COVID-19:
Common Employer Questions Asked and Answered
Agenda

• How do I communicate with my employees? What communications should I prepare?
• How do I handle travel restrictions and employees’ personal travel?
• How do I handle quarantine and the incubation period and does it need to be paid?
• Are there American with Disabilities Act Issues and how do I handle leave issues?
• How do I manage my employees telecommuting and working from home?
• What if I have hourly employees? Do I need to revise or create new PTO and sick leave policies?
Agenda

• What about Thermal Scanning and taking employees’ temperatures?
• What about medical examinations and fitness for duty exams?
• What about Primary Exposure In the Workplace?
• What about Secondary Exposure In the Workplace?
• What about Tertiary Exposure In the Workplace?
• What if I have to conduct furloughs and what wage and hour issues can we predict?
• Does *Force Majeure* apply in these situations?
• What about Workers’ Compensation and do we have to report to OSHA?
• What about Medical Privacy and HIPAA Issues?
• What about International Issues?
How Do I Communicate with my Employees? What Communications Should I Prepare?

- Provide email or memorandum to employees
- Acknowledge that safety is the Company’s highest priority
- Inform employees that there is no immediate cause for concern but in an abundance of caution the Company is taking precautionary measures
- Provide some background on the Coronavirus
- Inform employees of potential 14 day incubation and/or the requirement for a fitness for duty
- Inform employees of travel restrictions including business and personal travel
- Provide contact information for human resources or other person responsible for action plan.
How Do I Handle Travel Restrictions and Employee’s Personal Travel?
How Should I Handle Quarantine and the Incubation Period and Does it Need to be Paid?
Are there American with Disabilities Act Issues and How do I Handle Leave Issues?

- There are limitations of what employers can ask/do because of the ADA
- Employers may need to review reasonable accommodation policies
- Employers should review to see if FMLA or other leave may be applicable
- Employers should think about developing new policies as needed including a 14 day incubation leave
How do I Manage my Employees Telecommuting and Working from Home?

- Create temporary COVID-19 telecommuting policies
- Review your older telecommuting policy and revise as needed
- Keep in mind people may be telecommuting for reasons other than illness (e.g., taking care of a child because schools are closed, etc.)
- Utilize other resources/programs such as web conferencing to ensure employees can do their job.
- Ensure you are reimbursing employees for using their own instrumentalities (computers, phones, etc.)
- When reviewing performance, take into consideration limitations on telecommuting
What if I Have Hourly Employees? Do I Need to Revise or Create New PTO and Sick Leave Policies?

- Providing Extra Sick Leave For 2020
- Providing extra PTO for 2020
- Creating a new sick leave policy called COVID-19 leave
- Suspending attendance policies
What About Thermal Scanning and Taking Employees’ Temperatures?

- **EEOC link:** [https://www.eeoc.gov/facts/pandemic_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html)
  - The ADA prohibits an employer from making **disability-related inquiries** and requiring **medical examinations** of employees, except under limited circumstances.
  - **During employment:** The ADA prohibits employee disability-related inquiries or medical examinations unless they are job-related and consistent with business necessity.
  - A “**direct threat**” is “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.”

- **Direct threat** is an important ADA concept during an influenza pandemic.

- Whether pandemic influenza rises to the level of a direct threat depends on the severity of the illness. If the CDC or state or local public health authorities determine that the illness is like seasonal influenza or the 2009 spring/summer H1N1 influenza, it would not pose a direct threat or justify disability-related inquiries and medical examinations. By contrast, if the CDC or state or local health authorities determine that pandemic influenza is significantly more severe, it could pose a direct threat. The assessment by the CDC or public health authorities would provide the objective evidence needed for a disability-related inquiry or medical examination.

- During a pandemic, employers should rely on the latest CDC and state or local public health department assessments. While the EEOC recognizes that public health recommendations may change during a crisis and differ between states, employers are expected to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location, and to make reasonable assessments of conditions in their workplace based on this information.
What About Medical Examinations and Fitness for Duty Exams?

- What is a Fitness For Duty Exam?
- What should be included?
- What Can the Employer Ask of the Employee?
What About Primary Exposure In the Workplace?

- Employee is diagnosed with COVID-19
- Contact local Department of Public Health for guidance
- Identify individuals who may have been exposed
- Clean the workplace (abate the hazard)
- Options: Close down the facility for 14 days and offer PTO/Sick Leave/Telecommuting
What About Secondary Exposure In the Workplace?

Employee has a family member/roommate/spouse/partner/friend diagnosed with COVID-19 that they have been in close contact with during the last 14 days

Determine if the diagnosed individual has been instructed to self-quarantine by the local Department of Public Health or CDC and, if so, contact for guidance

Employers have the option of identifying individuals who may have been exposed, or waiting until test results are returned

Employers have the option to clean the workplace

Options: Close down office or facility for 14 days and offer PTO/Sick Leave/Telecommuting
What About Tertiary Exposure In the Workplace?

Employee has a family member/roommate/spouse/partner/friend that has been quarantined due to close contact with someone within the last 14 days who has been diagnosed with or being screened for COVID-19.

Determine if the diagnosed individual has been instructed to self-quarantine by the local Department of Public Health or CDC and, if so, contact for guidance.

Place the employee on quarantine/incubation leave.

Employers have the option to clean the workplace and areas where employee frequented.
What About Workers Compensation and do we Have to Report to OSHA?

The employee may be entitled to workers’ compensation if:

- The employee was exposed to the virus while they were traveling for business
- The employee was exposed to the virus at the work by a coworker or someone who visited the workplace
- An employee experiences stress or anxiety due to the potential of exposure to the virus
What if I Have to Conduct Furloughs and What Wage and Hour Issues can we Predict?

- A furlough involves reducing the days or weeks that an employee may work.
- A layoff can be temporary or permanent.
- Employers may also consider reducing the daily hours of some employees.
- Think about unemployment benefits.
- Notice requirements.
- Will WARN (or State Warn) go into play?
- Exempt and Nonexempt status compliance.
Does Force Majeure Apply in These Situations?

- **Force majeure** refers to a clause that is included in a contract to remove liability for natural and unavoidable catastrophes that interrupt the expected course of events and restrict participants from fulfilling obligations.

- Generally it operates to relieve one or both parties of some or all of their contractual obligations if an unforeseeable event beyond either party’s control prevents or delays full or partial performance of obligations under the contract.

- Some things to evaluate:
  - Which contract provisions are relevant?
  - What law governs the contract?
  - How does the contract define force majeure?
  - Is COVID-19 the reason for nonperformance?
  - Is there a notice requirement?
What About Medical Privacy and HIPAA Issues?

- The HIPAA Privacy Rule protects the privacy of patients’ health information (protected health information) but is balanced to ensure that appropriate uses and disclosures of that information may be made when necessary to treat a patient, to protect the nation’s public health and for other critical purposes.

- The Privacy Rule permits covered entities to disclose needed, protected health information without individual authorization:
  - To a public health authority, such as the CDC or a state or local health department;
  - At the direction of a public health authority, to a foreign government agency;
  - To persons at risk of contracting or spreading a disease or condition if other law, such as state law, authorizes the covered entity to notify such persons as necessary to prevent or control the spread of the disease.

- Health care providers may share patient information with anyone as necessary to prevent or lessen a serious and imminent threat to the health and safety of a person or the public – consistent with applicable law (such as state statutes, regulations, or case law) and the provider’s standards of ethical conduct.
Stay informed in a fast-changing environment! Look to regional and local public health authorities, labor authorities…and the news

- **European Centre for Disease Prevention and Control (ECDPC)** an agency of the European Union for updates and tools

- **National information resources for the public on COVID-19 for all EEA countries**
  

- **Local labour authorities and guidance sites, for example:**
  - Acas in UK  https://www.acas.org.uk/coronavirus

- **BBC News, Strait Times (Singapore), etc.**
International Issues- DUTY OF CARE

• Specific health and safety obligations
  – Specific equipment, cleaning material

• General duty of care in epidemic
  – workplace-specific risk analysis
  – individuals’ risk analyses
  – Psychological and physical well-being considered

• Role of workplace medical advisor

• Role of workplace employee representatives
  – Health and safety representatives
International - QUARANTINE
Keeping well employees away from the workplace as a proactive measure

If not recommended by government:

• Place of work may be subject to agreement
  - Need for agreement may be overridden for health and safety reasons (but possibly not for employee representatives)

• If telework is not possible, the employee will probably have to be paid
  - bonus may also be payable e.g. if proactive measure is arguably excessive
  - usually cannot force to take holiday- may be able to so with sufficient notice

If recommended or mandated by government:

  - If telework is not possible, may be able to use sick pay, special pay, or holiday

• In all cases be careful to avoid discrimination
• Employee’s own fear?
Can we require employees to submit to temperature testing before entering premises?

- May depend on level of community transmission – is it overreaching? Check with local public health
- Some countries you can offer it but not mandate it e.g. France
- May be restrictions on employer doing it- offer equipment for employee to take temp instead
- May be able to require it of non-employee visitors as a condition of entry more easily
- Consider data privacy issue (do not keep the data)

Examples all over the map:

- China temperature testing is everywhere!
- Ontario Canada: likely overreaching (at this point)
- Mexico- can require it
- France- can only offer it, not mandate it, and employer can only provide the equipment.
• **Voluntary unpaid “sabbaticals”** not likely to be helpful but may be permitted

• **Temporary layoff** requirements vary widely:
  - NL: COVID-19 “extraordinary circumstance” may allow for government reimbursement (capped) if employer permitted to reduce working time but must continue to pay salary (6 weeks x 3)
  - Germany: Normally employer has no ability to lay off employees temporarily unless *the authorities* impose a quarantine or ban on working. Employees would then be compensated by the State.
  - UK: Unless contractually agreed must pay in full if employee willing and able to work.
  - France: (“chômage partiel”) (similar to quarantine, if decrease in activity due to epidemic).

• **Terminations** **Watch out for compliance with the statutory requirements for collective redundancies!**
  - NL: have to prove that due to economic circumstances layoffs necessary for 26+weeks
  - UK: 20+ impacted in 90 day period- if foreseeable you must strictly comply with timelines.
• Look out for data privacy issues
  − GDPR: personally identifiable health data is “special data” – a hot potato!
  − asking employees about symptoms versus directing them to seek advice if they have symptoms
  − some EU Member States implementing special rules to help track exposures
  − consider all possible ways to minimize collection, processing, disclosure
  − consent does not necessarily solve the problem
  − not just a European issue any more

• Immigration
  − comply with sponsor obligations e.g. notify gov’t of changes to pay, place of work
  − visas may be extended if employees cannot return home
Questions?

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.
Thank You!

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.