

Employers Should Not Just Be Bold, But Smart, When Dealing With Ebola

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Watch as Benesch attorney [Joseph N. Gross](#) discusses the implications of Ebola in the workplace in this Benesch B-Cast.

Tensions are high concerning the potential spread of the Ebola virus disease in the U.S., fueled by the confirmation of new infections, around-the-clock news reports on potential calamities and our natural, and seemingly universal, fear of the unknown.

In light of the heightened threat of Ebola, employers must ensure that they are providing a healthy and safe environment for all employees. However, employers also need to be aware of their responsibilities under several employment-related laws, which may seem, at first, to be roadblocks. We believe the following laws are the most obvious:

Occupational Health and Safety Act

Ebola in the workplace certainly constitutes one of the hazards contemplated by the general duty clause of the Occupational Health and Safety Act. If an employer knows that an employee is infected, or came into contact with an infected person, the employer would have to take concrete steps to abate the situation. Such steps could include [educating](#) employees on the dangers of Ebola and its transmission, dispelling myths about the virus, providing adequate personal protection equipment (including gloves, masks, and goggles) and determining how to transport an employee to a medical facility or isolation area in the event an employee exhibited symptoms at work. Healthcare workers, who would be exposed to patients with the disease, would be required to follow certain safety protocols.

Americans with Disabilities Act

The Americans with Disabilities Act (“ADA”) prohibits employers from discriminating against qualified individuals with a disability, including keeping them out of the workplace, unless they pose a direct threat to themselves or others. The ADA also requires employers to provide reasonable accommodations to qualified individuals with a disability, absent an undue hardship. Even though the primary symptoms of the Ebola virus are relatively short-term, an employee contracting the Ebola virus disease could very well be considered “disabled” under the ADA, and a reasonable accommodation would have to be offered, if requested. However, and this one is easy, the employer should place a confirmed Ebola-infected employee on a leave of absence immediately to eliminate a direct threat to others. The tort liability arising from an employer permitting an infected person on the premises could be enormous. Ideally, an employer would get medical advice first, to defend any accusations that a “direct threat” was not imminent-but the employer’s getting an employee suspected of actually having the Ebola virus disease off the premises while getting that medical advice would be absolutely paramount.

An employee who has been exposed to someone with the Ebola virus disease and is ordered to “self-monitor” but has no other restrictions, presents a much different situation. Allowing the self-monitoring employee to continue working may cause extensive fear and disrupt operations, but requiring the employee to take a leave of absence may be viewed by the Equal Employment Opportunity Commission or other fair employment agency as discriminatory. Certainly, the employer and employee should discuss options. Perhaps the employee would be willing to work at home. However, if an employer decides to require the employee to take a leave of absence, serious consideration should be given to paying the employee while on the leave. Once the “self-monitoring” employee is prepared to return to work, the employer may require the employee to provide a release-to-duty note from a healthcare provider.

Furthermore, employers must maintain the confidentiality of employees’ medical conditions and keep their medical information and identities confidential. Even if an employer believes that other employees have knowledge of an infected-or potentially infected-employee, that employee’s privacy must be respected.

Family and Medical Leave Act

The Family and Medical Leave Act (“FMLA”) requires employers with more than 50 employees to provide 12 weeks of unpaid leave to eligible employees with a “serious health condition,” which renders them unable to perform the essential functions of their positions. Eligible employees caring for a parent, spouse, or child with a “serious health condition” may also be entitled to FMLA leave.

An eligible employee would likely be considered to have a serious health condition if a health care provider required the employee to self-monitor or stay away from others. Because the Centers for Disease Control and Prevention reports that the incubation period averages eight to 10 days but could be two to 21 days following exposure, an employer would likely have to grant FMLA leave to the employee. If an employee continues to receive treatment or is being monitored or quarantined (i.e., being incapacitated) following an eligible employee’s annual allotment of FMLA leave, or if the aftereffects of the virus last beyond such period, the employer should consider extending the employee’s leave or providing some other reasonable accommodation, such as working from home, to permit the employee to return to work, as would likely be required by the ADA.

Collective Bargaining Agreement

If employees are represented by a union, their employer cannot unilaterally make changes to the terms and conditions of the employees’ employment without bargaining with the union. Thus, if an employer reasonably believes that changes to workplace safety practices and leave policies are necessary following an employee’s exposure to someone with Ebola, the employer would have to negotiate these changes with the union to avoid a grievance under the collective bargaining agreement or a charge of an unfair labor practice. Employers should remember that it may be easier to negotiate “in” a generous leave policy than negotiating one “out,” so employers should think about negotiating “in” a policy with an automatic expiration date.

Additionally, Section 7 of the National Labor Relations Act provides protection for workers who confront abnormally dangerous working conditions together. If employees have a belief that an Ebola outbreak has occurred, and engage in a “concerted” refusal to work, their refusal to work may

be protected. That means an employer may not discipline or discharge, or otherwise retaliate against, employees in response to their refusal to work.

Workers' Compensation

The Ebola virus disease, if contracted by an employee through “occupational exposure,” may be considered an occupational disease, entitling the employee to workers’ compensation benefits. But can that employee sue the employer or the co-worker from whom he or she contracted the disease? The Ohio Workers’ Compensation Act, or its equivalent in other states, provides employers and co-workers a general immunity from lawsuits from injured workers. However, employers could be liable for an intentional tort if they knowingly permit Ebola-infected employees to stay at work. State laws on an employee’s right to bring an intentional tort action against their employer and co-workers vary from state to state.

Uniformed Services Employment and Reemployment Rights Act

On October 16, 2014, President Obama authorized the call-up of members of the National Guard and other military reserve units in response to the Ebola virus being in the West Africa region. Employers that have employees needing to report for duty under this call-up or any other call-up have to comply with the Uniformed Services Employment and Reemployment Rights Act (“USERRA”) when their employees return from service. USERRA protects employees serving in the military from discrimination in their civilian careers, including denying or delaying reemployment or employment benefits because of their military service.

Among other things, USERRA restricts employers from cutting off healthcare benefits to their employees after their being called to duty. Employers must keep their regular coverage in place for the first 30 days after the call-up. For military duty beyond 30 days, employees can elect to continue sponsored health care for 24 months, but they may be required to pay up to 102% of the premium.

Have a Policy, and Apply It Uniformly

Employers should consider implementing a temporary company policy. The policy should lay out the protocols that the employer would follow if there is a risk of exposure; whether the employer will offer leave and for how long; and what an employee must do before returning to work. Employers must apply their policy uniformly among their employees to avoid a potential discrimination claim under Title VII of the Civil Rights Act of 1964, the ADA, or some other law.

An employer’s decision on whether to pay an employee taking an extended leave of absence should be based on several factors. First, salaried employees who are exempt under the Fair Labor Standards Act must at least be paid for the entire week during any workweek they work at all, unless the leave of absence qualifies under the FMLA. Second, paying employees while they are on leave may avoid or mitigate any charge or lawsuit down the road. Third, paying employees, who may be thought of as victims, may be helpful for employee relations generally.

Conclusion

Additional information regarding the Ebola “outbreak” continues to develop. Whichever way the “outbreak” goes, employers must ensure they maintain the health and safety of the workplace,

communicate clearly with their employees and abide by all governing employment-related laws, even if they do not seem, at first, appropriate.

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