LABOR AND EMPLOYMENT

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# COVID-19 AND EMPLOYMENT CONSIDERATIONS FOR BUSINESSES

*By M. Christine Carty*

The global proliferation of the novel coronavirus, known as COVID-19, has forced employers to develop and implement plans to keep their workers safe and productive while complying with applicable laws and regulations. This Alert provides general guidance based on existing law and commentary from regulatory agencies applicable to prior disease outbreaks, and identifies resources for companies to obtain additional information to assist with plan development and implementation.

**The "General Duty Clause" Under OSHA and Related State Laws**

Section 5(a)(i) of the Occupational Safety and Health Act of 1970 ("OSHA"), known as the "general duty clause," requires employers to provide a workplace "free from recognized hazards…causing or likely to cause death or serious physical harm." In addition, numerous states have OSHA-approved workplace safety laws that require employers to make reasonable efforts to prevent work-related injuries, including the spread of infectious diseases. The "general duty clause" and state analogs provide legal support for employers imposing reasonable steps to protect employees from COVID-19 in the workplace.

Possible actions could include:

- Sharing information with employees about the Centers for Disease Control and Prevention ("CDC") and state and local health department guidelines to prevent the spread of infectious diseases, such as frequent handwashing with soap for at least 20 seconds, the use of hand sanitizer with at least 60% alcohol strength if handwashing is not possible, and providing employees with the websites of reliable sources of information and support, such as the CDC, the local health department, and hospitals.
- Evaluating options to disinfect the workplace, including retaining additional cleaning services, and providing hand sanitizer and other disinfecting material in public spaces.
- Considering policies to reduce large gatherings, such as discouraging or prohibiting optional large meetings or conferences and use of conference rooms.
- Prohibiting employees who are symptomatic for COVID-19 or the seasonal flu from coming to the workplace, and instructing those who develop symptoms while at work to leave the workplace immediately.
- Sequestering employees who develop symptoms of COVID-19 or the flu until they can be released and leave the workspace.
- Prohibiting employees who have traveled to countries coded by the CDC as a travel risk due to COVID-19 (currently China, South Korea, Iran, Italy, Japan and Hong Kong) from returning to the workplace for at least 14 days or longer, if they become symptomatic.
- Prohibiting employees who have been in close contact (six feet) with someone who has or had the COVID-19 virus from returning to

work for the incubation period of COVID-19, stated as 14 days by the CDC.

- Prohibiting employees from traveling internationally and nationally for business until further notice.

**EEOC Guidance from the 2009-10 H1N1 Pandemic**

Equal Employment Opportunity Commission ("EEOC") guidance in response to the H1N1 flu pandemic in 2009-10 provides additional legal support for the implementation of non-discriminatory COVID-19 policies and clarifies, to some extent, what types of employer action would be legal under the Americans with Disabilities Act. For example, the Guidance provides that barring sick workers from the workplace in a pandemic does not violate the Americans with Disabilities Act ("ADA") because it is "not a disability-related action." Also, the EEOC Guidance provides that such action may be permitted under the "direct threat" exception to the ADA. Although the EEOC has cautioned that it will not consider an illness to be a "direct threat" with certainty unless the CDC or local health authorities have declared a pandemic, the EEOC has instructed that employers "should rely on the latest CDC and state or local public health assessments" and make "reasonable assessments of conditions in their workplaces based on [such] information" to guide their preventative actions. On March 11, 2020, the World Health Organization declared the COVID-19 infections to be a pandemic. As of the date of this Alert, it is unknown whether the CDC will follow suit. Based on the WHO pandemic declaration, employers complying with CDC or local health department recommendations should not run afoul of the ADA.

As of the date of this Alert, some relevant CDC recommendations are:

- Symptomatic people should not be in the workplace in an effort to control the spread of COVID-19. CDC, Interim Guidance for Businesses and Employers.
- People with COVID-19 may be contagious, even before they are symptomatic. CDC, How COVID-19 Spreads.
- People who have traveled internationally and who develop COVID-19 symptoms should voluntarily quarantine themselves, except for seeking medical attention, until no longer symptomatic. CDC, Travelers from Countries with Widespread Sustained (Ongoing) Transmission Arriving in the United States.
- People who have been in close contact (e.g., living, traveling, or being within six feet) of anyone who has developed COVID-19 should self-quarantine. CDC, Interim US Guidance for Risk Assessment and Public Health Management of Persons with Potential Coronavirus Disease 2019.

Further, it is likely that employers may require an employee who has had COVID-19 symptoms to obtain a medical examination and clearance to return to work to demonstrate that s/he is no longer a "direct threat" to others in the workplace. Under many state laws, employers may be required to pay for such "fitness for duty" tests or examinations by covering co-pays and test costs. However, at the time of this Alert, the CDC is advocating that employers not require an employee to produce such medical clearance to avoid burdening health care workers. Rather, the CDC is advising that an employee may return to work if s/he has not had a fever for 24 hours and is not coughing and/or sneezing.

Read more on the CDC website here and the EEOC Guidance here.

**B-to-B Companies**

Companies that provide services to other companies, such as event planners, delivery companies, temporary service companies, etc. may want to prepare to explain to their clients about the safety measures they are taking to prevent the spread of COVID-19 in the clients' workplaces. Such service companies may consider developing a written policy

that is circulated to its employees and contractors, and made available to its clients.

**Policies for PTO and Flexible Work Arrangements**

Employers may wish to consider in advance whether workers will be paid for enforced furloughs of two weeks or longer resulting from COVID-19, whether such furloughs will be covered by existing PTO policies, or whether a customized policy should be crafted for the COVID-19 situation. In these circumstances, such a policy should be applied evenly without regard to an employee's race, age, national origin, religion, or other protected category. On March 3, 2020, the Governor of New York announced an amendment to his Paid Sick Leave budget proposal to the New York legislature that would mandate that employers continue to pay employees who are required to remain out of the workplace for a period of time due to contact with COVID-19. We are watching this initiative closely and will report as it moves through the legislature. As of the date of this Alert, other states have not followed suit. And, the $8.3 billion aid package approved by the U.S. Congress and signed by the President on March 6, 2020 does not include funding for paid sick leave due to COVID-19.

Employers may wish to review and update their emergency preparedness and flexible works plans and re-circulate relevant information to employees. The CDC recommends that employers develop flexible work plans for its workers which may include flextime hours, telework, and extended leaves to care for family members. Employers engaged in contingency planning to prepare for a possible business interruption due to widespread illness or a government order, such as a school or transportation shut down, may make carefully framed inquiries of employees as part of the planning process without running afoul of the ADA. Employers can consult the EEOC Guidance for framing ADA-compliant questions. Telework policies for COVID-19 should be consistently applied to avoid claims of discrimination.

Employers can also consider developing telework plans to accommodate those who are not allowed into the workplace due, for example, to close contact with someone displaying COVID-19 symptoms, but who remain asymptomatic themselves or who have pre-existing conditions and disabilities that make exposure to COVID-19 risky. Such accommodations are expressly permitted by the EEOC Guidance as not violative of the ADA. Care should be taken to address the implications of teleworking by non-exempt employees under the Fair Labor Standards Act and state labor law requirements, including paying employees for all time worked, paying overtime rates for time worked over 40 hours in a week, requiring meal and rest breaks, and keeping accurate records of all time worked.

**Conclusion**

These are complicated and fast-moving issues, causing understandable concern for both employers and workers. Frequent updates to policies and internal notifications may be appropriate. While developing appropriate practices and communicating with their personnel, business leaders may benefit from close consultation with employment counsel. We will continue to monitor governmental responses and advise of statutory or regulatory developments.

*This Alert was based on information available at the time of publishing. It is subject to change. You should consult government websites and publications for the most up-to-date information.* ◆



*For more information about Schnader's Labor and Employment Practices Group or to speak with a member of the firm, please contact:*

*M. Christine Carty*
*Partner*
*212-973-8012*
*ccarty@schnader.com*

*Jo Bennett*
*Co-Chair, Labor and Employment Practices Group*
*215-751-2134*
*jbennett@schnader.com*

*Michael J. Wietrzychowski*
*Co-Chair, Labor and Employment Practices Group*
*856-482-5723*
*mwietrzychowski@schnader.com*

*www.schnader.com*

** See: www.schnader.com/jakarta*