COVID-19: CORONAVIRUS CONCERNS IN THE WORKPLACE: WHAT U.S. EMPLOYERS NEED TO KNOW

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Labor, Employment and Workplace Safety Alert

By: April Boyer, M. Claire Healy

INTRODUCTION

The global spread of coronavirus disease 2019 ("COVID-19"), the rise of related health and travel advisories, and the extensive media coverage about the virus undoubtedly are leaving U.S. employers concerned about the health, safety, and welfare of their employees and assessing what steps they should be taking in response.

First, and most importantly, the current health risk of COVID-19 to the general public — including employees in non-healthcare settings — remains low in the United States. Nonetheless, employers should evaluate current policies and plan ahead by establishing a response plan. New cases of COVID-19 are being diagnosed in the United States every day, and certain regions of the country already have been significantly impacted by the virus. It is critical that all employers consider how best to decrease the spread of the virus and lower the impact of COVID-19 in their workplace in the event of a widespread outbreak in the United States.

GLOBAL OVERVIEW OF COVID-19

Toward the end of December 2019, authorities in Wuhan, Hubei province, China, announced a cluster of cases of pneumonia associated with a local seafood wholesale market for which a cause had not yet been identified. On January 8, 2020, a new coronavirus called 2019-novel coronavirus (referred to as 2019-nCoV) was identified as the cause of the illness.

As of early March 2020, there are over 89,000 confirmed cases of COVID-19 with over 3,000 deaths worldwide. Currently, four countries have been listed as Level 3 Travel Health Advisories: China, Iran, Italy, and South Korea, and one country is listed as a Level 2 Travel Health Advisory: Japan. In addition, over 70 other countries globally have reported confirmed cases, including but not limited to: the United States, Hong Kong, Macau, Taiwan, Australia, Cambodia, Canada, Finland, France, Germany, India, Malaysia, Nepal, Philippines, Sri Lanka, Singapore, Thailand, the Republic of Korea, the United Arab Emirates, and Vietnam. Although the large majority of cases have been confined to China, Iran, Italy, South Korea, and Japan, the expectation is that the virus will continue to spread throughout the world. There have been several confirmed cases of infection in the United States affecting people who travelled outside of the United States and contracted the disease, and there are also several cases of individuals who contracted COVID-19 in the United States.

COVID-19 IN THE UNITED STATES

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As of early March 2020, there are over 99 confirmed cases with 10 deaths in the United States. According to the U.S. Centers for Disease Control and Prevention ("CDC"), 13 states are reporting cases of COVID-19: Arizona, California, Florida, Georgia, Illinois, Massachusetts, New Hampshire, New York, North Carolina, Oregon, Rhode Island, Washington, and Wisconsin. Other sources have identified additional states that have confirmed cases of COVID-19. Certain regions of the country, such as the West Coast, are experiencing a higher volume of confirmed cases as compared to the rest of the United States. Major cities such as Los Angeles and Seattle have issued local health emergencies due to the outbreak of COVID-19. Many of the individuals diagnosed with COVID-19 in the United States recently have traveled abroad to high-risk areas.

However, health officials have reported some incidents of the virus occurring in individuals with no history of high-risk travel, indicating that the virus could be spreading undetected throughout the United States.

EMPLOYER RESPONSE TO COVID-19

An employer's timely and well-informed response to COVID-19 can protect the health and safety of its employees, prevent the spread of the virus, and ensure business continuity. Employers can take the following steps to address potential or actual COVID-19 occurrences in the workplace:

Form a task force or committee. The situation with COVID-19 is fluid and requires a dynamic response. Employers should designate a person or committee of employees to monitor developments with COVID-19, so that companies can have a response plan that is individualized to their business needs and the current information known about COVID-19.

Vigilantly monitor virus developments from reputable sources. Employers should review information provided by the CDC; the World Health Organization ("WHO"); the U.S. Department of Health and Human Services; and the U.S. Department of State (the "State Department") daily for up-to-date and reliable information. Guidance to employers from these sources can change rapidly as occurrences of the virus develop in the United States. Any employer response to COVID-19 should be informed by accurate sources in light of the sensationalism surrounding the virus. Employers should consider directing employees to these sources in order to manage fear and uncertainty surrounding COVID-19.

Inform employees how to prevent the spread of COVID-19. Employers should inform and remind employees of everyday precautions that help prevent the spread of COVID-19. Precautions are similar to those applied to avoiding the flu, including:

- washing your hands often with soap and water for at least 20 seconds and/or using an alcohol-based hand sanitizer;
- routinely cleaning all frequently touched surfaces in the workplace, such as workstations, countertops, and doorknobs with disinfectant cleaners;
- avoiding touching your eyes, nose, and mouth with unwashed hands;
- avoiding close contact with people who are sick; and
- staying home when you are sick.

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Employers should actively facilitate these precautions where appropriate. Employers should provide disinfectant wipes for employees to clean workstations and place alcohol-based hand sanitizer in multiple locations around the workplace. Employers should provide tissues to employees and remind employees of cough and sneeze etiquette. The CDC has published guidelines on cough and sneeze etiquette that may be helpful to share with employees. Employers also can encourage "no-handshake" meetings. The most important and effective step in preventing the spread of the virus is to keep sick employees at home. While employers can require employees to use paid time off or sick leave, if an employee is ill and has exhausted his or her paid or sick leave, employers should be flexible and implement a discretionary leave policy.

At this time, the CDC does not recommend that people who are well wear a facemask to protect themselves from respiratory diseases, including COVID-19. Facemasks should be used by people who show symptoms of COVID-19 to help prevent the spread of the disease to others.

Provide travel guidelines and protocols. Employers should establish work travel protocols and revisit them based, in part, on recommendations from WHO, CDC, and the State Department. Currently, many employers are either suspending all nonessential business travel or limiting travel to the contiguous United States. Travel to business conferences and large group meetings can be identified as voluntary instead of mandatory, or employers should permit those with medical concerns to not attend such meetings. Employers also should encourage alternatives to in-person meetings (e.g., videoconference). Employers should advise employees who choose to travel to check themselves for respiratory illness symptoms (e.g., fever, cough, and shortness of breath) before starting travel and after travel. Additionally, employers should ask employees who have traveled and/or reside with an individual who has traveled to high-risk areas of the world, as defined by the CDC, (currently, China; Italy; Iran; Japan; and South Korea) to telework for 14 days, as that is the projected incubation period of COVID-19. The CDC has created a risk assessment tool (the "Risk Assessment") which provides interim guidance regarding risk level associated with travel-associated exposure.

Provide training to employees regarding appropriate workplace protocols. The Occupational Safety and Health Administration ("OSHA") guidance states that all workers with reasonably anticipated occupational exposure to COVID-19 should be trained about the sources of exposure to the virus, the hazards associated with that exposure, and appropriate workplace protocols in place to prevent or reduce the likelihood of exposure. Training should include information about how to isolate individuals with suspected or confirmed COVID-19 or other infectious diseases and how to report possible cases.

Importantly, the training and training materials should also be communicated to employees in a language that employees can understand. For example, if "employees receive job instructions in a language other than English, then training and information to be conveyed under the [hazard communication standard] will also need to be conducted in a foreign language." *See, e.g.*, CPL 2-238(D)(1998).

This position is consistent with precedent from the Occupational Safety and Health Review Commission ("OSHRC") and the courts, which have held that an employer may not allege that an employee violated a work rule when the employer did not communicate that rule to non-English speaking employees in a language that employees could understand. *See, e.g., Modern Cont'l Constr. Co., Inc. v. OSHRC*, 305 F.3d 43, 52 (1st Cir. 2002); *Star Brite Constr. Co.*, 19 (BNA) OSHC 1687, 1695 n.12 (N. 95-0343, 2001). Finally, employers should also consider employees' vocabulary and literacy levels when providing training. Practically, this means if

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employees are not literate, the employer does not satisfy its training obligation by telling employees to read training materials.

Create employer protocols in response to *suspected* cases of COVID-19 in the workplace. Employers should require any employee who becomes ill at work with respiratory illness symptoms to notify a supervisor. If an employee is suffering from these symptoms at work, supervisors should separate the sick employee from other employees or send the sick employee home immediately. Employees who are suffering from symptoms of respiratory illness should remain at home until they are symptom-free for at least 24 hours without the use of symptom-altering medicines (e.g., fever-reducing medications or cough suppressants).

Employees exposed to a family member or other close contact with a confirmed case of COVID-19 should observe their symptoms. Employers should instruct these employees to conduct a Risk Assessment to assess their potential exposure pursuant to CDC guidance before reporting to work. The Risk Assessment requires employees to assess their risk level and whether they are symptomatic or asymptomatic. An employer may also recommend that an employee check his or her temperature before arriving at the workplace to ensure that the employee is still asymptomatic. Employers should require employees who have been exposed to the virus to telework for a period of 14 days after exposure. Employers should also be prepared to provide technical support or equipment to facilitate teleworking, including shipping an employee's work laptop or other supplies to an exposed employee who has been asked to telework so that the employee can avoid coming to the workplace.

Create employer protocols in response to *confirmed* cases of COVID-19 in the workplace. If an employee becomes infected with the virus while working for the company, the employer should require the employee to report the infection to the Human Resources Department immediately. Pursuant to OSHA recordkeeping requirements, COVID-19 is a recordable illness when a worker is infected on the job. If an employee is diagnosed with a confirmed case of COVID-19, employers should require a written authorization from the employee's healthcare provider before allowing the employee to return to work. In the event an employee is diagnosed with COVID-19, employers should inform other employees of their possible exposure while maintaining the sick employee's confidentiality.

Family and Medical Leave Act ("FMLA") Considerations

An employee who tests positive for COVID-19 would likely qualify as having a "serious health condition" for the purposes of the federal FMLA, which guarantees unpaid, job-protected leave for eligible workers at businesses with at least 50 employees who have a serious health condition. Employers should communicate to employees that anyone with a medically confirmed case of COVID-19, including anyone with complications from the disease or anyone requiring extended leave to recover, should contact the Human Resources Department to obtain information about short-term disability leave, long-term disability, family medical leave, and/or other discretionary medical leave.

Americans with Disabilities Act ("ADA") Considerations

Under the ADA, employers may not make disability-related inquiries and require medical examinations, *unless*: (1) the employer can show that the inquiry or exam is job-related and consistent with business necessity, or (2) the employer has a reasonable belief that the employee poses a direct threat to the health or safety of the individual or others that cannot otherwise be eliminated or reduced by reasonable accommodation. The Equal Employment Opportunity Commission has said that whether a particular outbreak rises to the level of a "direct

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threat" depends on the severity of the illness. The "severity of the illness" may vary based on the nature and location of an employer's business.

Adopt an outbreak response plan. Employers should prepare to implement strategies to protect their workforce from COVID-19 while ensuring that business operations continue in the event of a widespread outbreak of the virus. Well in advance of any crisis, employers should develop and test a response plan. A suggested starting point may be to review and adopt portions of other emergency response plans (e.g., natural disaster plan). Once the plan is tested for effectiveness, it should be communicated to all employees.

An employer's outbreak response plan should be informed by certain considerations. In creating a response plan, employers should consider:

- severity of the virus in the community where the business is located;
- impact of the virus on employees who are vulnerable or may be at higher risk for COVID-19;
- likelihood of increased employee absences due to illness of employees or their family members and dismissals of early childhood programs and K-12 schools; and
- information from state and local health officials specific to the employer's community.

An employer should be prepared to issue a COVID-19 outbreak response plan to employees. An effective outbreak response plan should:

- focus on increasing the physical distance between employees and between employees and the public by developing flexible worksite (e.g., telecommuting) and flexible work hour (e.g., staggered shifts) policies;
- identify essential business functions, jobs and roles, and critical elements within a company's supply chain to ensure business continuity;
- identify possible work-related exposure and health risks to the employees;
- set up authorities, triggers, and procedures for activating and terminating the company's infectious disease outbreak response plan and altering business operations;
- establish a communication plan to inform employees about Human Resources Department policies, workplace and leave flexibilities, and pay and benefits; and
- provide local managers with the authority to take appropriate actions outlined in the response plan if the employer has more than one business location.

LOOKING AHEAD: PANDEMIC PREPARATION AND RESPONSE

Currently, COVID-19 is not considered a pandemic. A pandemic declaration comes from the WHO. A "pandemic" is generally considered to be an illness that: (1) is spread between people, (2) results in deaths, and (3) is spread worldwide. Given that COVID-19 is currently present in at least 70 countries, health officials think that a pandemic declaration is imminent.

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In the event of a pandemic, employers have additional obligations to employees and can take further action in regulating the health and safety of their workforce. Should COVID-19 reach pandemic classification, employers should be aware of the following considerations:

- permitted employer responses under the ADA (e.g., asking an employee if he or she has COVID-19 symptoms); and
- exceptions to the Worker Adjustment and Retraining Notification (WARN) Act's 60-day advance notice requirement.

CONCLUSION

While employers should be mindful that occurrences of COVID-19 are increasing in the United States, employers are encouraged to respond to the threat as it exists now to prevent unnecessary fear or panic. Currently, the risk to employees in non-healthcare settings remains low, but employers should take appropriate steps to respond to COVID-19. Employers should continue to be informed and monitor the situation. Taking the steps outlined above can help prevent spread of the virus, protect business continuity, and help secure the safety and health of employees.

KEY CONTACTS



APRIL BOYER
CHAIR OF WOMEN IN THE PROFESSION COMMITTEE

MIAMI
+1.305.539.3380
APRIL.BOYER@KLGATES.COM



M. CLAIRE HEALY
ASSOCIATE

RALEIGH, CHARLESTON
+1.919.743.7303
CLAIRE.HEALY@KLGATES.COM

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