

COVID-19 CORONAVIRUS AND WORKFORCE CONSIDERATIONS FOR EMPLOYERS

Hodgson Russ Labor & Employment Alert
March 6, 2020

With global concern regarding novel coronavirus (2019-nCoV) and COVID-19 rising and cases in the United States now being widely reported, employers should consider several issues surrounding managing a potential outbreak.

Proactive Steps to Reduce Risks of an Outbreak in Your Workforce

Consistent with the “general obligations” clause of the Occupational Health and Safety Act (“OSHA”), which requires employers to maintain a workplace free from any recognized hazards that may cause death or serious injury to their employees, employers should take basic precautions now. This includes maintaining the cleanliness of all facilities, making soap and hand sanitizer available throughout each facility, and potentially providing protective gear to employees who interact with the public in geographies where there is an active virus outbreak.

Employers should also encourage employees to take preventive measures, including washing their hands frequently with anti-bacterial soap; staying home if they experience any symptoms of illness; and avoiding contact with anyone who is infected, appears to be ill, or has traveled to locations with active outbreaks. Depending on the nature of the business and the geographic locations in which they operate, employers may also consider restricting or suspending travel to infected or high-risk areas. Employers may also want to consider canceling all non-essential travel and/or scaling back travel commitments or scheduled trips to areas where the virus has spread. Conversely, employers should thoughtfully consider employee requests to avoid travel, particularly to high-risk areas, and employers should consider whether to institute any ban or quarantine period after personal travel to the impacted areas.

Employers should also begin to analyze their workforces and operations to determine what functions, if any, could be effectively performed from an employee’s home. Undertaking these analyses now may help avoid a disruption in productivity in the event of widespread business and school closures.

Employers with international operations will also need to consider any impact of laws related to employment in those areas.

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Finally, employers should carefully review their collective bargaining agreements, as applicable, and policies such as those contained in employee handbooks and disaster plans. In particular, employers should be aware of and comply with any provisions regarding closure protocols and the compensability of time off when the business is closed. Employers with unionized work forces should also be cognizant of potential bargaining obligations that may arise in implementing measures to address a COVID-19 outbreak.

Disability-Related Inquiries and Medical Examinations

Employers should take caution to avoid making unlawful disability-related inquiries or requests for medical examinations in connection with COVID-19. For instance, employers cannot poll employees about their health conditions prior to an outbreak, or make medical inquiries or require medical examinations for employees who show no symptoms and have not visited locations with active outbreaks.

However, if there is factual evidence that an employee has been exposed to the virus or is presenting with symptoms, or as outbreak becomes widespread in certain communities, it may be possible for employers to make inquiries or require examinations if job-related and consistent with business necessity. In addition, employers can likely require employees who have visited locations with active outbreaks to stay home for a reasonable period of time (e.g., 2 weeks) upon return and report if they develop symptoms of the virus.

Finally, to plan for any anticipated outages, employers may ask non-medical questions, such as questions regarding transportation and childcare coverage.

Potential Leave and Accommodation Impacts

Employers should keep in mind that absences related to COVID-19 may be legally protected. Specifically, the COVID-19 infection may, depending on the circumstances and severity, entitle employees to time off under the Family Medical Leave Act, Americans with Disabilities Act (“ADA”), and/or state or local laws. In localities with paid sick leave laws, this time off may need to be paid.

In addition, an employee with COVID-19 may also be entitled to other accommodations, such as a work-from-home arrangement, under the ADA and applicable state law. It is also possible that employees with disabilities that render them more susceptible to potential infection, or more likely to develop complications from infection, could request work accommodations to avoid contracting COVID-19. Employers should consider these requests as they would any other request for reasonable accommodation, including engaging in and documenting the interactive process with the employee.

Finally, under certain circumstances an employee who stays home to avoid contracting the virus may be found to have engaged in protected activity under OSHA. Accordingly, employers must exercise due diligence before taking adverse employment action against an employee for such absence.

Wage and Hour Impacts

Employers should also be cautious of wage and hour implications that present when an employee works from home or takes time off because of COVID-19-related issues.

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Salaried exempt staff generally must be compensated at their full salary in any workweek in which they perform any work – even just a few hours of checking emails from home. Accordingly, employers should clearly communicate to salaried exempt staff what expectations apply to work from home, and protocols should be put in place to monitor productivity. Employers can and should discipline exempt staff who do not meet productivity objectives while working from home.

Employers should be particularly cautious about allowing work from home for non-exempt employees. At a minimum, these employees should be required to accurately track and report all hours worked. As always, employee requests should be carefully analyzed before authorizing any work from home arrangement. If a non-exempt employee takes time off related to COVID-19, does not work from home, and has exhausted all paid time off and paid leave, the time off can generally be unpaid.

Hodgson Russ continues to monitor and analyze developments related to COVID-19. If you have any questions or would like to discuss your preparation protocols, please reach out to a member of our Labor & Employment team.

If you received this alert from a third party or from visiting our website, and would like to be added to our Labor & Employment mailing list or any other of our mailing lists, please visit us at: <https://forms.hodgsonruss.net/sign-up-for-email-and-other-communications.html>.