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Q&A - Understanding and Effectively Implementing the Required and Best Practices Associated with Reopening Your Business

Question 1: On slides 4 and 5 Workplace Requirements -- can you clarify whether these are "required" or whether they are mere suggestions?

Answer: First, to that, you should know that the CDC has thus far issued only guidelines – not requirements. So, all of the CDC communications are recommendations only. But, those guidelines, along with any state health department guidelines or mandates (some do mandate particular steps depending on the industry), have established a standard of care such that, if an employer does not follow them and an employee gets sick, the employee will call on the employer to answer as to why it did not follow the recommendations. So, unless an employer has a particular reason why they cannot implement these workplace practices, the word "should" really should be viewed as the same as the word "must."

Question 2: How does the employer consider the health of the members of an employee's household?

Answer(s): This question could be interpreted two ways, here are both answers.

May employers lawfully ask questions about the health and/or risk to an employee's family members? While the EEOC has gone quite far in allowing employers to ask for health information from employees, the EEOC has not said employers may ask about an employee's family members. Also, the Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits the use of genetic information in making employment decisions in any aspect of employment so inquiring about an employee's family members if dangerous, particularly if the answer would reveal some hereditary health condition. Therefore, it is not advisable for employers to ask for information about an employee's family members – except that the employer may ask generally if an employee has been in close contact with someone who has COVID-19 or a presumptive case of it.

May an employer lawfully refuse to allow an employee to come back to work if the employee lives with someone in a high-risk category, i.e., an elderly person? There is no legal requirement that an employer protect the health and safety of an employee's family members and I think, if employers start doing that now by forcing an employee to work from home or making an adverse decision because the employer thinks it needs to protect the employee's family, it would be slippery slope. Employers should not wade into that water. Now, if an employee is telling the employer that the employee is concerned about coming back to work because he/she lives with a high risk person, that is a conversation the employer should have with the employee to determine if something can be worked out. We will discuss later in the presentation situations involving employees who do not want to come back to work even though the employer is permitted to open up.

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Question 3: Is it legal for the company to ask employees who submit a vacation request questions like where they are going and who they are going with and, if the employer is not comfortable with the answers, the employer can require the employee to remain at home for 14 days. And is the company then required to pay for the 14 days the employee is sitting at home?

Answer: The CDC recognizes that people can be at a higher risk of contracting COVID-19 if they travel because they could be going to a hot spot and/or their mode of transportation is such that they cannot practice social distancing. There is some rationale for it certainly. That said, there are concerns. I would be concerned that this could be applied inconsistently – even if inadvertently – or could reveal an underlying preconceived notion that travel to one place versus another means the employee needs to be quarantined. As a rule of thumb, the closer employment decisions get to being based on assumptions and/or preconceived notions, the riskier they become. I would be happy to talk through this issue with anyone concerned about this. As a general matter, I cannot say it is an advisable practice.

Question 4: If an employee does not report having symptoms but then comes in to work and the employer observes that the employee is coughing or otherwise appears to be ill, may the employer ask about the symptoms? And then what should the employer do?

Answer: Yes, provided the inquiry relates only to the COVID-19 related symptoms. For example, the employer may ask about whether the employee took his/her temperature before coming to work, how long the employee has had the symptoms, is the employee experiencing any other symptoms that can indicate COVID-19. The employer can and should ask the employee if he/she can point to some other cause other than COVID-19. Depending on what the employee says in response – like if the employee cannot say that they know what it is from or even if the employer is unsure, the best course of action may be to send the employee home with instructions to monitor his/her health and not report back to work until the employee can verify that he/she is not experiencing COVID-19 related symptoms or get a physician's note verifying that the symptoms are from something else. If an employer has this situation where an employee seems to be exhibiting symptoms but claims they are related to something other than COVID-19, it is advisable for the employer to consult legal counsel to make sure that sending them home and requiring a note is appropriate.

Question 5: Related to sending an employee home if he/she has an elevated temperature does the employer have to pay the employee for the time he/she is at home?

Answer: It depends. The employee could qualify for different types of paid leave, whether the elevated fever was COVID-19 related.

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Question 6: Regarding confidentiality, what if an employee is screened for a fever and it turns out he/she has one? And then the employer sends the employee home. Other employees are likely going to see that person being sent home. Is the employer, by sending the employee home, unlawfully revealing confidential information?

Answer: Even if other employees think they know what happened, an employer is not unlawfully violating the employee's privacy or unlawfully revealing confidential information if the employer has acted reasonably and simply sent the employee home. If the employer announced the reason, for example, that would be a problem. Or if the employer wrote the result on a form and left the form out for people see. In short, employers just should ensure that the confidential information has not come from them, i.e., their lips or written documentation that other employees can see. That is why, as far as the logistics of screening, employers may want to use a tent or designated space right near the entrance to the workplace and screen one employee at a time. As I think makes sense, the CDC recommends screening occurs before employees enter the workplace.

Question 7: How should an employer respond if an employee asks why Employee X was sent home? Or the employee insists she/he needs to know who may have the virus?

Answer: The employer should respond simply that it has a duty to maintain the ill employee's confidentiality just as the employer has the duty to maintain the inquiring employee's confidentiality. In any event, it is not necessary to identify the employee. The employer can explain that it has investigated and has determined that the employee may have been exposed and, as such, must leave the workplace. The employer should suggest that the employee consult a healthcare professional and monitor his/her health for 14 days. The CDC recommends: "Potentially exposed employees who have symptoms of COVID-19 should self-isolate and follow CDC or local health authorities' recommended steps. Potentially exposed employees who do not have symptoms should remain at home or in a comparable setting and practice social distancing for 14 days."

Question 8: What if an employee self-identifies as high risk but insists on working?

Answer: If an employee self-identifies but insists on working, an employer may have grounds to ask the employee to obtain a doctor's note verifying that the employee can work. In certain circumstances, the employer may also be able to require the employee to work from home under the "direct threat defense" but this is risky. In any event, how this should be handled should be decided on a case-by-case basis, so, if you are having this issue, it would be advisable for you to seek legal advice on that particular employee.

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Question 9: Can you speak about the employee who ordinarily would be required to come to work (either because the employer is an essential business or the employer has opened up) but the employee has a medical condition for which the employee now requires leave as an accommodation?

Answer: The ADA and its state equivalents still apply. This means that, if an employee has a medical condition that could be considered a disability under those laws, employers have an obligation to engage in an interactive process with the employee to determine if an accommodation can be offered to that employee to enable her/him to perform his/her job. This could include allowing a high-risk individual with a condition that did not require an accommodation before COVID-19 but now does because of the great risk of coming into the office. That employee may be entitled to work from home as an accommodation. The way in which an employer should approach this conversation can be delicate and employers must be mindful of certain things, such as not asking for more medical information than is necessary. An employer faced with an employee like this who is unfamiliar with the interactive process should consult legal counsel about how to proceed.

Question 10: What if an employer provides services that only can be provided on site such that there is no work from home option and the employee cannot come to work out of fear of contracting the virus?

Answer: I will answer with a general rule of thumb: Any time an employer thinks that an accommodation cannot be provided, the employer needs to realize that, under the ADA, the burden is not high for an employee to show that a reasonable accommodation exists, while the burden is very high for an employer to show that no accommodation could be provided without an undue hardship. For example, as a general matter, even if the company is a place like a barber shop or salon and the employee cannot come to work because mere exposure (under any circumstances) poses too high of a risk, the employer should consider all of the possible sources for leave listed on slide 12, including giving the employee a period of unpaid leave to enable the employee to come back (this could be considered a reasonable accommodation). In the end, though, if none of these leaves are available and the employee really cannot perform his/her job with a reasonable accommodation and the leave is indefinite, the employer is not required to pay the employee during the leave and may not be required to keep the individual employed.

Thank You

If you have additional questions, please feel free to contact:

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