

CLIENT ALERT: Coronavirus Continues to Spread: What Employers Should Do

On February 13, 2020 we published a Client Alert entitled “Coronavirus: Employer Considerations” that can be found [here](#). We are continuing to monitor developments related to the outbreak and wanted to provide additional guidance as the situation evolves. On Wednesday, March 11, 2020, the World Health Organization (“WHO”) officially declared the Coronavirus (“COVID-19”) a “pandemic,” potentially altering the legal landscape with regard to monitoring employee health and permissible workplace measures taken by employers. Additionally, as the number of geographic regions affected continues to rise, travel considerations remain in flux.

The following are important considerations for employers as they continue navigating the difficult and evolving situation presented by the Coronavirus.

Travel. At the time of this publication, the CDC has issued a Level 3 travel notice (avoid all non-essential travel) for China, Iran, South Korea, and Italy, and a Level 2 notice (older or chronically ill individuals should consider postponing) for Japan. The Trump Administration instituted additional restrictions on travel from China, Iran, and Europe. Employers should postpone or cancel business-related travel to countries with travel notices or restrictions and seek alternative means of achieving the purpose of the trip. While there are no current domestic travel restrictions, employers should continue to monitor the CDC and other health organizations for updates and exercise reasonable judgment in determining the best course of action for employee work travel. Employers may not prohibit employees from personal travel, however they may impose restrictions on employees returning from affected areas or potentially exposed to the virus, such as a two-week work-from-home or leave arrangement.

Medical Inquiries. Generally, the Americans with Disabilities Act (“ADA”) prohibits employers from making disability-related inquiries unless 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 2) an employee will pose a direct threat due to a medical condition. A “direct threat” is defined by the ADA as a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” Because the presence and possible spread of the Coronavirus likely presents a “direct threat” to the workplace, employers may ask employees about Coronavirus-like symptoms, such as fever, cough, and shortness of breath. Similarly, because the CDC advised that employees showing symptoms of Coronavirus should be sent home immediately, employers may do so without running afoul of the ADA. Employers should be aware that the ADA requires that they maintain employee medical information in a separate confidential medical file (including any information about an employee’s diagnosis). Further, employers may inquire whether an employee has recently traveled to an affected area without implicating the ADA. Irrespective of the WHO’s pandemic declaration, employers may not ask employees who do not have symptoms of Coronavirus whether they have any underlying conditions that may render them more susceptible to developing the virus or related complications.

Medical Examinations. Medical examinations are subject to the same ADA restrictions as disability-related inquiries and while they *may* be permissible under the same “direct threat” analysis, Employers should tread carefully and consult legal counsel to work through such issues on a case-by-case basis. For example, employers considering taking an employee’s temperature to determine whether they have a fever should heed caution, as the CDC has not specifically recommended these precautions. With respect to employees returning to work after recovering from the virus, the CDC has advised against requiring a “fitness for duty” certificate, given concerns about healthcare system resources. Employers should advise employees that they may not return to work until they are symptom and fever free for at least 24 hours without the use of any symptom-relieving or fever-

reducing medication.

Employee Leave. As the requirement to provide paid leave to employees quarantined or suffering from Coronavirus will vary, depending upon the employer's location and size, employers should continue to assess applicable leave laws and policies and how they will be applied to affected employees. Applicable laws may include the Federal Family and Medical Leave Act, the ADA, state family and medical leave laws, or state sick leave laws. Employers should work with legal counsel to ensure policies are consistent with applicable laws and public health guidance, revising to fit the employer's needs, as necessary. Employers should also be aware that some laws may restrict the usage of certain categories of paid time off, such as sick leave. For example, in Massachusetts, earned sick leave may be used for the following designated purposes: 1) to care for the employee's child, spouse, parent, or parent of a spouse who is ill; 2) to care for their own illness; 3) to attend routine medical appointments; or 4) to address the effects of domestic violence.

Face Masks. Employers are only required to permit an employee to wear a face mask in limited circumstances. At this time, public health officials are only recommending face masks for workers in healthcare, persons infected with the virus, and individuals caring for an infected person. If an employee requests to wear a mask at work, employers may consider the request or direct the employee to official guidance regarding the preservation of masks for healthcare organizations.

Workplace Measures. In addition to the above, employers should continue to encourage sick employees to stay home, promote hand hygiene and respiratory etiquette, and perform routine environmental cleaning. Employers may consider limiting the presence of visitors to the workplace and advising employees against attending local conferences, meetings, or other events likely to draw large crowds. Finally, employers should continue to keep their employees informed through frequent and thoughtful communications, and stay apprised of further developments from the government and public health officials.

Please note that the above information is based upon the information presently known about the Coronavirus; this is an ongoing issue and employers should remain apprised of further updates from the WHO, the CDC and other local public health officials. Employers assessing potential risks associated with Coronavirus, other employee illness, or disability and/or medical leave laws should consult with their MBJ attorney.

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