

WORKPLACE PREPARATIONS FOR CORONAVIRUS (“COVID- 19”)

Based on the recommendation of the Centers for Disease Control (CDC) to begin preparing for a COVID-19 epidemic in the United States, prudent employers across the country are planning how they will respond to an outbreak among their employee populations. Those preparations should, of course, account for the obligations and restrictions imposed on employers by applicable law, including the Occupational Safety and Health Act (OSHA), the Americans with Disabilities Act (ADA) and the Genetic Information Non-Disclosure Act (GINA). Employers should be careful to navigate the tension among these laws by taking steps to warn and protect employees from known risks, as required by OSHA, while avoiding unlawful medical inquiries and confidentiality breaches, as required by the ADA and GINA. Likewise, employers should avoid pandemic response measures that target employees based on race, ethnicity or national origin—especially employees of Asian descent, who may be shunned by co-workers’ irrational fears.

Warning Employees of Known Health Risks

Under the OSHA general duty clause, employers generally must provide work environments free from known risks of serious physical harm or death. This obligation includes a requirement to investigate and take appropriate responsive action to address known health risks in the workplace, including informing employees of the presence of such risks. Placed in the context of the COVID-19 outbreak, if an employer learns that someone with COVID-19 has been on the employer’s premises, this basic information should be disclosed to employees working in areas where the exposure occurred. In making this disclosure, however, an employer must be careful to avoid disclosing personally identifiable information regarding the health of employees and their family members.

Confidentiality and Medical Inquiries

The ADA and GINA prohibit most disclosures of employee health information and the health information of an employee’s family members. Thus, employee names and other personally identifiable information should not be included in company warnings about suspected or known COVID-19 exposure in the workplace.

Likewise, the ADA and GINA generally prohibit disability-related inquiries made to employees and probing questions about the health of an employee’s family

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Brittney J. Herron

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members. Thus, at this point, employers should refrain from asking employees to disclose whether they or their family members have been diagnosed with COVID-19.

While the ADA would permit inquiries posed to an employee with respect to diagnosed illnesses that constitute a “direct threat” to the employee or others, the federal government has set the bar incredibly high for what constitutes a “direct threat.” The Equal Employment Opportunity Commission (EEOC) asserts any such threat must be based upon clear and convincing evidence, and the EEOC has refused to treat deadly, transitory viruses as “direct threats” in the past. For example, even though (according to the CDC) the 2009 H1N1 virus pandemic infected 60.8 million people, resulted in 274,304 hospitalizations and caused between 151,700 and 575,400 deaths worldwide, the EEOC refused to classify the H1N1 virus as a “direct threat.” Indeed, the EEOC’s published guidance indicates that a disease would have to be “significantly more severe” than the 2009 H1N1 pandemic to constitute a “direct threat” under the ADA. Thus, given that there are only a few dozen known cases of COVID-19 in the United States, there is significant risk that the EEOC would treat the virus as falling short of “direct threat” status.

What Measures to Take and to Avoid

Bearing these principles in mind, employers can consider the following steps to prepare for the risk of COVID-19 outbreaks in the communities where they do business or—even worse—among their employee populations:

- monitor information posted by the CDC and OSHA for guidance on appropriate measures to address the spread of COVID-19;
- communicate with employees about best practices to avoid exposure (<https://www.cdc.gov/flu/professionals/infectioncontrol/resphygiene.htm>);
- encourage employees who are experiencing symptoms that have been associated with COVID-19 (e.g., fever, cough, shortness of breath and other breathing difficulties) to stay home;
- request that employees disclose whether they have traveled to locations impacted by the spread COVID-19;
- temporarily suspend employee travel to mainland China (until the State Department has lifted its Level 4 travel warning for China);
- consider temporarily suspending employee travel to other locations significantly impacted by the virus (e.g., South Korea, Italy, Japan, Hong Kong and Iran);
- require employees traveling to the U.S. from locations impacted by the COVID-19 outbreak to work from home for at least 14 days;
- develop plans and strategies for remote working accommodations to the extent possible; and



- inform employees of known exposure risks in the workplace without revealing personally identifiable employee health information.

Employers should, however, avoid the following:

- asking employees to reveal their own medical diagnoses or the health status of their family members;
- targeting employees within particular racial or ethnic groups, e.g., ethnic Chinese employees, for elevated scrutiny or disparate treatment in an effort to prevent viral exposure in the workplace;
- revealing to co-workers the identity of an employee whose diagnoses is known; and
- taking adverse employment action against employees based on suspected exposure to COVID-19.

Employers considering any of the above-mentioned measures should consult with counsel prior taking such actions.