

CLIENT ALERT

Coronavirus: Key Issues for Employers

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As concern about coronavirus – the upper-respiratory infection that was first diagnosed in humans in Wuhan, China in late 2019, and has spread to the United States in recent days – grows worldwide, employers face a series of questions regarding the impact the virus will have on the workplace.

What Must Employers Do to Maintain a Safe Workplace?

U.S.-based employers may have concerns about compliance with workplace safety laws, including the Occupational Safety and Health Act (OSHA). Under OSHA, workers have the right to working conditions that do not pose a risk of serious harm; to receive information and training about workplace hazards; and to exercise their rights without retaliation, among others. To that end, employers should continue to monitor the development of the coronavirus and analyze whether employees could be at actual risk of exposure. Employers may refer to [OSHA's Guidance for Preparing Workplaces for an Influenza Pandemic](#). While not written to address coronavirus in particular, this Guidance does provide steps employers can take to address public health crises. OSHA has also aggregated its [resources relating directly to coronavirus](#), and will continue to update its guidance as conditions evolve.

Given that employers have a legal obligation to provide a safe workplace for employees, employers should take some basic steps to help prevent the spread of disease and keep employees healthy:

- Educating employees on the signs and symptoms of the coronavirus and the precautions that can be taken to minimize the risk of contracting the virus. At this time the CDC believes symptoms appear within two to fourteen days after exposure, with some infected individuals showing little to no signs.
- Providing hand sanitizer and hand washing stations, flu masks and facial tissues; encouraging employees to wash hands with soap and water for at least 20 seconds; and cleaning and disinfecting frequently-touched objects and surfaces.
- Minimizing unnecessary meetings and visitors, and assessing the risks of exposure by identifying workers who may have recently traveled to, come in direct contact with, or are scheduled to go to Wuhan City, and the Hubei Province in China.
- Implementing and/or evaluating workplace emergency response protocols.
- Implementing travel guidelines and procedures for approvals for travel to China.
- Allowing sick employees to work from home or take leave as appropriate.

Does Contraction of Corona Virus Implicate the ADA?

One question facing U.S.-based employers is whether an employee who contracts coronavirus – or, for that matter, any similar communicable disease, like influenza – could be considered to have a disability under the meaning of the Americans with Disabilities Act (ADA). Generally, the answer is no. Although an argument might be made that an upper-respiratory virus like the coronavirus meets the ADA's definition of a "disability" on the basis of its limiting of the major life function of breathing, the fact

that the coronavirus is a temporary condition weakens that argument. That said, employers should take care not to make assumptions about any employee's illness or other health condition – including refraining from making armchair diagnoses which run the risk of generating a “regarded as” claim under the ADA. The ADA permits employees to bring claims that an employer discriminated against them because the employer *regarded* them as having a physical or mental impairment that substantially limits a major life activity. Employers may note that the U.S. Equal Employment Opportunity Commission has issued a [fact sheet on Pandemic Preparedness in the Workplace and the ADA](#), which provides some guidance on this issue. Employers should also consider applicable state and local laws, which may apply definitions of “disability” broader than that of the ADA.

How Should Employers Handle Travel Concerns?

As of January 27, 2020, the CDC had issued a "Level 3" health travel notice advising travelers to avoid all non-essential travel to China. On January 30, following the World Health Organization's (WHO's) global health emergency declaration, the U.S. State Department raised its China travel advisory to "Level 4: Do Not Travel." In its communication, the U.S. State Department noted that “the World Health Organization has determined the rapidly spreading outbreak constitutes a Public Health Emergency of International Concern” and advised that “travelers should be prepared for travel restrictions to be put into effect with little or no advance notice.” Employers should consider whether to limit business travel to affected areas at this time and provide reasonable accommodations such as video conferencing during the duration of the threat and heightened risk.

Many large global employers have put a complete suspension on travel to China, or implemented policies which would require senior management approval for any such travel that would be considered essential. Employers would be wise to be particularly sensitive to requests from employees whose health is vulnerable, including employees with immunodeficiencies and those who are older or pregnant. Employers should also monitor travel alerts issued by the U.S. State Department, which provides objective guidance about the level of danger posed by travel to specific areas. Indeed, at this time, commercial carriers have reduced or suspended routes to and from China.

To the extent employers have employees who have recently traveled to China, and to the Wuhan area in particular, employers can consider asking the returning employees to work from home and/or place them on paid leave to ensure they are not bringing the virus into the workplace. Any such approach should take into account the recency of the travel, the areas to which the employee traveled, and the employee's current condition. In short, employers should consider the facts and circumstances of each situation and make decisions that protect against the potential spread of the virus but also account for employee rights.

Employers with employees in China should continue to work closely with their employees and be mindful of the local regulations being implemented for safety precautions. The State Council in China issued a Circular on January 27 under which the public holiday of the Chinese New Year will be extended to February 2 (Sunday) and all employees will start to return to work on February 3 (Monday). Following this announcement, several local governments issued local rules to further extend the start date for all companies to open offices locally (*i.e.*, February 9th). Employers should be mindful of the continued updates and communicate closely with their employees in China.

Employers in the U.S. and elsewhere are wise to remain sensitive to employee concerns and accommodate them to the extent reasonable. They should avoid assuming that any given employee would opt out of travel, *e.g.* passing over a pregnant employee who may in fact want to take an opportunity which would require travel, as doing so could give rise to an accusation of disparate

treatment. And, to the extent possible, employers should not pressure employees into traveling; disciplining an employee for refusing to travel to Asia may not directly give rise to an actionable claim, but would negatively impact workplace morale.

What Else Should Employers Keep In Mind?

The number of new coronavirus cases is small, and employers should not overreact to any threat it poses. Many employers can likely continue to operate largely as normal; those with significant employee travel or employee interchange in Asia should continue to take steps that are appropriate in light of all circumstances and updates issued by the State Department and the WHO.

Coronavirus impacts persons of all ethnicities; singling out employees because of their ethnicity for testing, leave, or other virus-related actions could lead to discrimination charges. All policies should be enforced in a uniform and consistent way. Within China, as the quarantine measures are now conducted by the local governments, any employees who are ordered to be quarantined by the local government (including patients, suspected patients and individuals who are categorized as close contacts), should not have their pay impacted by the fact that they cannot perform work during the special period due to the quarantine measures. Employers should continue to check updated local rules in China for further information as different local governments in China may have different local rules regarding employee benefits and pay practices during the extended period after February 3rd – the official date published by the State Council for employees to return to work.

U.S.-based employers should not administer any medical tests for workers, unless they are otherwise a job-related necessity, because insisting upon such tests may violate the ADA. U.S. employers operating abroad should consult applicable laws and regulations regarding medical testing in other countries. However, employers should reinforce sick leave policies and encourage employees to stay home if they are feeling ill, to the extent feasible. And, employers should *not* offer medical opinions or propagate information about the virus that does not come from a reliable government source. As this situation continues to evolve, employers should continue to seek guidance from counsel.

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