Alert

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COZEN O'CONNOR

Medical Inquiries and Examinations Related to Coronavirus

Many employers are wondering about what they can do to protect their workforce in the face of an unprecedented public health crisis associated with the coronavirus a/k/a COVID-19. Public health officials across the country recommend excluding any employees from work who may be infected, and employers face not only the medical threat to their employee's health, but also the potential economic impact of forced quarantines of a large number of workers. The following is a summary of the commonly asked questions in this area.

Can I require employees to inform the company if they test positive for COVID-19?

Yes. An employer has a right to make reasonable inquiries about an employee's medical condition under the Americans with Disabilities Act (ADA) if it is job related and consistent with business necessity. The EEOC's guidelines for "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act" specifically contemplate such inquiries in the event public health officials declare a pandemic. Further, medical information obtained for purposes of making employment decisions is generally not protected by HIPAA privacy protections.

Can I ask require employees to self-report potential exposure to coronavirus or ask questions about their travel history?

Yes. According to the guidelines issued by the EEOC, the threat assessment "by the CDC or public health authorities" provides "objective evidence needed for a disability-related inquiry or medical examination." 29 CFR § 1630(2)(B). At this point, there is a clear objective basis for making reasonable inquiries concerning employee health and requiring the reporting of an actual or presumptive diagnosis of coronavirus.

With respect to employee travel, it is important to distinguish between inquiries and actual restrictions on personal behavior. Many states prohibit disciplinary action against an employee for engaging in an otherwise lawful off-duty activity like travel, although it is important to note that these protections may not apply if an employee violates a government imposed travel restriction. The best practice is to focus on self-reporting in such situations and implement a 14-day quarantine outside the workplace (either working from home or being placed on leave). Employers should also consider requiring self-reporting of not only employee activity, but also exposure to anyone in the employee's household who may have been diagnosed, placed under a formal/informal quarantine, or is exhibiting observable symptoms of coronavirus.

Can I send an employee home if he or she is exhibiting symptoms of a respiratory disease in the workplace?

Yes. An employer has a right to exclude workers who may pose a direct threat to the health and safety of their coworkers. According to guidance issued by the EEOC, "[d]uring a pandemic, employers should rely on the latest CDC and state or local public health assessments." 29 CFR § 1630(2)(B). Accordingly, an employee exhibiting symptoms of coronavirus in the workplace should be sent home as recommended by public health officials and such actions would be excluded from the discrimination protections under the ADA. It is important to note that employees sent home after reporting to work may be entitled to minimum compensation under state or local laws or an applicable collective bargaining agreement.

If an employee displays symptoms of coronavirus, can I require a test or medical certification before returning to work?

An employer may require a medical examination under the ADA if there is a good faith basis to

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believe that the employee poses a direct threat to the safety and health of the workplace. This belief may be based on observable symptoms, recent travel to an affected region, exposure to an infected person, or other reasonable factors. Testing is not widely available at the present time, however, and an employer would be required to pay for both the test and any time associated with obtaining the required testing. Further, requiring testing prior to the development of serious symptoms may be counterproductive because the lack of widespread private testing may unnecessarily expose an employee to coronavirus who may have another less serious illness.

Under both the ADA and FMLA, an employer may require a return to work certification; however, doctor appointments may not be easily obtainable due to high demand. As a practical matter, some people with coronavirus may never develop serious symptoms — making it hard to distinguish between a common illness or the coronavirus. In such situations, employers should weigh carefully whether an employee should be allowed to return to the workplace once they are no longer symptomatic (like a normal illness) or be asked to provide a formal return to work certification from a physician. Each case should be addressed on an individual basis, depending on whether there is an actual diagnosis of coronavirus, the severity of the symptoms, length of absence, and local availability of testing and medical treatment, keeping in mind the importance of ensuring that a contagious employee is not allowed back into the workplace too soon.

What are the legal risks, if any, associated with temperature checks for employees entering the company's job site?

Thermal scanning of employees may be helpful in identifying persons who are running a fever — a common symptom of coronavirus. In some heavily impacted areas, like Seattle, the CDC is actually recommending thermal scans and other active screening of employees for symptoms. Employers considering such a step should carefully consider the practical issues associated with performing these temperature checks, including additional staffing, training, and equipment costs.

In the event employees refuse a thermal scan as a condition for entry to the workplace, the basis of their refusal may have important legal implications. For example, if employees refuse based on religious objections, the employer must analyze whether a reasonable accommodation is possible. Similarly, a coordinated refusal to be tested on the part of more than one employee may also constitute protected concerted activity under the National Labor Relations Act. If the employer has a unionized workforce, any thermal testing may also be subject to negotiation with an applicable labor union, or run afoul of an existing collective bargaining agreement.

Recent litigation involving compensation of employees for time spent in security checkpoints at retailers and industry sites also raises the prospect of similar arguments that any meaningful time spent in a line for a thermal scan may be compensable work time. The analysis of this issue would likely turn on the purpose of the scan, i.e. temporary public health emergency as opposed to a tangible benefit to the employer, and the application of such a policy to all persons entering the work site and not just employees.

Please keep in mind that the above general advice could change based on differences in local and state laws, or the circumstances in a particular industry or geographic location. For specific advice, please seek legal counsel.