

THOUGHTS ON EMPLOYEMENT PRACTICES IN TROUBLED TIMES

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Employers and Employees are faced with unprecedented issues related to workplace safety and personal security because of the Covid 19 pandemic. What can they do to protect their workplace and fellow employees in the face of an unprecedented public health crisis? Financial and cash flow issues are compounded by the unknown duration of the crisis. Concern for employee and customer health and well being leaves even experts giving conflicting advice regarding best practices. All questions are not clear much less answers. However, some guidance can be gleaned for workplace policy in the immediate future. Specifically, the EEOC has recently reminded employers and employees that it's 2009 guidance for employers under pandemic situations as to ADA and other workplace concerns is still in effect and serves and a great source of information.

https://www.eeoc.gov/facts/pandemic_flu.html

Here are a few of the questions that most employers and employees are facing:

- 1) May an employer require employees to self-report potential exposure to coronavirus, positive test results and/or ask questions about their travel history?**

Answer: Yes, with some exceptions. EEOC guidelines provide that a threat assessment “by the CDC or public health authorities” may provide an employer with “objective evidence needed for a disability-

related inquiry or medical examination.” 29 CFR § 1630(2)(B). Certainly, current WHO, CDC and state, local and federal public health pronouncements establish that employers now have a clear objective basis for making reasonable inquiries concerning employee health. Asking employees to report of an actual or presumptive diagnosis of coronavirus would fall within a reasonable response to a known health risk.

The EEOC’s guidelines referenced above specifically contemplate such inquiries in the event public health officials declare a pandemic. Further, required disclosure of medical information obtained specifically for purposes of making employment decisions is generally not prohibited by HIPAA privacy protections if the disclosure is reasonable, job related and consistent with business necessity. Employers may have a duty to keep such information private and protected and maintain such records separate and apart from other employee files.

As for travel, employers must distinguish between inquiry as to travel and restrictions on personal, private activity. In most instances, an employee cannot be disciplined for engaging in an otherwise lawful off-duty activity. This may include travel, though some employers may have specific job-related reasons for travel restrictions and violation of government-imposed travel restrictions would certainly be a different situation.

2) May an employer send an employee home if s/he is exhibiting symptoms consistent with Covid 19 or of a respiratory disease? May an employer require a “return to work” certification from a physician before allowing an employee to return to the workplace?

Answer: Yes. In general, an employer always has a right and perhaps a duty to exclude workers who may pose a direct threat to the health and safety of other employees, clients, suppliers or the public at large. As set forth above, the EEOC pandemic guidance provides in part, “[d]uring a pandemic, employers should rely on the latest CDC and state or local public health assessments” in making health related

decisions. 29 CFR § 1630(2)(B). Any employee exhibiting symptoms of coronavirus in the workplace can and should be sent home as recommended by public health officials and such actions would be excluded from the discrimination protections under the ADA.

To compensation during such times are impacted by employer PTO policies as well as local, state and federal wage and hour laws. Employees sent home after reporting to work may be entitled to some level of compensation and each individual employer and employee should be assessed in light of all of the above.

As a general principle, an employer may require a medical examination under the ADA if there is a good faith basis to believe that the employee poses a direct threat to the safety and health of the workplace. This belief may be based on reasonable factors such as time in quarantine after exposure or last observable symptoms. A complicating factor for Covid 19 is that in the USA testing is still not widely available. In this situation the employer must be able to demonstrate a reasonable concern that only a test would provide sufficient proof of an employee's ability to return to work safely and ability to assume their essential job responsibilities. If a test is required, the employer would need to pay for both the test and any employee time incurred in obtaining the required testing.