "free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." So where can employers go for guidance? The CDC has issued some **interim guidance** for employers to help prevent workplace exposures in non-healthcare settings (the issues are different for health care workplaces). The following CDC recommendations are taken from its website with minor edits, but a full summary can be found at the link above:

1. **Actively encourage sick employees to stay home.** Employees who have symptoms of acute respiratory illness are recommended to stay home and not come to work until they are free of fever, signs of a fever, and any other symptoms for at least 24 hours, without the use of fever-

reducing or other symptom-altering medicines.

2. **Separate sick employees.** The CDC recommends that employees who appear to have acute respiratory illness symptoms, such as cough or shortness of breath, upon arrival to work or who become sick during the day should be separated from other employees and sent home immediately. Sick employees should cover their noses and mouths with a tissue when coughing or sneezing (or an elbow or shoulder if no tissue is available).

3. **Emphasize staying home when sick, respiratory etiquette, and hand hygiene.** Place posters that encourage staying home when sick, cough and sneeze etiquette, and hand hygiene at the entrance to your workplace and in other workplace areas where they are likely to be seen. Provide tissues and no-touch disposal receptacles for use by employees.

4. **Perform routine environmental cleaning.** Routinely clean all frequently touched surfaces in the workplace, such as workstations, countertops, and doorknobs. Use the cleaning agents that are usually used in these areas, and follow the directions on the label.

5. **Advise employees to take certain steps before traveling.** This could include checking Traveler's Health Notices for the latest guidance, and other information that is available on the CDC's website.

6. **Take additional measures as needed.** Employees who are well should be instructed to notify their supervisors if they have family members with COVID-19 and to refer to CDC guidance on conducting a risk assessment of their potential exposure.

What about employee leave?

The federal Family and Medical Leave Act allows an employee to take up to 12 weeks of unpaid, job-protected leave due to his or her own "serious health condition" or that of a spouse, parent or child. To be "covered," a private employer must employ 50 or more employees in 20 or more workweeks in the current or preceding calendar year, including a joint employer or successor in interest to a covered employer. Employees must also be "eligible" for FMLA leave, meaning (1) they have worked for a covered employer for at least 12 months, which need not be consecutive; (2) they have at least 1250 hours of service during the 12-month period immediately preceding the leave; and (3) they work at a location where the employer has at least 50 employees within a 75-mile radius of the worksite, or they receive direction from a facility that has at least 50 employees within a 75-mile radius (for example, a remote worker who receives instructions and supervision from someone in the corporate office). It is almost certain that COVID-19 would be considered a "serious health condition" qualifying the employee for FMLA leave if the employer is covered and the employee is eligible.

Depending on the jurisdiction, the employer may also be required to comply with state or local medical leave laws. These laws may have broader coverage and more liberal eligibility requirements, as well as more generous leave provisions, than the FMLA.

Finally, many states now have laws requiring *paid* leave, including Arizona, California, Connecticut, Massachusetts, Oregon, Vermont, and Washington State. Illinois, Maryland, and Minnesota – among others – allow sick leave already provided by employers to be used for employees' family members.

What about the Americans with Disabilities Act?

The ADA generally prohibits discrimination against individuals with "disabilities" as defined in the law and requires reasonable accommodation in certain circumstances. It also imposes restrictions on the medical information that employer may obtain, and requires that employee medical information be kept confidential and separate from the employee's personnel file. These last two provisions of the ADA apply to all employees, not just employees with disabilities.

Under the more liberalized definition of "disability" that has been in effect since 2009, it is likely that some manifestations of COVID-19 would be considered disabilities. In addition, the law protects individuals who have a history of a disability, or who are "regarded as" having a disability, even if they have no "current" or actual condition.

The ADA's confidentiality provisions can present difficulties when an employer learns that an employee has an contagious illness, such as COVID-19. If the employer learns that its workforce may have been exposed to COVID-19, the employer should simply tell employees generally of the exposure or potential exposure (and, of course, any precautions that they should take) but without providing information that would identify the individual employee.

The ADA also prohibits employers from requiring current employees to undergo medical examinations unless the examinations are "job-related and consistent with business necessity." This would prohibit an employer from making a blanket demand that all employees – or all employees in a given unit – be screened for COVID-19.

However, ADA does give employers the ability to assess whether an employee is a "direct threat." The term "direct threat" is defined as "[a] significant risk of substantial harm to health or safety of self or others that cannot be eliminated or reduced by reasonable accommodation." Thus, if the employer learns that a particular employee has or has been exposed to COVID-19, the employer should be permitted to send that employee for a medical assessment to determine the extent of the risk to other employees and how best to accommodate the employee who is ill.

A determination that a direct threat exists must be based on an individualized assessment of the employee's present ability to perform the essential functions of the job safely, considering reasonable medical judgment that relies on the most current medical knowledge or the best available objective evidence. The availability of any "reasonable accommodation" that would reduce or eliminate the risk of harm must also be considered.

As the COVID-19 outbreak evolves, employers should stay abreast of the latest CDC guidance and consult with qualified employment counsel.

If you have any questions about this or other workplace issues, please do not hesitate to contact any Constangy attorney.

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