CLIENT ALERTS & INSIGHTS

COVID-19: Focus on Employment Law Considerations

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Are these the "end times"? No, but the degree of threat that Coronavirus Disease 2019 (COVID-19) poses to the world's population keeps being debated in the print, broadcast, cable, and social media. Although the disease reportedly originated in Wuhan, Hubei Province, China, COVID-19 is now present in several states and is apparently here to stay-at least for the next few months. As most of the country knows, fears about the disease have impacted the nation's commerce and wealth, as markets plummeted roughly 13.5% in the last half of February. In addition, California, Washington, Florida, and Maryland have recently declared "states of emergency," and we believe there soon will be others as pockets of COVID-19 spread throughout the nation.

With this in mind, the following information is intended as a guide to employers in dealing with the COVID-19 "new reality," however long it may last.

BASIC INFORMATION ON THE DISEASE AND HOW IT SPREADS

Even the Centers for Disease Control and Prevention (CDC) recognizes the novelty of COVID-19 and advises that it must learn more about how the disease spreads, the severity of illness it causes, and to what extent it may spread further in the United States. Therefore, this information should be considered "fluid."

The CDC currently advises that COVID-19 is spread primarily "person-to-person" from those in close contact with others (within about 6 feet). This spread occurs when respiratory droplets produced by the coughs and sneezes of infected individuals land in the mouths or noses of others. Importantly, the CDC has indicated that although it may be *possible* that individuals can contract COVID-19 by touching surfaces or objects tainted with the virus, and thereafter touching their own mouths, noses, or eyes, CDC does not believe that this is the most likely method of transmission.

According to the CDC, COVID-19 appears to spread easily and sustainably; however, as of March 6, 2020, there were only five countries with sustained community transmission: Japan, South Korea, Italy, China, and Iran. The CDC recommends that older adults or those who have chronic medical conditions should consider postponing travel to Japan, and that all Americans should avoid nonessential travel to South Korea, Italy, China, and Iran. Entry of foreign nationals from those countries into the United States is currently suspended, and Americans who are returning to the United States from Hubei province will be quarantined for two weeks.

In addition to implementing some or all of the suggestions below, employers should consider providing employees with general information regarding COVID-19 to ensure employees are properly educated on the disease and to avoid misinformation leading to unnecessary panic. This information is easily accessible online from the CDC and World Health Organization (WHO).

SPECIFIC SUGGESTIONS FOR EMPLOYERS

Encourage Sick Employees to Stay Home

- Employers should advise employees who are sick or have symptoms of acute respiratory illness to stay home until they are free of fever (100.4° F or greater using an oral thermometer), signs of fever, and any other flu-like symptoms for at least 24 hours, without the use of fever-reducing or other symptom-relieving medicines, including cough suppressants.

- Employers should ensure that their sick-leave policies are flexible and consistent with public health guidance and state and federal law, and that their employees are aware of the policies. Employees should require their staffing companies to do the same and, at least for the immediate future, consider making their leave and sick-time policies more forgiving.
- Employers should not require a healthcare provider's note for employees who are sick with acute respiratory illness to validate their illness or to return to work, as healthcare provider offices and medical facilities can be extremely busy and not able to provide the documentation in a timely way.
- Employers should consider making their policies that permit employees to stay home to care for a sick family member more flexible or lenient. If COVID-19 spreads as some fear, more employees may need to stay at home to care for their sick children or other family members than is usual.
- Employers should place posters throughout their workplaces that encourage their employees to stay home when sick.

Separate Sick Employees

Employers should separate and send home employees who appear to have acute respiratory illness symptoms (i.e., cough, shortness of breath) upon arrival to work or who become sick during the day.

Emphasize Respiratory Etiquette and Hand Hygiene

Employers should consider the following:

- Placing posters throughout their workplaces to use proper cough and sneeze etiquette (either covering their noses and mouths with a tissue when coughing or sneezing or using an elbow or shoulder when tissues are unavailable).
- Placing additional hand hygiene stations throughout their workplaces.
- Providing tissues and no-touch disposal receptacles throughout their workplaces.
- Encouraging their employees to wash their hands with soap and water for at least 20 seconds or apply a hand sanitizer that contains at least 60-95% alcohol.
- Providing alcohol-based hand rubs to their employees.

Perform Routine Environmental Cleaning

The CDC recommends that employers frequently clean all frequently touched surfaces in the workplace, such as workstations, countertops, and doorknobs. The CDC *does not* recommend using any extraordinary disinfection techniques beyond routine cleaning at this time.

Business Travel Considerations

Employers should monitor the CDC's Traveler's Health Notices for the latest guidance and recommendations for each country to which their employees must travel.

Employers should advise employees to check themselves for symptoms of acute respiratory illness before traveling and to notify their supervisors and not travel if they are sick.

Employers should advise employees who become sick while traveling to notify their supervisors and to promptly call a healthcare provider for medical advice.

If outside the United States, employees who become sick can contact a U.S. consular officer to find an appropriate healthcare provider. However, U.S. embassies, consulates, and military facilities do not have the legal authority, capability, or resources to evacuate employees or provide them with medicines, vaccines, or medical care.

EMPLOYMENT-RELATED LEGAL CONSIDERATIONS

OSHA

OSHA has no particular standard dealing with COVID-19 in the workplace. However, employers should consider that COVID-19 in their workplaces would, at the minimum, be covered by the general duty clause of the Occupational Health and Safety Act. Employers knowing that an employee is contagious with COVID-19 or any other infectious disease should consider how best to abate the situation. At present, OSHA is merely advising employers and employees with questions about COVID-19 to review CDC guidance.

Employers should be cautious when dealing with employees who raise concerns about COVID-19. Employees generally have the right to complain to OSHA or their employers about the safety conditions in their workplaces and not to perform duties in conditions that they consider dangerous. OSHA could consider an employer's taking an adverse employment action against an employee who complains about his or her concern about COVID-19 in the workplace as unlawful retaliation. The adverse action could be nearly anything that would make the employee unhappy, from being fired to being isolated in a room by himself or herself until feeling better.

Employee Leave/Americans with Disabilities Act

The Family and Medical Leave Act (FMLA), state-specific leave laws, and employer-specific leave policies could be implicated by an employee's concern about COVID-19. Generally speaking, the FMLA and other leave laws do not protect employees who wish to stay home to avoid getting sick. Nevertheless, employers should consider any leave requests made by their employees regarding COVID-19, and make decisions only after assessing all relevant facts. Although employers may not have to grant leaves under the FMLA or other laws, they should consider providing leaves to those who express concerns under their personal leave policies. Although there may not be a legal reason to do so, the cost-benefit ratio and employee morale benefits given the current climate regarding COVID-19 could justify going over and above the minimum leaves permitted by law or a policy.

An employee who has COVID-19 may or may not be a qualified individual with a disability. The symptoms often are not all that bad, similar to a cold or flu. Even so, employers should be concerned about the Americans with Disabilities Act (ADA). For example, an employee with serious symptoms could be substantially limited in a major life activity, or the employee could have some other impairment or bodily condition that could make the employee eligible for protection under the ADA. And, the ADA protects employees whom their employers regard as disabled even when they are perfectly capable of performing their duties at work.

The ADA also restricts the kind of inquiries that an employer can make into an employee's medical status. The ADA prohibits employers from making disability-related inquiries and requiring medical examinations, unless they (1) can show that the inquiries or exams are job-related and consistent with business necessity or (2) have reasonable beliefs that employees pose direct threats to the health or safety of themselves or others that cannot otherwise be eliminated or reduced by reasonable accommodation.

According to the Equal Employment Opportunity Commission (EEOC), whether a particular outbreak rises to the level of a "direct threat" depends on the severity of the illness. The EEOC advises employers that assessments by the CDC or other public health authorities provide the objective evidence needed for disability-related inquiries or medical examinations, including taking the temperatures of employees. To date, the WHO has not classified COVID-19 as a pandemic and instead refers to the disease as a "public health emergency of international concern." As of March 3, 2020, the CDC notes that COVID-19 currently meets only two of the three criteria for being classified a "pandemic," but also that "current global circumstances suggest it is likely that [COVID-19] will cause a pandemic."

HIPAA and Similar State Laws

The Health Insurance Portability and Accountability Act (HIPAA) and similar state laws may be implicated in employer efforts to combat COVID-19 outbreaks in their workplaces. HIPAA protects an individual's "protected health information" and sets forth under what circumstances it may be used or disclosed.

HIPAA-covered entities, including self-insured employers who administer their own health plans, should remind their employees of their obligations regarding the disclosure of protected health information under HIPAA, including when authorizations may be required before disclosure. Covered entities should also be mindful of disclosures of protected health information to family members and

others and encourage strict compliance of the rules that regulate when authorizations must be obtained. For certain employers, it may be especially important to retrain their employees so that they understand that unauthorized access of personal health information may result in significant liability. Reviewing protected health information should only occur when necessary, and reviewing protected health information "just because" should be expressly prohibited.

Finally, HIPAA-covered employers should consider implementing and following a policy for communicating with media outlets or public health agencies/departments when those communications may indirectly disclose protected health information. Consider appointing a "lead" through whom all external communications are filtered.

The WARN Act

Generally, the federal WARN Act imposes notice obligations on covered employers that implement plant closings or mass layoffs in certain situations, even when they are forced to do so for economic or health concern reasons. Under the Act, employers must provide 60 calendar days' notice prior to any covered plant closing or mass layoff. There are a few exceptions to this general rule, such as the unforeseen business circumstances exception.

A COVID-19-specific "plant closure" or "mass layoff" may or may not implicate the WARN Act or its exceptions, and many states have enacted their own "mini-WARN" acts. Whether an employer's decision to temporarily cease operations at a specific "plant" is a fact-specific inquiry, and before doing so, we recommend that employers consult with their employment counsel to ensure legal compliance.

Labor Relations

The National Labor Relations Act (NLRA) requires employers to bargain in good faith over mandatory subjects of bargaining such as wages, hours, and terms and other conditions of employment. This duty obviously impacts a union employer's decision to change employees' work schedules or duties, among other employment-related matters, in response to a COVID-19 concern. Employers should take care to review their collective bargaining obligations with their labor counsel before making unilateral changes over a mandatory subject of bargaining in response to COVID-19-related concerns.

Section 7 of the NLRA provides employees, even nonunion employees, the right to act collectively. Therefore, employers should pay attention to whether employee complaints concern just themselves or a group of employees. An employee who yells at a supervisor that the company is not doing enough to protect "us" could be engaged in protected activity under the NLRA, as well as the OSH Act, as previously noted.

In summary, employers in all sectors of the economy will be best served by acting now to ensure that their workplaces and workforces are in the best positions possible to effectively deal with the potential for a COVID-19 outbreak in their locations. Educating workforces should be the paramount concern now, and the major theme of any educational efforts on the part of employers should be to remind their employees not to panic, to maintain proper handwashing and other personal hygiene techniques, and to be forthright with management about any plans to travel outside of the country.

Benesch Law, including the Benesch Labor and Employment Law Practice Group, stands ready to assist with any questions as we closely follow COVID-19 developments and support our clients' response efforts in the labor and employment and other relevant areas.

For more information, please contact a member of the firm's Labor & Employment Practice Group.

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[1] Please note that this information is current as of the date of this Client Alert, based on the available data. However, because COVID-19's status and updates related to the same are ongoing, we recommend real-time review of guidance distributed by the CDC and local officials.