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GENERAL COVID-19 (CORONAVIRUS) GUIDANCE FOR EMPLOYERS:

VIRUS SCREENING AND RESPONSE AS OF MARCH 25, 2020

Introduction

This memorandum provides the background guidance, a summary action-plan, and an appendix with resources from the CDC, OSHA, and the EEOC. For more specific local information, please be guided by information being issued by your local public health officials and state and local authorities. Laws and guidance are evolving rapidly and may be subject to change.

As you know, there is an ongoing and developing situation regarding the outbreak of COVID-19, commonly known as the Coronavirus. The Coronavirus has been declared a pandemic by the World Health Organization. The most common symptoms of Coronavirus are: Fever, Cough, and Shortness of Breath. The CDC believes at this time that symptoms may appear in as few as two days or as long as 14 days after exposure. The CDC is still determining exactly how the virus is spread but it is believed to spread from person to person through small droplets from the nose or mouth which are spread when a person with COVID-19 coughs or exhales. These droplets also land on objects and surfaces around the person. Other people then catch COVID-19 by touching these objects or surfaces, then touching their eyes, nose, or mouth. It is believed that it possible to catch the virus from someone even before they have symptoms, but little is known about this aspect of the virus at this time.

The CDC and governmental authorities are urging social distancing and staying at least 6 feet from others. Employers are encouraged to take the following reasonable steps recommended by OSHA and the CDC to prevent community spread in their workforces. This is important, not only to protect employees, but to protect the public at large and to prevent further disruption to operations. In

this regard, it is important to remember that, while the below actions taken out of an abundance of caution may cause minor disruptions in the workplace, they are there to prevent even larger workplace disruptions. Employers have the same basic responsibilities to their workforces under OSHA to protect workers from physical harm.

Supervisors should be trained to calmly follow the CDC and OSHA guidelines and not overreact to create panic at the worksite. These guidelines are summarized in this bulletin and links for additional information are provided. Employees who are exhibiting symptoms may be asked to go home and seek medical attention.

Employee Screening

In light of the declared pandemic, on March 19, 2020, the EEOC has issued guidance to provide additional flexibility to employers to act to protect the general duty of safety in the workplace. While the EEOC had issued prior guidance related to the taking of temperatures during a pandemic, this is the first time that the EEOC has explicitly included COVID-19. Based on the guidance of the CDC and public health authorities, at this time, the EEOC has determined that the COVID-19 pandemic meets the direct threat standard (due to acknowledged community spread and associated guidance issued for precautions to slow the spread). An employee may be sent home if they display symptoms of COVID-19 (fever, shortness of breath, and/or cough). Additionally, employers may ask employees who call in sick or report feeling ill at work if they are experiencing symptoms of COVID-19. While taking an employee's body temperature would normally be considered a medical examination; the EEOC has issued guidance that employers may measure employees' body temperature. This guidance addresses potential concerns regarding conducting medical examinations and the Americans with Disabilities Act; however, state and local disability and privacy laws should be considered for each locality. Additionally, health care providers and health plans are bound by HIPAA and may not provide employers with certain health information without the employee's authorization unless other laws require them to do so. See Appendix D for further information on HIPAA. They also remind that, the fact that an employee has a fever or other symptoms is subject to ADA confidentiality requirements. It is important to remember that persons with COVID-19 may not display with a fever. At this time, employers may not inquire whether employees are at greater risk due to any pre-existing medical conditions.

Once an employee has provided information regarding their condition and/or any need for extended leave, you should follow the interactive process with respect to any potential accommodations they may require going forward.

With respect to travel, employers may follow the advice of the CDC and state/local public health authorities regarding information needed to permit an employee's return to the workplace after visiting a specified location, whether for business or personal reasons. Employers should practice regular infection control practices as outlined by the CDC and OSHA. Employers may ask employees who have been away from the workplace to provide a doctor's note certifying fitness to return to work, but as a practical matter, given the fact that doctors and health care professionals may be too busy to provide a note, other approaches and leniency may be recommended.

For employers with outsourced staff or subcontractors, you may consider requiring verification that subcontractors are observing the OSHA and CDC protocols and inquire into what steps and screening protocols the outsourced staff or subcontractors are following or may require them to perform screening. You should consider having a conversation with outsourced staff and/or subcontractors regarding staying home when sick. While employers may require screening by subcontractors, employers should be mindful of the fact that subcontractors may not have the ability or resources to safely screen their staff. Employers should weigh concerns regarding subjecting outsourced staff or subcontractors to screening against the potential for joint employer liability where the employer is exercising control over the outsourced staff and/or subcontractors.

If you, as an employer, have a union relationship, any unilateral changes without consultation and/or bargaining with the union may be considered unfair labor practices. For employers working with hiring halls, ideally, there would be coordination so that the hall does not send employees back out for work who have been sent home from a job due to COVID-19 symptoms. However, any such protocols should be discussed and/or bargained with the union and employee privacy should be maintained.

Employers have expressed interest in performing COVID-19 screening of employees before they begin their shifts. There are several practical considerations for employers before they implement a screening program. First, with respect to who handles the screening, screening is ideally carried out by a certified health professional, of which there is a shortage. Second, the screener should be adequately protected from those they are screening and coming into contact with and should follow CDC and OSHA guidelines for medical professionals, including the wearing of personal protective equipment, including masks and gloves. There is a current shortage of personal protective equipment and, where available, there can be considerable expense associated with procuring same. Some officials have also been encouraging individuals to avoid purchasing PPE in order to preserve the availability for health care workers in hospitals. While the recommendation is to use a contactless thermometer, there is still a high likelihood that the screener will come within close contact to the employees; therefore, appropriate precautions should be taken.

If you implement job site screening, the following steps should be taken:

- Communicate clearly to all affected employees that you will be requiring mandatory temperature and symptom screenings of all employees before they start their shifts.
- Explain that this is merely a temporary step being taken out of an abundance of caution and as a preventative measure in response to the pandemic.
- Advise employees that if they take their temperature at home and it is elevated, they are encouraged to take the day off and stay home from work (and should use their sick leave entitlement).
- When employees arrive, ensure that employees clock in before subjected to screening as employees are entitled to be paid for the time waiting for and being subjected to screening procedures.
- Screenings should be conducted in a separate private area to the extent practicable.
- Screeners should practice the highest-level of hygiene and take all precautions. You should consider using a certified health professional. It is likely that there will be a shortage of same; however, inquiries may be made with your workers' compensation carrier as to whether they have services available.
- Temperatures should be taken with a no-contact thermometer certified for accuracy and use on humans.
- If an employee registers a fever of 100.4 degrees or higher (which is classified as a fever per CDC guidance), the employee should immediately be sent home (with pay for the balance of the workday).

- Any employee being sent home should be asked where they have been at the job site and who they have had contact with. If possible, this area should be cleaned immediately.
- The employee should be advised that they should speak with a health professional immediately for further screening (and they may be asked about any other COVID-19 symptoms). Employees who are sent home may be entitled to sick leave (including sick leave as outlined by Federal and State Sick leave laws and/or PTO for the remainder of their absence).

As discussed above, regardless of whether the employer performs screening or becomes aware of information related to the employee's medical condition, the ADA requires that the employers maintain confidentiality with respect to the employee's medical information and not disclose the employee's identity or status to other employees.

Per CDC guidance, if an employee is confirmed to have COVID-19, or if there is a suspected case, employers should inform fellow employees/those who have had close contact with the individual of their possible exposure to COVID-19 in the workplace. Employers should not, however, disclose to co-workers or third parties the identity of the employee because confidentiality requirements under federal law, such as the Americans with Disabilities Act (ADA), or state law, may apply. The fellow employees should then self-monitor for symptoms (i.e., fever, cough, or shortness of breath).

The employee's diagnosis would be considered a medical record which must be kept confidential and this information should only be provided to those managers/supervisors and/or human resources personnel with a "need-to-know" in order to comply with the ADA and other disability discrimination and reasonable accommodation laws.

Who receives notification of potential exposure and the scope of information provided to employees notified of the potential exposure must be determined on a case-by-case basis. If you have a concern regarding the potential exposure status of employees working closely with an employee who is confirmed to have COVID-19 or presumptive positive, please reach out to the local public health department to determine what next steps need to be taken.

Employers may wonder how far back to look to determine whether employees, contractors, or clients have had contact with the employee who is confirmed positive. While the CDC doesn't provide any guidance for this, the "14-day incubation period" may be a good place to start. However, we still know little about how long a person is contagious before showing symptoms, after showing symptoms, or after recovery, accordingly, it is again wise to contact your local public health department if you have any questions.

Additionally, OSHA requires certain employers to record work-related injuries and illnesses that meet certain severity criteria on the OSHA 300 Log, as well as complete the OSHA Form 301 (or equivalent) upon the occurrence of these injuries. COVID-19 can be a recordable illness if a worker is infected as a result of



performing their work-related duties. However, employers are only responsible for recording cases of COVID-19 if all of the following are met:

1. The case is a confirmed case of COVID-19;
2. The case is work-related; and
3. The case involves one or more of the general recording criteria (e.g. medical treatment beyond first-aid, days away from work, etc...). Additional information is available at: <https://www.osha.gov/SLTC/covid-19/standards.html>

Appendix A

OSHA GUIDANCE (SUMMARY)

OSHA recommends that employers emphasize basic infection prevention measures. OSHA's complete guidance on preparing workplaces for COVID-19 is available at: <https://www.osha.gov/Publications/OSHA3990.pdf>

As appropriate, all employers should implement good hygiene and infection control practices, including:

- Promote frequent and thorough hand washing, including by providing workers, customers, and worksite visitors with a place to wash their hands. If soap and running water are not immediately available, provide alcohol-based hand rubs containing at least 60% alcohol.
- Encourage workers to stay home if they are sick.
- Encourage respiratory etiquette, including covering coughs and sneezes.
- Provide customers and the public with tissues and trash receptacles.
- Employers should explore whether they can establish policies and practices, such as flexible worksites (e.g., telecommuting) and flexible work hours (e.g., staggered shifts), to increase the physical distance among employees and between employees and others if state and local health authorities recommend the use of social distancing strategies.
- Discourage workers from using other workers' phones, desks, offices, or other work tools and equipment, when possible.
- Maintain regular housekeeping practices, including routine cleaning and disinfecting of surfaces, equipment, and other elements of the work environment. When choosing cleaning chemicals, employers should consult information on Environmental Protection Agency (EPA)-approved disinfectant labels with claims against emerging viral pathogens. Follow the manufacturer's instructions for use of all cleaning and disinfection products.

Additional information is available in the OSHA guidance based on the risk level of the workplace, including industry-level guidance.

Appendix B

CDC GUIDANCE (SUMMARY)

The CDC's interim guidance for businesses and employers is available at:

<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

The CDC recommends that employers actively encourage sick employees to stay home if they have symptoms of acute respiratory illness and not to come to work until they are free of fever and any other symptoms for at least 24 hours, without the use of fever-reducing or any other symptom-altering medicines. The CDC also recommends that employers be flexible and not mandate employees with acute respiratory illness to bring in a doctor's note following their illness because doctor's offices are overwhelmed and may not be able to provide a note as quickly as they would normally be able to. The CDC recommends that employees who appear to have acute respiratory illness symptoms (i.e. cough, shortness of breath) upon arrival to work or become sick during the day should be separated from other employees and be sent home immediately. Sick employees should cover their noses and mouths with a tissue when coughing or sneezing (or an elbow or shoulder if no tissue is available). The CDC also recommends the following guidelines for employers:

- Employers are recommended to put up posters that encourage staying home when sick, cough and sneeze etiquette, and hand-washing hygiene. Employers are also encouraged to provide tissues and no-touch garbage cans as well as hand sanitizers that contain at least 60% alcohol and/or a place for employees to wash their hands.
- Employers are recommended to routinely clean all frequently touched surfaces in the workplace, such as workstations, countertops, and doorknobs. Use the cleaning materials that are usually used in these areas and follow the directions on the label.
- Advise employees to check themselves for symptoms of acute respiratory illness before starting travel and notify their supervisor and stay home if they are sick.
- Ensure employees who become sick while traveling or on temporary assignment understand that they should notify their supervisor and should promptly call a healthcare provider for advice if needed.
- Employees who are well but who have a sick family member at home with COVID-19 should notify their supervisor and refer to CDC guidance for how to conduct a risk assessment of their potential exposure.

If an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (ADA). Employees exposed to a co-worker with confirmed COVID-19 should refer to CDC guidance for how to conduct a risk assessment.

The CDC recommends enhanced cleaning and disinfecting of areas used by employees who have a suspected and/or confirmed case of COVID-19. They recommend that, to the extent possible, the area be closed off, the air circulation to the area be increased, and if the area can be isolated the worker who is cleaning the area should wait at least 24 hours before cleaning to reduce the risk of exposure. The CDC's guidelines for cleaning and disinfection are available at:

<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html>

For confirmed cases, there is no guidance regarding when staff should be permitted to return to work, except for healthcare providers.

For healthcare providers, the CDC recommends exclusion from work until:

- Resolution of fever without the use of fever-reducing medications and
- Improvement in respiratory symptoms (e.g., cough, shortness of breath), and
- Negative results for COVID-19 from at least two consecutive tests collected ≥ 24 hours apart

OR

- At least 3 days (72 hours) have passed since recovery defined as resolution of fever without the use of fever-reducing medications and improvement in respiratory symptoms (e.g., cough, shortness of breath); and,
- At least 7 days have passed since symptoms first appeared

See <https://www.cdc.gov/coronavirus/2019-ncov/healthcare-facilities/hcp-return-work.html>

Appendix C

EEOC GUIDANCE (SUMMARY)

The EEOC's current guidance for Employers and compliance with the Americans with Disabilities Act is available at: https://www.eeoc.gov/facts/pandemic_flu.html

The ADA regulates employers' disability-related inquiries and medical examinations for all applicants and employees, including those who do not have ADA disabilities. The ADA also prohibits covered employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a "direct threat" (i.e. a significant risk of substantial harm even with reasonable accommodation). The ADA requires reasonable accommodations for individuals with disabilities (absent undue hardship) during a pandemic.

The ADA prohibits employee disability-related inquiries or medical examinations unless they are job-related and consistent with business necessity. Generally, a disability-related inquiry or medical examination of an employee is job-related and consistent with business necessity when an employer has a reasonable belief, based on objective evidence, that:

1. An employee's ability to perform essential job functions will be impaired by a medical condition; or
1. An employee will pose a direct threat due to a medical condition.

This reasonable belief "must be based on objective evidence obtained, or reasonably available to the employer, prior to making a disability-related inquiry or requiring a medical examination."

All information about applicants or employees obtained through disability-related inquiries or medical examinations must be kept confidential. Information regarding the medical condition or history of an employee must be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record.

However, the EEOC has stated the following with respect to the "direct threat" standard:

Based on guidance of the CDC and public health authorities as of March 2020, the COVID-19 pandemic meets the direct threat standard. The CDC and public health authorities have acknowledged community spread of COVID-19 in the United States and have issued precautions to slow the spread, such as significant restrictions on public gatherings. In addition, numerous state and local authorities have issued closure orders for businesses, entertainment and sport venues, and schools in order to avoid bringing people together in close quarters due to the risk of contagion. These facts manifestly support a finding that a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace at the current time. At such time as the CDC and state/local public health authorities revise their assessment of the spread and severity of COVID-19, that could affect whether a direct threat still exists.

The EEOC provides guidance for employers before, during, and after a pandemic. It has provided Q&A related to COVID-19. The Q&A is available at the link above; however, a relevant excerpt of the Q&A is included below:

- **How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic?**
 - During a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.
- **When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic?**
 - Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.
- **Does the ADA allow employers to require employees to stay home if they have symptoms of the COVID-19?**
 - Yes. The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace. The ADA does not interfere with employers following this advice.
- **When employees return to work, does the ADA allow employers to require doctors' notes certifying their fitness for duty?**
 - Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.
- **If an employer is hiring, may it screen applicants for symptoms of COVID-19?**
 - Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule applies whether or not the applicant has a disability.



- **May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam?**
 - Yes. Any medical exams are permitted after an employer has made a conditional offer of employment. However, employers should be aware that some people with COVID-19 do not have a fever.
- **May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it?**
 - Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.
- **May an employer withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it?**
 - Based on current CDC guidance, this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer.

Appendix D

HIPAA INFORMATION

The HIPAA Privacy Rule controls how a health plan or a covered health care provider shares your protected health information with others, including with your employer. For more information on HIPAA generally, see: <https://www.hhs.gov/hipaa/for-individuals/guidance-materials-for-consumers/index.html>

Employers are not covered under the HIPAA Privacy Rule; however, they are covered under other rules in the workplace, such as the ADA and state and local privacy and/or disability law. Where HIPAA comes up in the employment context is when the employer is interacting with the health care professional or the health care plan (including business associates to the covered entity). While an employer may ask for a doctor's note or information for the purposes of sick leave, worker's compensation, wellness programs, or health insurance, if the employer asks a health care provider directly for information regarding the employee, the provider cannot provide the information without the employee's authorization unless other laws require them to do so.

For more information on employers and HIPAA, see:

<https://www.hhs.gov/hipaa/for-individuals/employers-health-information-workplace/index.html>