

## Client Alert

### **THE CORONAVIRUS: WHAT EMPLOYERS SHOULD KNOW ABOUT AVOIDING THE SPREAD OF INFECTIOUS DISEASES IN THE WORKPLACE AND COMPLYING WITH APPLICABLE LAW**

Employers remain on high alert after numerous [cases of COVID-19](#), an infectious disease that is causing the current outbreak of Coronavirus, have been confirmed in the United States by the Centers for Disease Control and Prevention (CDC). Similar in its symptoms to the flu, the Coronavirus is a contagious respiratory illness with typical symptoms of fever, cough, and shortness of breath. Under the [General Duty](#) clause set forth by the Occupational Safety and Health Administration (OSHA), employers must manage the risk of serious illness spreading in the workplace by developing and implementing a strategy to maintain a healthy workplace, while doing so in a way that complies with federal, state, and local employment laws.

The CDC recently released [guidance for employers](#) to plan and develop a proactive strategy to address employees' concerns surrounding the Coronavirus. As an initial step, employers must develop a strategy that does not make any determinations based on an employee's race, ethnicity, or national origin, for example, which are protected classes under federal, state and local laws. Employers must also maintain confidentiality of identity of employees confirmed to have COVID-19, as well as the confidentiality of all medical-related information received from employees, in accordance with the Americans with Disabilities Act (ADA) and analogous state and local laws.

The following are frequently asked questions (FAQ) to help employers navigate applicable laws while implementing a strategy to prevent the spread of infectious diseases in the workplace.

## **FAQ 1: CAN EMPLOYERS ASK EMPLOYEES ILLNESS-RELATED QUESTIONS?**

*The short answer is: Yes, dependent on the circumstances outlined below.*

Generally, if an employee is experiencing symptoms that are, or are perceived to be, substantially limiting his or her major life activity, such as, for example, his or her ability to breathe, then such illness may be protected under the ADA. As such, an employer may violate the ADA if it were to ask the affected employee illness-related questions. Employers must also keep in mind that some state and local laws afford employees even greater protections; for example, under New York City law, a “disability” means “any physical, medical, mental or psychological impairment, or a history or record of such impairment.” Thus, a disability under New York City law does not have to substantially limit an employee’s major life activity.

An employer may ask illness-related questions of an employee who has a short-term commonplace illness, or who has recently traveled to a quarantined area regarding his or her risk of exposure to COVID-19.

Best practice dictates that employers ask disability-related inquiries (*i.e.*, illness-related questions of an employee who is experiencing serious symptoms) and require medical examinations of employees only if they are job-related and consistent with a business necessity. Generally, a disability-related inquiry or medical examination of an employee may be job-related and consistent with a business necessity when the employer has a reasonable belief, based on objective credible evidence, that: (1) an employee’s ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat to the health or safety of that individual or others due to a medical condition. The determination as to whether an employee poses a direct threat to health or safety must be based on an individualized assessment of that employee’s present ability to safely perform the essential functions of his or her job. It is not a license to ask every employee questions regarding their medical histories and/or conditions.

For example, if an employer has credible information that an employee is suffering from a respiratory illness, where he or she is struggling to breathe and may not be able currently to perform the essential functions of his or her job, or where the employer has a reasonable belief that an infectious disease may spread in the workplace, the employer may ask that employee illness-related questions and even require medical examinations to confirm that the employee does not have an infectious illness. Employers are

required to keep any medical information and documentation received from the employee confidential.

## **FAQ 2: CAN EMPLOYERS SEND HOME EMPLOYEES WHO APPEAR TO HAVE SYMPTOMS OF A RESPIRATORY ILLNESS?**

*The short answer: Yes.*

Sending an employee home, even against his or her will, who displays symptoms of a potentially contagious illness would not run afoul of the ADA's restrictions on disability-related employer actions. This is because: (i) if the illness ultimately turns out to be relatively commonplace and short-term, such as the flu, then it is not a disability under federal law; and (ii) if the illness does turn out to be severe, where it substantially limits an employee's major life activity and thus may constitute a disability under the ADA (or is at least perceived to be severe), then sending the employee home would be lawful, as the severe illness poses a direct threat to the health or safety of that individual and other employees in the workplace.

An employee may also in certain circumstances be entitled to job-protected unpaid leave for up to 12 weeks in a 12-month period under the federal Family and Medical Leave Act (FMLA) or state law analogues when he or she is experiencing a "serious health condition" or requires time to care of a family member with such a condition. Many state or local laws, such as in New York City, allow employees to also take job-protected paid sick leave.

## **FAQ 3: HOW DOES AN EMPLOYER KNOW IF AN EMPLOYEE IS REQUESTING AN ACCOMODATION?**

*The short answer: If an employee is asking to adjust or change the way he or she currently performs his or her job responsibilities, then this is an accommodation request.*

There are no magic words for an employee to request an accommodation under federal and state laws. Instead, employers must be on the lookout for any verbal or written request by employees to alter the way they currently perform their jobs. Examples of such alterations include requests to wear a protective mask or gloves while working, increasing hand sanitizer and disposable wipes for additional cleaning of shared surfaces and doorknobs, or temporarily working from home.

For employers within New York City, there is a requirement actually to initiate a cooperative dialogue with employees who are perceived to have disabilities or who request accommodations, while elsewhere, the employer's obligation is typically

limited to participating in an interactive dialogue only after an employee asks for an accommodation. Any determinations regarding reasonable accommodation requests must be applied to all employees in a consistent fashion. If an accommodation would not create an undue hardship on the company, then an employer should consider granting the request, especially if it could prevent the spread of a contagious illness. New York City law also requires a final determination concerning the accommodation request to be made by an employer in writing and sent to the employee. Accordingly, employers should consider adopting interim location-wide or store-wide policies, as applicable, to grant accommodation requests made by employees consistent with the law.

## OTHER CONSIDERATIONS

The CDC has included other considerations for employers in its [guide](#), including:

- Educating and providing guidance to employees to prevent misinformation and limit panic in the workplace.
- Actively encouraging sick employees to stay home, especially if they have any signs of fever.
- Sharing best practices with employees of proper respiratory etiquette and hand hygiene while at work.
- Performing routine and increased environmental cleaning at the workplace.

Employers should designate a point of contact, in their Human Resources department or otherwise, who will be responsible for monitoring the CDC's classification of the Coronavirus, relaying proper and timely information to employees as needed, and answering any questions from employees relating to infectious diseases at the workplace, including fielding requests for reasonable accommodations and determining paid or unpaid leaves of absence for employees consistent with existing policies and applicable law. Employers should also ensure that employees are not refusing to interact, and are, instead, properly interacting with colleagues, customers, vendors, and other third-parties, regardless of race, ethnicity, national origin, or other protected characteristics. Contrary behavior could lead to the filing of complaints of discrimination or harassment, as well as cause reputational harm to the business.

The CDC has not declared a Coronavirus pandemic in the United States to date. However, employers should continue to monitor closely the CDC website for further updates. In the event that a pandemic is declared, employers are permitted to take further actions as set forth in [additional guidelines](#) published by the Equal Employment

Opportunity Commission. We all remain hopeful that such a scenario will not occur here in the United States.

If you have any questions regarding infectious diseases in the workplace or any of the laws that govern such issues, please feel free to contact us.

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