Coronavirus: 10 Steps US Employers Should Take to Maintain a Safe Workplace in the Face of a Public Health Emergency

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The coronavirus, also known as COVID-19, is spreading rapidly across the globe and throughout the United States. Accordingly, employers should keep track of rapidly emerging developments and consider taking the 10 steps discussed below in order to maintain a safe workplace and to reassure their employees that management is appropriately monitoring and responding to the situation. Having a carefully coordinated and well-thought-out approach to the coronavirus should help mitigate risks for employers while reducing many employee concerns.

In addition to the information below, Mayer Brown has developed a cross-functional, global webpage dedicated to the coronavirus, which provides additional resources, including recommendations specific to other regions of the world.

1. Educate Your Workforce and Communicate Regularly with Employees

Employers should communicate openly and often with the workforce so that employees have information they need to help keep themselves educated and updated about the coronavirus. As we discuss throughout this Legal Update, communicating regularly with your employees regarding company policies and procedures related to good hygiene, business travel, quarantines, working remotely, safety precautions and screening visitors is an effective method to demonstrate to your workforce that you are monitoring the situation and working to keep everyone healthy and safe. Soliciting direct input and suggestions from your employees, particularly on hygiene issues in your specific workplace, may help further reduce the risks of transmission of the virus.

As part of those communications, we recommend that employers provide employees with additional resources so that they may learn more about the situation as it develops. For example, the Centers for Disease Control (“CDC”) has a detailed website, presently available in English, Spanish and simplified Chinese, that provides up-to-date information about the coronavirus. The CDC’s website includes details about, among other things,
coronavirus symptoms, prevention and treatment, geographic updates, and frequently asked questions. The CDC’s website also includes links to posters that employers can download and place in restrooms and other areas of the workplace where they are likely to be seen. The World Health Organization ("WHO") similarly has developed a website with useful materials for employers and employees.

In addition, the Occupational Safety and Health Administration ("OSHA"), which is tasked with ensuring safe working conditions for employees by setting and enforcing workplace standards and providing training and education, has provided guidance and information about the coronavirus on its website.

Regular communication helps not only to educate employees on best practices in the workplace but also to dispel myths and unfounded rumors, about the coronavirus itself and its potential impact on the workplace. In addition, employers that do not communicate with their employees may be perceived, rightly or wrongly, as ill-prepared to handle the outbreak and uncaring about the well-being of their employees. Such employers may also experience a greater number of potentially unnecessary employee absences.

In addition to providing regular communications and reminders to employees, employers should develop mechanisms that will allow them to communicate with all employees on an emergency basis (e.g., in the event of an unanticipated office or building shutdown). Employers should communicate in as many ways as possible, depending on their technical proficiency (e.g., global email, voicemail, text, phone tree, etc.).

2. Monitor Developments on a Daily Basis

The coronavirus situation is highly fluid. Both the CDC and WHO frequently update the information on coronavirus on their websites. Accordingly, employers should check these websites often as the outbreak continues to evolve. The CDC has a “latest updates” link on its website for the coronavirus. Similarly, the WHO has a “rolling updates” section on its website. For the benefit of US employers, the CDC also has developed interim guidance for businesses and employers to plan for and respond to issues related to the coronavirus. The CDC’s interim guidance provides a series of recommended strategies for employers to implement now, many of which we discuss below.

In addition to the websites and frequent updates from the CDC, WHO and OSHA, additional information may be available from state and local departments of health, as well as from the US Food and Drug Administration.

3. Appoint a Cross-Functional Coronavirus Emergency Management Team
Unlike weather-related crises, which often permit businesses to engage in some level of advance preparation, the coronavirus has the power to disrupt business operations significantly and without any warning. Employers need to be prepared to act quickly if the coronavirus enters their specific workplace. Accordingly, employers should appoint a central point of contact and cross-functional emergency management team (“EMT”) to address all of the issues arising from the coronavirus outbreak in the workplace, including employee health and safety; internal and external messaging; medical and sick leaves; workers’ compensation; short-term disability; the interactive process and potential accommodations under the ADA; confidentiality and privacy protections; technology support; and legal compliance. Where feasible, the EMT likely should include, at minimum, representatives of the HR, communications, IT, and legal departments.

It is critical that the EMT be given sufficient authority (or access to authority) to act nimbly and decisively in the face of quickly changing information and circumstances, while possessing the flexibility to make adjustments as time goes on and business needs may require.

In addition to operational planning and emergency preparedness, the EMT should be tasked with responsibility for monitoring the news and key websites on a daily basis for reliable information in this highly fluid situation.

**4. Reinforce Good Hygiene Practices and Take Related Safety Precautions**

The “General Duty” clause of the Occupational Safety and Health Act generally requires employers to provide employees with a safe and healthy workplace that is free from recognized hazards that are causing or likely to cause death or serious physical harm, and to comply with occupational safety and health standards and rules. Accordingly, employers should remind employees to take basic preventive measures and safety precautions that may help to reduce the risk of contracting the coronavirus or spreading it in the workplace, including:

- frequently washing their hands thoroughly with soap and water for at least 20 seconds or an alcohol-based hand sanitizer that contains at least 60 percent alcohol;
- avoiding touching their eyes, nose and mouth;
- covering sneezes or coughs with tissues, if possible, or else with a sleeve or shoulder;
- avoiding close contact with people who are sick;
- staying home when sick; and
- cleaning and disinfecting frequently touched surfaces and objects.
To facilitate these practices, employers should ensure that they maintain adequate supplies in the workplace, including tissues, soap, alcohol-based hand sanitizer that contains at least 60 percent alcohol, and hand wipes. The CDC has also recommended that employers provide no-touch disposal receptacles for use by employees, place no-touch sanitizer dispensers in multiple locations or in conference rooms to encourage good hand hygiene, and provide employees with disposable wipes so that they can wipe down commonly used surfaces before each use.

Encouraging good hygiene practices extends beyond employees themselves. Employers that rely on staffing services for contingent or temporary employees should ensure that those services are taking appropriate precautions for workers sent to the employers’ premises.

Employers should also review their cleaning operations to ensure that frequently touched surfaces, such as door handles, elevator buttons, phones, keyboards, workstations and countertops are routinely disinfected. Depending on the work environment, employers may need to coordinate this effort with their landlords or tenants. Employers should review their leases to understand their duties and obligations in this regard. It also is important to ensure that cleaning personnel are properly trained and equipped to disinfect frequently touched areas and that they have appropriate personal protective equipment to avoid contracting the coronavirus while cleaning. If the employer learns that an infected employee or other person has been in the workplace, the employer should also consider contracting with specialists for additional deep-cleaning and sanitizing services to prevent the spread of the virus.

5. Actively Encourage Sick Employees to Stay Home and Immediately Send Sick Employees Home

Consistent with CDC guidance, employers should actively encourage employees to stay home if they are sick or have been exposed to someone who is sick, and to remain home until they are free of a fever, signs of a fever or other symptoms for at least 24 hours. This is especially important for employees who have symptoms of acute respiratory illness. In fact, CDC guidance specifically recommends that employers send home immediately any employees who appear to have symptoms of an acute respiratory illness.

As a practical matter, employers who show flexibility with sick leave and attendance policies may facilitate more transparency by employees about their health. This, in turn, can help reduce the risk of exposure among the broader workforce. For example, employees who have exhausted their sick leave may be reluctant to disclose symptoms of coronavirus and/or miss work for fear that missing additional time will jeopardize their
employment. Further, because medical providers may be busier than usual as a result of the coronavirus, employers may desire to be more flexible with employees about when employees must provide certification of a medical condition that renders them unable to work.

Employers should understand that implementing precautionary steps in the workplace has its limits. For example, some employers may wish to take the temperatures of employees because an elevated temperature is one common indicator of the coronavirus. The Americans with Disabilities Act ("ADA"), which regulates employer disability-related inquiries and medical examinations, generally prohibits covered employers from requiring medical examinations of employees unless they are job-related and consistent with business necessity when an employer has a reasonable belief, based on objective evidence, that (i) an employee’s ability to perform essential job functions will be impaired by the medical condition or (ii) an employee will pose a direct threat to others due to the medical condition.

In 2009, in conjunction with the H1N1 flu pandemic, the Equal Employment Opportunity Commission ("EEOC") issued a technical assistance document on how employers should handle the workplace implications of that pandemic in conjunction with the requirements of the ADA. The EEOC emphasized that whether a pandemic influenza rises to the level of a “direct threat” (such that it cannot be eliminated or reduced by a reasonable accommodation) depends on the severity of the illness. At the time, the EEOC added that if the CDC or state or local public health authorities determine that a pandemic influenza is significantly severe, it could rise to the level of a direct threat.

To date, the CDC has made no such determination of a pandemic with respect to the coronavirus. Even if the CDC ultimately makes such a determination, we strongly recommend that employers discuss any contemplated mandatory medical tests or examinations of employees, including temperature-taking, with their counsel before adopting or implementing them.

Importantly, if exposure to the coronavirus occurs in the course and scope of the employee’s work, it may constitute an occupational hazard under the federal Occupational Safety and Health Act. OSHA regulations may also be implicated if the employer uses enhanced sanitation techniques with stronger chemical products during the outbreak.

6. Suspend or Limit Business Travel

Employers should consider prohibiting or strictly limiting business travel to countries and regions that pose a high risk of transmission of the coronavirus. In that regard, the CDC
has established geographic risk stratification criteria in order to issue travel health notices and guidance for public health management decisions about potential travel-related exposure to the coronavirus. The CDC’s three stratification levels are based on a number of factors such as the size, geographic distribution and epidemiology of the outbreak.

Countries designated by the CDC as “Level 3” involve widespread sustained transmission, and currently include China, Iran, Italy and South Korea. The CDC recommends that non-essential travel to Level 3 countries should be avoided, and the US government has imposed entry restrictions from certain Level 3 countries. Accordingly, employers should immediately suspend non-essential business travel to Level 3 countries and should also require anyone who travels to a Level 3 country to remain out of the office for a period of at least 14 days following their return, even if an employee has no symptoms of the virus.

The CDC designates as “Level 2” those countries in which there is sustained community transmission of the coronavirus; Japan is presently the only Level 2 country. The CDC has recommended that older adults and those who have chronic medical conditions should consider postponing travel to Level 2 countries. Employers should bear these points in mind when determining whether to restrict business travel to Level 2 countries. The CDC’s list of countries within its risk stratification is likely to grow as the coronavirus continues to spread globally.

Employers should also consider whether to change their travel policies regarding places that are not on the CDC’s list and how any such changes may impact the efficacy of their business operations. There is no “one-size-fits-all” approach, as every employer has different operational needs. But as the coronavirus continues to spread within the United States, some employers may decide to suspend all non-essential business travel both outside and within the United States, at least for a limited period of time, or permit employees to opt out of non-essential business travel. Employers should also give serious consideration to cancelling, postponing or rescheduling company meetings or group events (e.g., retreats, sales meetings, trade shows, etc.) to minimize the risk of large numbers of employees coming into contact with the virus at one time. In some instances, videoconferencing may be a reasonable alternative to in-person meetings.

In the event employees refuse to travel for work, employers should consult with counsel before taking any steps, particularly if a group of employees jointly makes such a request, as the employer’s response should be tailored to the specific circumstances.

Importantly, employers cannot prohibit employees from personal travel, even to areas known to be affected by the coronavirus. Employers should communicate with employees regarding their travel plans before they depart and should advise them of the
implications of such travel. For example, it is reasonable for employers to ask employees where they plan to travel and to advise employees whether, based on the currently available information, they will need to self-quarantine for 14 days upon returning. Employers should also advise employees to check the CDC’s Travelers’ Health Notices for the latest guidance and recommendations for travel to each country. Further, employers should ensure that employees understand that if they become sick while traveling or upon their return, they should contact their healthcare provider and their supervisor immediately. Employers should apply their travel policies (and all other policies) uniformly and in a non-discriminatory manner so that there is no disparate treatment of employees in any particular protected classes. For example, employers cannot single out employees of a particular national origin or race. Employers should also closely monitor any reports of alleged disparate treatment of their employees.

7. Quarantine Potentially Exposed Employees, Even if They Do Not Exhibit Symptoms

Both the federal government and some state and local governments have placed restrictions on entry to the United States from certain countries. Specifically, for individuals returning from certain countries designated by the CDC as Level 3, employees must be quarantined for a period of 14 days, the incubation period for the coronavirus. Employers may want to consider following this practice with respect to Level 2 countries as well, in order to slow the potential spread of the virus. Employers should require that if any employees become ill during a quarantine period, they should seek medical care and may return to work only after they have received appropriate clearance from their medical provider.

When deciding whether to quarantine any employees and when dealing with employees required by governmental authorities to be quarantined, employers may need to address how to compensate such employees, particularly those who cannot work remotely during the quarantine period. Generally, subject to any contractual obligations that an employer may have, employers are permitted to require employees to use paid time off, provided that they do not work during that time.

However, if the employer is dealing with unionized employees, there may be an obligation to negotiate with the union regarding quarantine policies because they may alter the terms and conditions of employment, which include wages and hours of work. Depending on the terms of the collective bargaining agreement, the employer may have the right to send an employee home but may still have to pay the employee based on the union-rights clause.
If the employer is dealing with overseas employees, the employer will need to comply with the laws of that country. If employees are quarantined abroad, the employer should explore the possibility of permitting them to work remotely. If the employer has foreign national employees quarantined outside the country, it will not impact their obligation to maintain lawful immigration status but may trigger other immigration issues.

As the coronavirus spreads, employers may also encounter an increasing number of employees who wish to self-quarantine or self-isolate to protect themselves from workplace exposure to the virus. To the extent employers have the flexibility to allow employees who wish to self-quarantine to do so, that may go a long way to show support for employees in an obviously stressful and evolving situation; however, not all employers have this flexibility, and they also have to focus on keeping their businesses operating. Notably, employees generally are not entitled to FMLA, sick leave, or other reasonable accommodation leave under the ADA if they wish to stay at home to avoid getting sick if there is no indication of any imminent danger of being exposed to the virus.

8. Consider Having Non-Essential Employees Work Remotely

In the digital age, it may be possible for employers to encourage many employees whose presence in the workplace is not essential to work remotely. Employers should consider the security risks of allowing employees to work remotely and should also take steps to provide IT support and equipment for employees who may be able to work remotely but have not historically done so. Employers should also ensure that they have a mechanism in place to ensure that such employees are paid for all hours worked, particularly with respect to nonexempt employees, and that they are provided or reimbursed for all necessary work-related expenses in accordance with applicable laws.

Employers may well see increases in absenteeism in certain locations, particularly if schools remain closed for periods of time and employees have young children. Employers should consider whether cross-training essential job functions among employees may help to alleviate the effects of increased absenteeism.

Importantly, employers may not base work-from-home and/or quarantine decisions on an employee’s national origin. Decisions should be applicable to all similarly situated employees based on their potential exposure to the coronavirus.

9. Be Mindful of the Interplay Between Sick Leave Laws and Policies, the FMLA, ADA, HIPAA and Workers’ Compensation

When dealing with the coronavirus, as with any instance of employee illness, employers should keep in mind that many different laws and policies may be implicated. If an
employee communicates that he or she or an immediate family member has been diagnosed with the coronavirus, the employer generally should follow its existing sick leave, medical and other leave and workers’ compensation policies. For example, the Family and Medical Leave Act (“FMLA”) and state counterparts may be triggered if the virus becomes a serious health condition. Under many state and local sick leave laws, such employees must be permitted to use accrued paid sick leave. In addition, if the illness arises out of or in the course of employment, workers’ compensation benefits may be triggered.

A potentially thorny issue arises with regard to employees who may not have been diagnosed with the coronavirus but who either are exhibiting symptoms that could also be associated with a cold or the flu, or who are asymptomatic but under self-quarantine due to travel to a Level 3 country or exposure to someone with the virus. In those circumstances, particularly where no public health emergency has been declared, the employee is likely not entitled to unpaid leave under the FMLA or paid sick leave. Employers can require employees to use vacation or accrued paid time off for the absences. Importantly, to the extent employers require employees to take time off, they must ensure that employees are not working. This can be challenging, particularly with exempt employees, who often have access to their work emails and may respond to emails, answer calls, or perform other work during the workweek, as they are then entitled to their salary for the week. Accordingly, employers should clearly state their policies regarding work-from-home in these situations. As discussed above, in order to facilitate transparency by employees about their health conditions, employers should consider whether they nonetheless want to pay employees for mandated time off without requiring employees to use their accrued time off.

Employers also should be mindful of their obligations under the ADA and related state law counterparts. While the coronavirus is, for many infected individuals, a temporary and mild condition that may not progress to the level of a disability, the ADA prohibits employers from discriminating against employees whom the employer perceives as disabled. It also is possible that employees infected with the coronavirus may develop more serious problems that constitute actual disabilities. If so, employers will need to consider the required “interactive process” under the ADA and whether reasonable accommodations, such as an additional leave of absence, might enable the employees to return to work or otherwise perform the essential functions of their jobs, as well as any corresponding undue hardships.

If an employee misses work for his or her own illness due to the coronavirus, employers may (and arguably should) require a medical certification from the employee’s physician.
before permitting the employee to return to work.

Further, confidentiality should be maintained with respect to employees who have or may have the coronavirus, consistent with the privacy protections of the Health Insurance Portability and Accountability Act (“HIPAA”). Employers should not disclose the name of any infected employee(s) to their co-workers or any information regarding their medical condition.

10. Screen Visitors to the Workplace

Employers have a duty to protect visitors to the workplace from hazards that are not open and obvious. If an employer is aware of known cases of coronavirus infection among its employees, the employer may have an obligation to notify visitors. If the employer is also a landlord, the employer may have additional obligations to notify tenants of known infection events.

By the same token, visitors to the workplace, including vendors and delivery persons, should be screened for exposure to or symptoms of coronavirus and should be excluded from the workplace if they exhibit symptoms consistent with the coronavirus.

Summary

The coronavirus continues to expand globally and rapidly, with new developments and outbreaks happening almost daily. Accordingly, it is imperative for employers to communicate with the workforce, take health and safety precautions, monitor information about the virus, and plan and prepare for emergencies.

For employers who do not already have one, we recommend that they adopt a sickness prevention and communicable diseases policy, as the coronavirus is but one of a long list of communicable diseases, such as measles, Severe Acute Respiratory Syndrome (“SARS”), and tuberculosis. The policy should include notification to employees of the types of communicable diseases covered by the policy, a statement that the employer will not discriminate against any job applicant or employee based on the individual having a communicable disease, and a statement that the employer will comply with statutes and regulations relating to the employee’s privacy. Mayer Brown has worked with a number of clients in developing such policies.

We also recommend that all employers consult with their labor and employment counsel about any legal issues that relate to the coronavirus and its impact on the workplace.
The CDC has not explicitly suggested travel restrictions related to Level 1, its lowest level of risk stratification. Hong Kong is the only location presently designated as Level 1.