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Coronavirus: An Employer's Action Guide

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Daily headlines about the growing coronavirus threat have many employers concerned that they are not doing all they should to protect employees without undue disruption to operations. Here are some answers that may inform your own response plan.

Updates as of March 5, 2020

Do declared states of emergency, as in San Francisco, change standard workplace policies or laws?

Not necessarily. Localities may declare emergency status to access greater resources for prevention and preparedness, in hopes of avoiding the spread of disease. Such measures would not directly impact standard workplace policies or laws in most cases, although employers should monitor any such declarations in locations where they have employees for specific provisions applicable to employers.

What is the extent of coverage for FMLA/sick leave if we start to see school/daycare closures?

Although FMLA time is not usually available for a normal bout of the flu, it may well be available to eligible employees who contract the coronavirus or who have an immediate family member who contracts the virus and needs the employee's care. A medical condition lasting more than three consecutive calendar days, with a visit to a health care provider and either a follow-up visit, with both visits within certain time frames, or other treatment such as a prescription, qualifies as a serious health condition under the FMLA. Some states also have sick leave laws that may provide time off with job protection, although, as with FMLA leave, not necessarily with pay.

Those forms of protection do not usually extend to time off work that is needed to care for a child who is healthy but cannot go to school or daycare because of a closure to avoid spread of infection. Unless employers or collective bargaining agreements provide options such as remote-work arrangements or use of available time off under sick leave or PTO policies to care for a

child who is home because of a disease prevention situation, such employees could be at risk under attendance policies.

How can employers balance the obligation to ensure a healthy and safe work environment with privacy and antidiscrimination obligations under state and federal laws?

Proactive communication to the general employee populace about measures that the employer is taking for prevention and would take in the case of a report of an employee testing positive for the coronavirus can pay off if there is an actual individual situation to be addressed. If an individual situation does arise, be very thoughtful about who really has a need to know and what each person needs to know to minimize the risk of disclosure of confidential medical information and discrimination based on actual or perceived medical condition, ethnicity, etc. Encourage employees who have concerns to bring them forward to Human Resources rather than engaging in speculation and "water cooler" discussion that can easily lead to misinformation and unfounded fears. Establish a line of communication for employees to submit questions related to coronavirus prevention and preparedness measures, post answers to questions that may be of general interest, and provide ongoing assurance that the company is very mindful of safeguarding employee health and safety in a manner that is appropriately respectful of everyone's privacy.

Are there any other considerations/changes that employers need to think about, given the CDC's recent announcements urging the U.S. to prepare for an outbreak?

Designate a point person to stay on top of developments, manage the communication process, and receive and address employee concerns, supported by a response team representing functions such as Human Resources, Health & Safety, IT, Facilities Management, Production, and other functional areas that need to anticipate action steps should the threat escalate. Look ahead to planned company events, such as staff retreats and sales meetings to anticipate the possibility of a need to limit travel to avoid employee exposure. Stock restrooms and work areas with plenty of supplies for hand washing and sanitizing. Anticipate employee support, customer service, technology, and other needs in the event of a business interruption. Review communications very thoughtfully so as not to either trivialize or escalate employee concerns.

Why is it not a good idea for employers to take employee's temperature before they enter the workplace? Is it a prohibited medical examination under the Americans with Disabilities Act?

Yes, the EEOC's position is that taking body temperature is a form of medical examination under the ADA, which means that doing so must be job-related and consistent with business necessity. That evaluation should be made on objective evidence and not simply general news reports, personal experience, fear, or assumptions. Employers in the U.S. should closely monitor guidance from the Centers for Disease Control, because the EEOC has cited the CDC as a form of objective information that could establish job-relatedness and business necessity. So, if and when the CDC recommends this measure, employers have a very defensible opportunity to implement it, but doing so earlier would trigger risk of an ADA violation.

Is taking the temperature of employees before they enter work ineffective, since people may have the virus but not yet have a fever?

That certainly is a complication with this virus. A fever of 100.4+ degrees is symptomatic of acute respiratory illness, according to the CDC, but a person may be carrying the virus with few (if any) noticeable symptoms. If the situation worsens and the CDC were to recommend temperature tests for employees, that would be a defensible mitigating measure that employers could take, but they should continue other measures, such as providing plenty of hand sanitizer and cleaning supplies (although that could become challenging if supply shortages occur), requiring frequent hand washing (which the ADA allows), sending anyone with severe coughing or sneezing home, even if the person does not have a fever, allowing time off for employees who are caring for someone at home with a fever, etc.

One thing to keep in mind is that while the EEOC gives deference to CDC guidance, it has made clear that the reliance should be on current guidance for the community where the employer is located. Employers should adapt their prevention programs based on reported conditions on a facility-by-facility basis.

Should employers allow employees who have been told not to come onsite to work remotely? What considerations are relevant if they're exempt versus nonexempt?

Allowing an employee to work remotely in lieu of time off (especially unpaid) might be considered a reasonable accommodation for a disability. Of course, the individual may not actually be disabled and, if he or she is merely regarded as actually or potentially disabled, may not be entitled to accommodation — but if the individual can be fully productive with an acceptable quality of work while telecommuting, employers can greatly reduce the risk of an ADA claim by allowing employees who have been at risk of exposure to work from home. Keep in mind, though, that the ADA does not require employers to lower quality or productivity standards as a reasonable accommodation. Also, employers who allow work-from-home arrangements may set reasonable expectations regarding working schedules, response time, output, prompt communication, etc. So if a remote arrangement does not result in a comparable contribution to what would be expected from working onsite, the employer could defensibly provide a leave of absence as the next-best form of reasonable accommodation.

When evaluating potential telecommuting arrangements, be sure to consider whether there would be appropriate protections regarding confidentiality and data security. This analysis should take into account the nature of the business and the types of information accessed in the employee's role. Inability to ensure sufficient safeguards may make remote work infeasible.

Another consideration is that, even for jobs that could be done remotely, the employee may not have an appropriate set-up for that arrangement, especially if the need arises on short notice. Home offices can be held to reasonable standards for protection of confidential information, backup of information according to standard company requirements for business continuity, etc. Employers should work with employees who are directed to work from home to provide the means to do so (within reason), keeping in mind that in some states, including California, employees cannot be required to pay for their employers' business expenses, so an employee

working from home may be entitled to reimbursement for things like internet access charges, supplies, and so on.

If remote work isn't feasible and the employer imposes time off, U.S. employers generally need not pay nonunionized employees if the time is not covered by an available form of employer paid time off or a form of state or local paid sick leave. For nonunionized hourly (nonexempt) employees, all time off work could be unpaid. For salaried (exempt) personnel, however, under federal wage/hour law, the time may be unpaid only if the employee performs no work during the entire workweek that is treated as unpaid.

Should employers "quarantine" employees who have travelled to a country designated as a level one, two or three travel health notice by the CDC and, if so, for how long?

There is no clear-cut guidance on this, but if someone is returning from a level-three country, it seems defensible to require that person to work remotely for a period of time or to take time off if remote work isn't feasible. Current CDC guidance indicates that symptoms typically appear within 14 days after exposure, so that would be the best source for determining the period of time the person should work remotely. Focus on remote work arrangements or leave and avoid using the term "quarantine" due to possible stereotyping and stigma and because it might imply that the employer is mandating isolating health measures beyond what employers may do under the ADA.

It's a closer call for level-one and -two countries. The ADA standard is that the employer should base decisions on objective evidence that allowing the individual to come to work would pose a direct threat to the health and safety of that person or others. So, be wary of forcing someone who has traveled to such countries off work, especially without pay, without further evidence that the person has been at high risk of exposure. Do be sure to monitor the CDC site on a daily basis, as this situation is changing fast, and travel advisories are likely to be updated fairly often.

May we lawfully require employees who have been off work for flu-like symptoms or potential coronavirus exposure to provide us with medical releases from their health care providers before they may return to work?

Yes. CDC guidance suggests that employers consider foregoing those releases – but their concern is that issuing those will be too burdensome on health care providers, and hard to get, if health care professionals are inundated with treating people with flu symptoms that could be due to the virus. We suggest keeping the requirement in place but being flexible about format. If an initial off-work note says "may return to work 14 days after all symptoms subside," for example, why make the person go back to a provider to say, "I've been fine for two weeks now," when the provider has no way of verifying that anyway? That may be sufficient documentation if the elapsed time is consistent with the provider's directions. Also, consider accepting expedited forms of release such as an email from the provider in lieu of a note that requires a return visit in person by the employee.

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May we require employees to travel to/from China if needed for business purposes, or should we cancel all business travel to/from China for the duration of the threat?

Although employers generally have broad discretion in determining and enforcing their job requirements, employers must tread carefully when deciding to require an employee to travel to a country with heightened travel warnings. Given the Centers for Disease Control and Prevention's (CDC's) Level 3 (Avoid Nonessential Travel) and the U.S. Department of State's Level 4 (Do Not Travel) warnings, employers should limit business travel to China to absolute necessity and avoid travel to any of the affected areas.

If an employee notifies an employer that he or she does not feel comfortable traveling to China amid heightened travel warnings, then it is the employer's responsibility to weigh carefully the employee's concerns, the risk of actual exposure and the business needs to determine whether an accommodation is possible, such as video conferencing or rescheduling the trip.

In instances where travel to China is necessary, employers should provide their employees with as much support as possible. For example, consider reimbursing reasonable expenses for personal protective equipment, medicine and even upgrading the employee's flight class to limit exposure to other passengers.

What should we do if we become aware that one of our employees was exposed to the virus? May we require employees who have recently traveled to China to work from home?

If an employer has a reasonable objective belief (not based on unfounded fears) that an employee may have been exposed to the coronavirus and is a danger to the workplace, the employer can require the employee to work from home. However, absent a reasonable objective belief, the employer does not have a legitimate basis to require an employee to work from home.

When determining whether you should require an employer to work from home, employers should consider the facts and circumstances of the employee's recent travel, including but not limited to the duration of the employee's trip, the areas the employee visited, the amount of time the employee has been back and the employee's symptoms, if any.

If an employee's position does not allow him or her to work from home, then the employer should consider providing the employee with paid leave for the duration of the incubation period (originally believed to be 14 days, although newer information indicates a longer period of up to 24 days).

Employers should consult with legal counsel before requiring an employee who recently traveled to China to work from home to ensure that the employer is not violating the Americans with Disabilities Act and/or any local, federal or state antidiscrimination laws.

Should we survey employees on recent travel to/from China for any reason? What should we communicate to employees about measures we are taking?

Questioning employees about their personal travel raises issues of privacy and the potential for actual or perceived discriminatory treatment. Generally speaking, the better approach is to let all employees know that the company is monitoring the situation and taking appropriate precautions, and to provide a point person for questions related to coronavirus risk avoidance. Direct employees to immediately notify that point person if they have been exposed to the virus, so that the company can provide them with appropriate support, such as a temporary work-from-home accommodation to avoid coworker exposure. Assure employees of the confidentiality of information they provide, with sharing of that information on a need-to-know basis only or as required by law in the case of government agency notification. If exposure already has occurred, the company should provide notice and similar support to those affected (without identifying the source, absent consent).

How should we respond to employees who express fear of working around others who may have traveled to/from China recently?

It is natural for employees to express fear over the coronavirus outbreak, including fear that they could be exposed to the virus in the workplace. There is much we don't yet know about the virus, and often the unknown is what drives our fear. Employers can do a lot to address general fear of the virus by educating their workforce, including posting updates from the CDC in common areas with other workplace postings and communicating to employees that they are monitoring any guidance issued by OSHA and other regulatory agencies related to the coronavirus outbreak.

If one or more employees approach Human Resources or a manager about fears related to the coronavirus, it is important to listen to those concerns exactly as if the employee(s) had come to HR to complain about a potential safety hazard. Pinpointing the nature of the alleged "hazard" is essential so that additional details can be gathered to evaluate whether the concern is credible. If the employee identifies a coworker who recently returned from China, ask the employee why they believe this person may have the coronavirus or could be a carrier. Document the information that the employee provides (whether it is based on general fears or actual first-hand knowledge). Remember that symptoms of the virus include fever, cough and trouble breathing, but those same symptoms closely align with a host of other medical conditions, including the flu.

After listening to the employee's concerns and gathering whatever information is conveyed, HR should inform the employee that the information provided will be evaluated and any steps that may be warranted will be taken. However, do not discuss any other employee's personal information with the employee who lodged the concern, or make any promises to do so. If the employee discloses that he or she has a medical condition that causes greater susceptibility to the virus (or increased anxiety about possibly contracting the virus), ask what the employee is asking the organization to do to address that condition, and document that request as part of the interactive process to help ensure compliance with the Americans with Disabilities Act.

If an employee raises a concern about the coronavirus to HR or a manager, it is important to remember that even if the fear is not reasonable, the employee has a right to raise it without fear of retaliation. Federal law and laws in many states protect individuals from retaliation for raising safety concerns in the workplace.

Under what circumstances, if any, should we require an employee to undergo medical screening?

Medical screening should be considered only after carefully evaluating all available and credible information about the employee's potential exposure to the virus. Then, as with any other medical condition, medical screening may only be done if it is "job-related and consistent with business necessity," which requires "a reasonable belief based on objective evidence" that the employee poses a direct threat to himself or herself or others due to the suspected medical condition. The employer must show that the employee's medical condition poses a "significant risk of substantial harm" to the health or safety of the employee or others that cannot be eliminated or reduced by reasonable accommodation.

Certainly, the coronavirus poses a significant risk of substantial harm if in fact the employee has the condition or is a carrier, but you also must consider the likelihood that the potential harm will occur. That determination requires an examination of all relevant information, without consideration of information from unreliable sources and without relying on stereotypes or making general assumptions. Whether or not impairment due to exposure to the coronavirus qualifies as a disability under federal or state law, an employer could face a discrimination claim under the Americans with Disabilities Act or state law if the employer regarded the employee as disabled.

Is there anything my organization needs to do to meet my OSHA obligations?

OSHA's General Duty clause requires employers to mitigate or eliminate workplace hazards that could cause serious harm to employees. The nature of the workplace affects the type and level of response that may be required. For example, health care facilities and organizations entrusted with care for vulnerable populations may need to implement heightened protection standards.

Remind employees to take common-sense precautions such as staying home if they are sick, greeting others in ways other than hand-shaking, and minimizing the risk of infection by conscientious hand-washing and sneezing and coughing into a sleeve or tissue. Provide plentiful supplies such as hand sanitizer and antiseptic wipes and avoid holding meetings in close quarters. Employers should assign someone, often a member of HR or Employee Health and Safety, to regularly monitor information posted by the CDC (https://www.cdc.gov/coronavirus/index.html) and OSHA (https://www.osha.gov/SLTC/novel_coronavirus/) for guidance on appropriate measures.

What should we consider if we have a unionized workforce or employee group with concerns about the coronavirus?

In unionized facilities, employers operating with collective bargaining agreements (CBAs) should consider whether their responses to coronavirus concerns constitute unilateral changes of existing work conditions or procedures. Despite employer desires to act for the safety and benefit of their employees, implementing changes to working conditions in response to coronavirus concerns without bargaining with a union could result in unfair labor practices under the National Labor Relations Act (NLRA). Employers must carefully assess the language in their

CBAs so that bargaining obligations are fulfilled and to determine what management rights support their ability to appropriately respond to coronavirus concerns.

Even in non-unionized facilities, employers should consider NLRA implications if employees collectively raise concerns about working conditions or changes to work procedures/operations because of the coronavirus. Under Section 7 of the NLRA, employees have the right "to engage in [concerted] activities for the purpose of … mutual aid or protection.…" This includes employees raising group concerns about safety and health, such as by requesting additional personal protective equipment (PPE) because of potential exposure to the coronavirus. Under these magnified circumstances, employers must avoid retaliatory, threatening or discriminatory responses to employee group concerns about the coronavirus.

What should we keep in mind for our international employees outside of China?

Companies with employees working outside the U.S. should check any government or health authority guidance issued by the country in question. Employers also may wish to seek specific advice from employment law experts in that country, especially if the country has a high number of coronavirus cases or if any employee is believed to be at high risk of infection. Our firm has specialists in the U.K. and China who can assist companies with employees in those countries, and we can source advice in relation to any other country through our strong network of contacts.

Meet the Authors

Susan W. Kline
Partner
+1 317 237 1059
Indianapolis
susan.kline@faegredrinker.com

Kelly Petrocelli
Counsel
+1 312 569 1343
Chicago
kelly.petrocelli@faegredrinker.com

Emma Vennesson
Counsel
+44 (0) 20 7450 4562
London
emma.vennesson@faegredrinker.com

Carita Austin
Associate
+1 317 237 1402
Indianapolis
carita.austin@faegredrinker.com

Renee C. Manson
Associate
+1 215 988 2755
Philadelphia
renee.manson@faegredrinker.com