

EMPLOYMENT LAW ALERT



An Employer's Guide to Preparing for the Coronavirus Disease 2019 (COVID-19)

Coronavirus Disease 2019 ("COVID-19") is a respiratory infection first identified in Wuhan City, China in December 2019. The World Health Organization ("WHO"), which is coordinating global efforts, has officially classified the current coronavirus outbreak as a "public health emergency of international concern."

Given this increasingly alarming situation with "pandemic potential" (per WHO), what should employers do? **First, don't panic!** Keep in mind that COVID-19 is not the first disease that has raised concerns that impact the workforce – employers managed through the 2009 H1N1 pandemic, 2014 Ebola virus outbreak, 2015 Zika virus epidemic, and more. By staying level-headed and addressing employment concerns thoughtfully and with care, employers likewise will manage through the current health crisis.

The following tips can help employers prepare:

Focus on Facts, Not Fears

- While there is much information floating around, employers should educate themselves about the facts from – and make employment decisions based upon – reputable sources, such as the Centers for Disease Control and Prevention ("CDC"), <https://www.cdc.gov/coronavirus/2019-ncov/index.html>. Typically, with most respiratory viruses, people are thought to be contagious when they are symptomatic. However, in this case, the virus may be infectious before symptoms are present. The CDC believes at this time that symptoms may appear in as few as 2 days or as long as 14 days after exposure.

Plan for Business Disruption

- Employers should consider establishing business continuity plans addressing items, such as business and supply chain disruptions and office closures, as well

as employee absenteeism and opportunities for working remotely. Having a plan in place that covers pandemic preparedness is a first step to ensuring uniform treatment to employees and minimizing the impact of COVID-19 on the business.

Communicate with Employees

- Employers should regularly communicate with employees so that employees have confidence that the company is taking the concerns seriously, but at the same time not creating an atmosphere of panic in the workplace. Employers should be monitoring communications from the CDC, WHO, Department of Homeland Security (“DHS”) and State Department for current guidance and use that information to educate employees as appropriate.
- The best way to prevent COVID-19 infection is to avoid exposure. Employers should remind employees and others in the workplace of the steps to take to avoid spreading any illness (washing hands, covering their face when coughing, etc.).

Address Sick Employees

- **Perhaps the most important message employers can give to employees is to stay home if they are sick.** Employees should be encouraged to stay home without fear of being penalized. If any employee presents themselves at work with a fever or difficulty in breathing, they should be directed to seek medical attention. Employers are required by the federal Occupational Safety and Health Act (“OSHA”) to take reasonable steps to eliminate or mitigate recognized health hazards in the workplace. Removing sick employees from the workplace during a pandemic and taking other safety measures in the workplace to minimize the spread of illness can help avoid later claims the employer did not fulfill its obligations under OSHA (as well as potential negligence or personal injury allegations).
- When employees are sent home due to illness, the company should be flexible and permit use of sick or vacation time or other PTO, or allow additional unpaid time off. Under certain state sick leave laws, employers may not require use of PTO for sick days. Therefore, check the sick leave laws that apply to your company. Remember that exempt employees must be paid their full salary for any weeks in which they perform any work (other than as allowed by a bona fide sick leave plan, policy or practice) in order to avoid losing the exempt classification. In addition, depending on the size of the employer and the medical condition of the employee due to their illness, there could be additional considerations under the FMLA, ADA or other applicable leave laws.

Evaluate Need for Travel

- The Department of State and CDC have issued travel advisory warnings. Employers can monitor travel advisory information by visiting <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories.html> and <https://www.cdc.gov/coronavirus/2019-ncov/travelers/index.html>.

Employers should seriously consider whether any scheduled international travel is essential. If a business trip cannot be avoided, employers must ensure that employees understand potential risks and take into consideration employee concerns. Employers should proceed with caution when approached by employees who object to travel on behalf of others or in groups. These objections could be covered by the National Labor Relations Act and/or OSHA.

Evaluate Employees Returning from Travel

- Employers who have employees returning from China or other affected areas also should consider whether to require those employees to stay at home for some period of time. DHS now requires individuals who have been in China within the last 14 days to be evaluated and possibly be subjected to quarantine (many companies have expanded this beyond China). These DHS guidelines, along with the CDC guidance that 14 days is considered the longest incubation period, can help inform employer decisions.
- Employers may also consider whether to require medical clearance for workers returning from business or other trips to China or other high risk areas identified by the government. Although employers generally cannot require workers to take medical exams under the ADA, an exception may apply here in the case of potential "direct threat" to the health or safety of others. Such a process should be reviewed by counsel before implementation and, if put in place, be applied consistently.
- For those employees whose job duties cannot be fulfilled during the period of quarantine while working from home, the employer must consider whether to allow a paid or unpaid leave during the period of requested absence from the workplace.

Consider Telecommuting Options

- Even where travel is not an issue, employees may raise concerns about reporting to the workplace for fear of contacting COVID-19. This is particularly true for employees in higher risk workplaces, such as hospitals. It is prudent for employers to evaluate work-from-home capabilities now.

Maintain Employee Privacy

- Keep in mind that a health crisis does not remove an employer's general obligations under the ADA, HIPAA and other laws to maintain privacy of employee health and other personal information. Though it may be tempting to reveal details about an employee's situation to quell concerns by other employees about COVID-19 exposure, this could expose the employer to breach of privacy claims. Any employee medical information should be maintained in a confidential file separate from the personnel file.

When in Doubt: Follow the Public Health Guidance and Consult Legal Counsel

- This is a rapidly evolving situation and employers should stay informed on the latest developments. The risk of successful discrimination, privacy, and other

legal claims by employees is significantly reduced when employers properly follow public health guidance and consult counsel with any concerns.

Please e-mail the NFC attorney you work with or call us at 973.665.9100 should you have questions or employment concerns regarding the COVID-19 disease.

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