Coronavirus legal considerations beyond the basics: It’s time to think ahead

While much remains unknown about the 2019 novel coronavirus (COVID-19), the virus is spreading human-to-human in mainland China, South Korea, Italy and Iran. More limited human-to-human transmissions have been reported in other countries, including the U.S. The first case of the coronavirus was reported in Wisconsin on Feb. 5, 2020 and the first reported deaths in the U.S. were reported on Saturday. While employers have begun implementing measures to safeguard against the coronavirus, now is the time to think ahead and prepare for a potential impact on your workplace.

Six coronavirus considerations for employers

Here are six key considerations employers should be thinking about when ramping up coronavirus precautions:

1. Limiting business travel

In the case of an unavoidable business trip, employers should ensure employees understand potential risks associated with the trip. Employees with covered disabilities under the Americans with Disabilities Act (ADA) may ask for required business travel to be temporarily suspended as a reasonable accommodation. Engage with the employee to determine if the request is medically warranted and a reasonable accommodation. In addition, routinely check the U.S. Centers for Disease Control and Prevention's (CDC's) Travelers' Health Notices prior to scheduled departures and suspend required travel to those countries with risk of community spread.

If an employee’s performance is reliant on business travel and is directly impacted by this limitation, you should not penalize the employee for the employer’s decision to limit travel when annual review time comes along and no employee should be penalized under the ADA for reasonable accommodations.

2. Implementing flexible remote work policies, sick leave and sending employees home

Encouraging an employee who may have been exposed to the coronavirus to work remotely for the 14-day incubation period, asking sick employees to stay home and sending employees home who get sick while at work are all good practices to help mitigate transmission, if done thoughtfully. The CDC is recommending employers implement “flexible” sick and leave policies and to allow employees to work from home. Employers will want to consider whether working from home is feasible (and the employee is medically able to do so), paying the employee for sick time that exceeds the usual policy, and whether the time off is covered by the Family Medical Leave Act (FMLA) and should be designated as such. Remember, employers should review federal, state and local sick leave and family leave laws now to ensure compliance in a pinch.
3. Handling requests to wear protective face masks at work

While the CDC is not currently recommending the use of face masks for the general public, under the National Labor Relations Act (NLRA), which applies to most workplaces in the U.S., employees have the right to participate in group activities that improve the conditions of their employment. If an employee requests to wear a face mask in the workplace, you should ask questions to better understand the reason for the request, such as a medical condition which makes the mask a necessity. Until the CDC requires employers to provide and/or allows employees to wear face masks at work, there is no legal requirement for employers to do so, unless a group of employees request to wear face masks in the workplace. Then it could be considered protected concerted activity under the NLRA.

4. Requiring employee medical examinations

While it may seem like a good idea at first, even the most simple of screening procedures imposed on employees can raise legal issues. According to the Equal Employment Opportunity Commission (EEOC), under the ADA, medical examinations of employees can be required only under certain circumstances. The EEOC guidance is less than clear as to what falls within the purview of “procedure or test that seeks information about an individual's physical or mental impairments,” but does provide factors that may be relevant in the analysis.

While the CDC has yet to declare a COVID-19 pandemic or recommend employees in the workplace be screened for the virus, if the CDC or a state or local health authority proclaims an epidemic in an area, then the workplace screening procedures may not only be encouraged, but required. Thinking ahead, we suggest reviewing the EEOC's specific guidance.

5. Disclosing of employees' private information

If you have an employee that has been exposed to the coronavirus and/or is showing symptoms that has led the employee to be sent home, coworkers may inquire about the situation or make complaints about working near the individual. In these situations, the CDC recommends letting exposed coworkers know so they can monitor their own health and identify potential symptoms. While that makes perfect sense from a containment standpoint, employers must be careful not to disclose specific information regarding the individual's circumstances as it could violate the ADA. As a result, an employer can disclose generally that an employee or employee’s family member has been exposed to the virus; however, no names should be shared and all communications should focus on more generalized guidance on how the organization is responding to the coronavirus.

6. Encouraging effective precautions

While it seems obvious, even the CDC is reminding people that good cough and sneeze etiquette and handwashing practices are effective precautions. Talk to your cleaning staff and ask for more frequent cleaning and sanitizing of commonly touched surfaces. Provide easy access to tissues, alcohol-based hand sanitizer and disinfecting disposable wipes. The Occupational Safety and Health Administration (OSHA) requires employers to keep the workplace safe and implementing these precautions are a small expense to the employer in exchange for a healthier workplace.

Additional guidance for employers

Additional information for employers on mitigating coronavirus workplace exposure is available through the CDC's recently issued guidance.

For more information on coronavirus-related policies and their legal implications for your business, contact our Labor, Employment & Immigration Practice Group.