



ADAMS AND REESE LLP

Labor and Employment Coronavirus Alert

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Navigating Coronavirus Through the Myriad of Employment Laws: Legal Issues Employers Need to Consider

The recent uptick in the number of confirmed coronavirus cases — both abroad and in the United States — should be on every employer's radar. The time for planning is now. Being prepared for an outbreak (or even worse, a pandemic) triggers a number of state and federal employment laws that must be complied with concurrently. Navigating the myriad of legal issues can be daunting.

What should employers be doing now?

Employers should be proactive. Keep the lines of communication open with your employees. Avoid being an alarmist. Instead, provide accurate information about the spread of the virus, and avoid speculation or offering medical opinions.

Provide your workforce with best practices to avoid the spread of the virus, *e.g.*, wash hands periodically with soap and water for at least 20 seconds; avoid touching eyes and mouth; keep hand sanitizer at your work station; cover your cough or sneeze.

Most importantly, make it clear to your employees that no one should risk infecting other employees by reporting to work when they are sick.

Employers should also revisit their existing policies regarding

medical leave, sick leave, paid time off (PTO) and working remotely. Consider whether modifications should be made to existing policies. Any modifications, however, must be applied uniformly for the entire workforce.

It is also advisable to revisit your anti-discrimination and harassment policies with your employees. Employees should be reminded that adverse treatment — or singling out of members of certain ethnicities or national origins where the virus originated — will not be tolerated.

Can employers send a sick employee home?

Yes. The Occupational Safety and Health Administration (OSHA) requires that employers provide a safe work environment for its employees. [OSHA has issued guidance](#) for how to handle a global health emergency.

When assessing whether to send an employee home, employers should also be mindful of their obligations under the Americans With Disabilities Act (ADA). Although an illness such as coronavirus would likely not qualify as a “disability” under the ADA (because it is temporary), the ADA still imposes certain legal requirements on employers.

For example, the ADA prohibits discrimination against an employee based on a perceived disability. The ADA also regulates employers’ disability-related inquiries and medical examinations for **all** employees, including those who do **not** have ADA disabilities. Thus, it is important for employers to understand what they can and cannot do (or ask) when assessing whether to send an employee home.

Notably, depending on whether the coronavirus outbreak is elevated to a “pandemic” (as determined by the Centers for Disease Control), the ADA requires reasonable accommodations for individuals (absent undue hardship).

Also of note during a “pandemic,” employers have greater flexibility in requiring medical examinations to determine if an employee has contracted the disease, provided the employer has a reasonable belief that the employee poses a “direct threat” to others.

In the absence of a “pandemic,” the usual limitations on the types of health information employers can seek about their employees would apply. [The EEOC has issued guidance](#) for how to navigate the ADA during a pandemic.

Do employers have to pay employees that are sent home?

It depends. Under the Fair Labor Standards Act (FLSA), non-exempt employees must be paid for all hours worked — even if they are working from home. Exempt employees must be paid their full salary for a given workweek if they work any part of it (subject to absences for personal reasons or sick leave policies). Regardless of classification, if the employee has available sick leave or PTO, the employee should be allowed to use those available days.

If the employee is able to perform the essential functions of the job by working remotely, employers should consider that accommodation so that employees can still earn a living while on leave.

A word of caution, as no good deed goes unpunished: If you allow the employee to work remotely, consider whether it could open the door for claims of failure to accommodate under the ADA if you deny future requests to work remotely, *i.e.*, after the risk of contracting the coronavirus has passed.

Depending on the jurisdiction, your employees may also be entitled to paid medical leave (the FMLA only requires **unpaid** leave).

One potential issue for employers to be mindful of is whether workers’ compensation benefits would be triggered if an employee contracts the coronavirus while at work. Depending on the nature of the job and related circumstances, an argument could be made that benefits may be triggered.

Depending on your existing policies and benefits package, some employees may also qualify for disability benefits.

In sum, employers should consider all laws and available policies and benefits when assessing whether an employee is

entitled to paid leave.

What if the employee recently traveled overseas to infected areas but is asymptomatic?

No two situations are factually alike. This is a balancing act — requiring employers to guard against potential threats to other employees, while at the same time ensuring that the employer does not run afoul of state and federal anti-discrimination laws.

One potential solution is to implement a temporary policy requiring all employees that have traveled to/from infected areas to work remotely during the incubation and transmission period (14 days). It is important to treat all employees the same and to apply any policies uniformly and consistently.

Can my employee refuse to travel for work?

It depends. Assuming the employee is scheduled to travel to an infected area, employers should consider honoring a request not to travel to those areas. OSHA imposes a general duty on employers to ensure a safe and healthy work environment.

Furthermore, if an employee is particularly prone to contracting the virus due to an underlying medical condition, employers will need to consider whether a cessation of business travel to infected areas constitutes a reasonable accommodation under the ADA — particularly if the employee can still perform the essential functions of the job even in the absence of travel.

Can employers require a doctor's note from an employee?

It depends. Under the FMLA, certification of a “serious health condition” by a qualified medical professional is usually required. Depending on the jurisdiction, some state sick leave laws may also apply.

Under the ADA, medical examinations and limited questioning of the employee's physician is also allowed under certain circumstances, *i.e.*, if the employer has a reasonable belief that the employee poses a “direct threat” to the workplace.

Of course, employers should ensure that all medical information

obtained remains confidential. Employers should not identify any infected employees by name, as doing so would give rise to a violation of the ADA.

What can be done if an employee refuses to come to work out of fear of contracting the virus?

Employers will need to evaluate this situation on a case-by-case basis. For example, if an underlying medical condition increases the risk of contracting the virus to the employee, reasonable accommodations should be considered, *e.g.*, allow the employee to work from home.

In that same vein, OSHA allows employees to refuse to come to work if they have a good faith belief that they will be exposed to a dangerous condition and the danger of death or serious injury is imminent.

At the same time, depending on the circumstances, employers would be well within their rights to uniformly enforce attendance policies in the event it is determined that the employee's fears of contracting the disease are disingenuous.

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This is a fluid situation, and additional information will help guide best practices for employers going forward. We will continue to monitor developments on coronavirus and how employers may be affected. As always, it is advisable for any employer to consult with experienced employment counsel when attempting to tackle these complex legal issues, as each situation is unique.

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