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ALERT

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ADDRESSING THE CORONAVIRUS

Reports of COVID-19 (commonly known as the "coronavirus") are of concern to just about everyone, including our employees. The practical and legal questions are immense.

On March 18, 2020, the Equal Employment Opportunity Commission (EEOC) updated its guidelines about pandemics, specifically to cover issues related to COVID-19. The updated guidance is attached. Some of the most pertinent questions and answers are stated below:

1. **How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic?**
 - o During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.
2. **Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19?**
 - o Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.
3. **If an employer is hiring, may it screen applicants for symptoms of COVID-19?**
 - o Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type.

Another federal agency that has addressed the pandemic is the Occupational Safety and Health Commission (OSHA), which provided guidance in March, entitled "Guidance on Preparing Workplaces for COVID-19." This Guidance contains recommendations as well as descriptions of mandatory safety and health standards. The Guidance describes the symptoms of this virus as including fever, cough, and shortness of breath. However, others have experienced no symptoms

at all. The symptoms may appear in as few as two days or as long as 14 days after exposure. The virus is thought to spread mainly from person-to-person, including:

- Between people who are in close contact with one another (within about six feet);
- Through respiratory droplets produced when an infected person coughs or sneezes.

While it may be possible that a person can get COVID-19 by touching a surface and then touching their own mouth, nose, or possibly their eyes, this is not thought to be the primary way the virus spreads. People are thought to be most contagious when they are most symptomatic. According to OSHA, for most employers protecting workers will depend on emphasizing basic infection prevention measures, including:

- Promote frequent and thorough hand washing, including by providing workers, customers and work site visitors with a place to wash their hands. If soap and running water are not immediately available, provide alcohol-based hand rubs containing at least 60% alcohol.
- Encourage workers to stay home if they are sick.
- Encourage respiratory etiquette, including covering coughs and sneezes.
- Provide customers and the public with tissues and trash receptacles.
- Discourage workers from using other workers' phones, desks, offices, or other work tools and equipment, when possible.
- Maintain regular housekeeping practices, including routine cleaning and disinfecting of surfaces, equipment, and other elements of the work environment. Products with EPA-approved emerging viral pathogens claims are expected to be effective against this virus.
- Prompt identification and isolation of potentially infectious individuals is a critical step in protecting workers.
- Encourage employees to self-monitor for signs and symptoms of COVID-19 if they suspect possible exposure.
- Employers should develop policies and procedures for employees to report when they are sick or experiencing symptoms of COVID-19
- Where appropriate, employers should develop policies and procedures for immediately isolating people who have signs and/or symptoms of COVID-19, and train workers to implement them.
- Take steps to limit spread of the respiratory secretions of a person who may have COVID-19, such as providing a face mask and asking the person to wear it.
- It may be difficult to require a healthcare provider's note for employees who are sick with acute respiratory illness to validate their illness as healthcare provider officers may not be able to provide such documentation in a timely way.
- Provide appropriate training and informational material about the issues, including proper hygiene practices, particularly since informed workers who feel safe at work are less likely to be unnecessarily absent.

It is important to note that OSHA states that worker risks of occupational exposure to the virus that causes COVID-19 may vary from very high to high, or medium, or lower (caution) risk.

The level of risk depends in part on the industry type, and the need for contact within six feet of people known to be, or suspected of being, infected. To help an employer to determine the appropriate precautions, OSHA has divided job tasks into four risk exposure levels: Very high, high, medium, and lower risk. Lower exposure risk (caution) jobs are those that do not require contact with people known to be, or suspected of being, infected with the virus, nor frequent close contact with (i.e., within six feet of) the general public. Workers in this lower exposure risk (caution) category have minimal occupational contact with the public and other co-workers. Additional personal protective equipment is not recommended for workers in the lower exposure risk group. While the dividing line between what OSHA considers lower exposure risk and medium exposure risk is vague, in the case of medium exposure risk, additional prevention measures may be considered such as the following:

1. Installing physical barriers, such as clear plastic sneeze guards, where feasible;
2. Consider offering face masks to ill employees to contain respiratory secretions until they are able to leave the workplace;
3. Limiting the public's access to the work site or restricting access;
4. Considering strategies to minimize face-to-face contact, and communicating the availability of medical screening or other worker health resources (e.g., on-site nurse, telemedicine services, etc.). The most common personal protective equipment would include some combination of gloves, gown, face mask, and/or a face shield or goggles.

The FMLA may provide leave rights to employees to care for themselves and immediate family members affected by the coronavirus. It is important to be aware of any new federal legislation that may affect FMLA rights during the pandemic. Employers should also be familiar with any state or local laws that address employee leave policies, such as paid leave.

Employees may be eligible for workers' compensation if they contract the virus while at work.

Most of all, it is important that an employer communicate with employees about the measures it is taking to protect their health and safety. Almost every institution has made some type of policy statement, and a failure to address the subject may be deemed by employees as a lack of caring. Obviously, such an announcement should express concern, and should attempt to educate employees on some of the basis prevention techniques. Efforts should be made to avoid raising alarm or panic, and probably also provide sources for the advice since the employer is not the doctor.

A more difficult question is whether to expand, relax, or otherwise make changes in normal attendance and sick leave policies. If the employer goes too far in this regard, there may also be some concern about opening up a Pandora's Box of unexcused absences due to non-legitimate reasons, as well as setting bad precedents for the future.

Let us start with the type information that employers should know, based upon the guidance provided by the CDC.

- Actively encourage sick employees to stay home:
 - Employees who have symptoms of acute respiratory illness are recommended to stay home and not come to work until they are free of fever (100.4° F or greater using an oral thermometer), signs of a fever, and any other symptoms for at least 24 hours, without the use of fever-reducing or other symptom-altering medicines (e.g. cough suppressants). Employees should notify their supervisor and stay home if they are sick.
 - Ensure that your sick leave policies are flexible and consistent with public health guidance and that employees are aware of these policies.
 - Talk with companies that provide your business with contract or temporary employees about the importance of sick employees staying home and encourage them to develop non-punitive leave policies.
 - Do 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 may be extremely busy and not able to provide such documentation in a timely way.
 - Employers should maintain flexible policies that permit employees to stay home to care for a sick family member. Employers should be aware that more employees may need to stay at home to care for sick children or other sick family members than is usual.
- Separate sick employees:
 - CDC recommends that employees who appear to have acute respiratory illness symptoms (i.e. cough, shortness of breath) upon arrival to work or become sick during the day should be separated from other employees and be sent home immediately. Sick employees should cover their noses and mouths with a tissue when coughing or sneezing (or an elbow or shoulder if no tissue is available).
- Emphasize staying home when sick, respiratory etiquette and hand hygiene by all employees:
 - Place posters that encourage staying home when sick, cough and sneeze etiquette, and hand hygiene at the entrance to your workplace and in other workplace areas where they are likely to be seen.
 - Provide tissues and no-touch disposal receptacles for use by employees.
 - Instruct employees to clean their hands often with an alcohol-based hand sanitizer that contains at least 60-95% alcohol, or wash their hands with soap and water for at least 20 seconds. Soap and water should be used preferentially if hands are visibly dirty.
 - Provide soap and water and alcohol-based hand rubs in the workplace. Ensure that adequate supplies are maintained. Place hand rubs in multiple locations or in conference rooms to encourage hand hygiene.
 - Visit the coughing and sneezing etiquette and clean hands webpage for more information.
- Perform routine environmental cleaning:
 - Routinely clean all frequently touched surfaces in the workplace, such as workstations, countertops, and doorknobs. Use the cleaning agents that are usually used in these areas and follow the directions on the label.
 - No additional disinfection beyond routine cleaning is recommended at this time.

- Provide disposable wipes so that commonly used surfaces (for example, doorknobs, keyboards, remote controls, desks) can be wiped down by employees before each use.

Here are also some tips from the CDC that might be more appropriate to communicate to employees to help prevent the spread of respiratory viruses, including the coronavirus:

- Wash your hands often with soap and water for at least 20 seconds, especially after going to the bathroom, before eating, and after blowing your nose, coughing, or sneezing.
- If soap and water are not readily available, use an alcohol-based hand sanitizer with at least 60% alcohol. Always wash hands with soap and water if hands are visibly dirty.
- Avoid touching your eyes, nose, and mouth with unwashed hands.
- Avoid close contact with people who are sick.
- Stay home when you are sick.
- Cover your cough or sneeze with a tissue, then throw the tissue in the trash.
- Do not share glasses, eating utensils, water bottles, etc.

As part of this announcement, employers may want to emphasize steps they have taken, including increasing the frequency of cleaning surfaces, placing additional hand sanitizing stations throughout, and monitoring of medical recommendations.

Questions? Need more information? Call Larry Stine (jls@wimlaw.com), Jim Wimberly (jww@wimlaw.com) or Kathleen Jennings (kjj@wimlaw.com) at 404-365-0900.

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