Coronavirus (COVID-19)

Returning to Work

There are several considerations for employers as they contemplate returning employees to the workplace or continue to manage employees who have remained at work. Each federal agency charged with the health and safety of workers have issued new guidance regarding employee relations and business operations in the COVID-19 crisis.

Employer's Obligations and Liability for Safety

The OSHA General Duty Clause requires that employers of all industries:

1. Shall furnish to each employee, employment and a place of employment which are *free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;*
2. Shall comply with occupational safety and health standards promulgated under this Act.

Each employee must comply with occupational safety and health standards pursuant to the General Duty Clause which are applicable to the employee's own actions and conduct.

In addition to the OSHA obligations, employers may also face liability under other theories of law. At times employers believe an employee who experiences a condition in the workplace may be covered by workers' compensation insurance. However, workers' compensation generally does not respond to a pandemic unless there is demonstrable proof that the condition was solely contracted within the course and scope of the job duties. For example, most workers' compensation carriers have agreed that first-responders and healthcare professionals would likely receive coverage for a COVID19 claim but this will vary from state to state.

Most workers' compensation state statutes include a provision called the "exclusive remedy" provision. The exclusive remedy provision provides that an employee's only course of action and remediation is through the workers' compensation claims process unless the employee experiences retaliation by the employer.

Because workers' compensation carriers may not cover COVID19 cases, the exclusive remedy provision does not apply and employee-litigants (and their attorneys) are free to pursue other legal causes of action. Consequently, one area of litigation that appears to be gaining traction is employer negligence. Recently, we have seen cases filed against employers arguing that the employer did not act reasonably to provide a safe working environment to its employees. Most recently a case filed against Wal-Mart, the plaintiff-employee's estate claims that Wal-Mart did not provide Personal Protective Equipment (PPE) to its employees, did not provide cleaning or disinfectant products, and did not pre-screen workers to prevent the transmission of the virus. It is likely that we may see more litigation like this alleging negligence by the employer.

It's important that employers understand their obligations and their rights to mitigate and manage the risk of working in the new COVID-19 environment.

Employer Policies

The success of a COVID-19 risk mitigation program may rise or fall based on employee behavior and compliance. Therefore, in addition to employee screening, employers should consider creating new policies and standards of conduct for employees in the workplace related to COVID-19. More specifically, employers should set forth clear rules, processes and expectations for employee behavior.

New policies may include:

- Standards of conduct including handwashing, hand sanitizing, sharing of equipment, dissemination of hard-copy documents, donning and doffing of PPE, social distancing, and workstation cleaning and disinfecting
- Details and consequences regarding prohibited conduct and failure to comply with the standards of conduct such as coming to work with COVID-19 symptoms, failure to socially distance in the workplace, failure to wear and utilize PPE, and failure to disinfect/clean working areas and equipment
- Rules regarding entering and exiting the building to ensure social distancing – for example only two people in an elevator at one time and/or the requirement to wash your hands before you enter the office or your workspace
- New procedures and policies regarding calling in sick, incentives to remain home when sick rather than come into the office (even if you feel like you can work), and what circumstances or symptoms require (or mandate) employees to remain home.
- An acknowledgement by the employee of these new policies (electronic is better than hard-copy considering new safety protocols around hard-copy documents) including information regarding consequences for failure to comply and reiterate employed "at will".

Employers should remember to document and disseminate their behavioral and performance expectations to their employees. Likewise, employers must be sure to hold employees accountable for their compliance with the new work rules as they would any other work rule or standard of conduct.

Accountability should include documentation that follows the best practices of discipline including identifying the following:

- the specific work rule that has been broken
- the prohibited behavior
- the desired behavior
- the reason prohibited behavior is problematic or the risk it creates
- consequences for continued violations

And of course, discipline documentation should also reiterate the "at will" nature of the employment relationship.

Employee Medical Questions – the General Rule

The Americans with Disabilities Act (ADA) regulates the kinds of medical information an employer may gather from its employees. Generally, the ADA permits employers to obtain medical information solely related to the employee's ability to perform the essential functions of his or her job. However, since the emergence of the COVID19 crisis – the Equal Employment Opportunity Commission ("EEOC") has issued guidance expanding the scope of medical information to which an employer may be entitled, under certain and specific circumstances.

Applicants and New Hires

Employers that are hiring and filling open positions may screen applicants for symptoms of COVID-19. More specifically, an employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, if it does so for all entering employees in the same type of job. Such screening may include requiring the applicant to successfully complete a COVID-19 pre-employment diagnostic test. Likewise, a hiring employer may take an applicant's temperature as part of the post-offer/pre-employment medical exam. However, employers should be aware that some individuals with COVID-19 do not have a fever or show any signs of symptoms from the virus.

Employers who are concerned about starting an applicant with symptoms may delay the applicant's start date. In fact, the CDC is clear that an individual who has COVID-19 or symptoms associated with it should not be in the workplace. Likewise, an employer may withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 symptoms. However, the employer may **not** postpone the start date or withdraw a job offer because the individual is 65 years old or pregnant, both of which place them at higher risk from COVID-19. The fact that the CDC has identified those who are 65 or older, or pregnant women, as being at greater risk does not justify unilaterally postponing the start date or withdrawing a job offer. However, an employer may choose to allow telework or to discuss with these individuals if they would like to postpone the start date.

Current Employees Own Condition

In addition to pre-screening applicants, employers should also conduct daily pre-screening of employees who are going to the work location (see the employee screening form at the end of this bulletin). To be sure that employers can prevent and control the potential exposure to and spread of COVID-19, employers may take an employee's temperature and/or ask the following questions of current employees coming into the work location:

- Are you experiencing any of the following CDC - COVID-19 Symptoms:
    - Fever (100.4 degrees) – the employer may take the employee's temperature with an air-thermometer. The person conducting the daily pre-screening should be provided PPE including an appropriate mask.
    - Dry Cough
    - Difficulty breathing
- Are you currently waiting for COVID-19 test results?
- Have you tested positive for COVID-19?

Current Employees Exposure to Others

Likewise, employers should ask the following questions of current employees coming into the work location regarding their exposure to others who may have COVID-19:

- Have you self-quarantined? If so, how many days and why? (remaining in your home and outdoor activities without coming closer than 6-feet from others)
- Have you been exposed to anyone currently waiting for COVID-19 test results?
- Have you been exposed to anyone who has tested positive for COVID-19?
- Have you been exposed to anyone with any of the following symptoms?
    - Fever (100.4 degrees)
    - Dry Cough
    - Difficulty Breathing
- Have you traveled outside your state or regional area?

It's important to note that employers may only ask these questions of employees who are coming into the workplace. Employers may not ask COVID19 medical questions of employees working remotely and telecommuting.

Employers should ensure that the person conducting the screening follows and complies with Personal Protective Equipment (PPE) Guidelines such as wearing a mask, gloves, protective eyewear and other devices to ensure their safety. The employer and the person handling the temperature checking (and any other screening measures) must ensure that they follow and enforce safety measures such as social distancing. For example, the "screener" must ensure that employees who are "waiting to be screened" remain at least 6 feet apart before entering the workplace. There should also be considerations made for the proper documenting, handling and managing the medical results of employees to ensure the information is kept confidential.

Note: Non-exempt employees who are "waiting" to be screened at the beginning of each workday may need to be paid for that "waiting" time. Therefore, employers should check with local employment law counsel regarding the wage and hour (FLSA) requirements.

Employee COVID-19 Diagnostic Testing

On April 23, 2020, the EEOC provided updated guidance paving the way for employers to conduct COVID-19 diagnostic testing. More specifically, the EEOC sternly reminded employers that any mandatory medical test of employees be "job related and consistent with business necessity." It is within this framework that the EEOC has stated that employers may take steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat[1] to the health of others.

Consistent with the ADA standard, employers should ensure that the tests are accurate and reliable. The EEOC suggests that employers may review guidance from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities, and check for updates. It is also important for employers to consider the accuracy of the testing and the incidence of false-positives or false-negatives associated with a particular test. The EEOC cautions that accurate testing only reveals if the virus is currently present; a negative test does not mean the employee will not acquire the virus later.

Employers may adopt one of at least two approaches to testing:

1. **Employer Administered Testing** - Employer testing of employees is wrought with complexity and is not something that an employer should take lightly or casually. To begin with, testing for COVID-19 is a medical diagnostic test that obtains confidential and private health information from an employee in the employment setting which means handling and managing this information is highly regulated. Additionally, the testing requires taking a nasal swab from the employee – this is the procurement of a bodily fluid which in turn subjects the employer to rigorous OSHA rules, including the very complex Blood Borne Pathogen rules. It would be prudent for employers to work with their outside counsel and the HUB risk services division to set up an internal program.

2. **Vendor/Outsourced Testing** – Employers may choose to outsource their testing program. In this case, employee testing would resemble other similar employment physical and screening programs. Employers should be sure that they thoroughly vet testing vendors including the testing methods and accuracy and efficiency of the

[1] "Direct threat" means a significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation. 29 C.F.R. §1630.2(r)(1998). Direct threat determinations must be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job, considering a reasonable medical judgment relying on the most current medical knowledge and/or best available objective evidence. Id. To determine whether an employee poses a direct threat, the following factors should be considered: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur; and, (4) the imminence of the potential harm. 42 U.S.C. §12112(d)(3)(1994); 29 C.F.R. §1630.14(b)(1998).

equipment/test-kits. They likewise should have their attorney review the program, process, and service agreement (if any). In fact, the EEOC contemplates that employers may outsource these services advising that "[a]n employer also may be given reliable information by a credible third party that an employee has a medical condition, or the employer may observe symptoms indicating that an employee may have a medical condition that . . . will pose a direct threat." Outsourcing the testing program may shift some of the compliance obligations directly to the vendor which may provide some relief to the employer.

When to Test

Employers may adopt a regularly-scheduled approach to medical testing or a test on case-by-case based on the manifestation of symptoms or exposure. For example, if an employee presents with symptoms during a daily-screening (see above) the employer may require the employee to receive a test provided by a third-party vendor (similar to reasonable suspicion testing). Likewise, employers may require an employee to submit to a COVID-19 if they learn of an employee's symptoms through a co-worker. The EEOC provides the following very relevant example:

> ***Example A:*** *Bob and Joe are close friends who work as copy editors for an advertising firm. Bob tells Joe that he is worried because he has just learned that he had a positive reaction to a tuberculin skin test and believes that he has tuberculosis. Joe encourages Bob to tell their supervisor, but Bob refuses. Joe is reluctant to breach Bob's trust but is concerned that he and the other editors may be at risk since they all work closely together in the same room. After a couple of sleepless nights, Joe tells his supervisor about Bob. The supervisor questions Joe about how he learned of Bob's alleged condition and finds Joe's explanation credible.*
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> *Because tuberculosis is a potentially life-threatening medical condition and can be passed from person to person by coughing or sneezing, the supervisor has a reasonable belief, based on objective evidence, that Bob will pose a direct threat if he in fact has active tuberculosis. Under these circumstances, the employer may make disability-related inquiries or require a medical examination to the extent necessary to determine whether Bob has tuberculosis and is contagious.*

The employers' approach to mitigating risk through employee screening should be part of a larger and more holistic risk management program that also includes other infection control practices (such as regular cleaning, disinfecting, social distancing, regular handwashing, PPE, and other measures) in the workplace to prevent transmission of COVID-19.

Confidentiality of Medical Information

As employers begin to learn about employee's individual medical concerns and conditions, itis important to remember that several laws have very specific confidentiality requirements. FMLA, ADA, and Workers' Compensation statutes all contain provisions that protect the confidentiality of an employee's medical information. Employers have the obligation to ensure that all medical information obtained about an employee is private and confidential. Medical information gathered through the FMLA, ADA, disability insurance, workers compensation, or other sick-leave documentation is generally not protected under HIPAA but is confidential.

Health Insurance Portability Accountability Act (HIPAA) Requirements

Depending on the source of the medical information, employers may also face HIPAA privacy obligations. While HIPAA can be a complex law, in a nutshell, if the employer learns of the employee's medical information, condition, diagnosis etc. through the health plan, then that information is likely protected under HIPAA.

Generally, HIPAA obligations manifest themselves most frequently in employers with a self-funded health program that have access to claims information. Self-funded programs include health flexible spending arrangements and health reimbursement arrangements. However, employers that receive employee's Explanation of Benefits (even if fully insured) may unintentionally subject themselves to HIPAA. HIPAA also generally prohibits an employer from discriminating against an employee who has a medical condition.

These measures are a good first step for employers to put in place. These measures are proactive and preventative measures to control the exposure to and transmission of COVID-19 in the workplace. Additionally, employers should provide employees with the proper and appropriate protective equipment and workplace rules. In particular, the CDC recommends that employers pre-screen employees entering the workplace each day, issue masks to employees, ensure that workers remain 6 feet apart, and clean and disinfect the workplace and all common areas routinely.