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MAY 13, 2020 | PUBLICATION

Client Alert: Carolinas Coronavirus Guidance for Employers (Updated)

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I. Employment

1. Can we send sick employees home from work?

- Yes, you may send sick employees home, provided you do so in a nondiscriminatory manner.
- Coronavirus guidance from Centers for Disease Control and Prevention ("CDC") and pandemic flu guidance from the Department of Labor ("DOL") provide that employers may send employees home in a nondiscriminatory manner. Generally, the decision to send an employee home cannot be based on their race, national origin, disability, sex, age (40 or over), color, religion, or veteran status. However, an employee with a disability (i.e., the Coronavirus or suspected Coronavirus), may be sent home if the employer:
    - Has objective evidence that the employee poses a direct threat (i.e. significant risk of substantial harm); and
    - Determines that there is no available reasonable accommodation (that would not pose an undue hardship) to eliminate the direct threat.
- Based on pandemic flu guidance from the U.S. Equal Employment Opportunity Commission ("EEOC"), pandemic influenza can rise to the level of a direct threat if the CDC, state, or local health authorities determine that the pandemic influenza is significantly severe. Likening the Coronavirus to a pandemic influenza, based on public health emergency declarations or the World Health Organization's international health emergency declaration regarding the Coronavirus, the Coronavirus is arguably a direct threat.
- Based on the CDC's Coronavirus guidance, employees who appear to have acute respiratory illness symptoms (i.e. cough, shortness of breath) upon arrival to work or during the day should be separated from other employees and be sent home immediately. They should stay home until they are symptom free for 24 hours.
- Employers should send employees home uniformly or they may face discrimination claims (for example, do not let a coughing CEO stay, but send a coughing assistant home).
- Employers with union employees will need to review the applicable collective bargaining agreement regarding employees' rights as to employer mandated leave.
- In South Carolina, an employer may not fire, demote, or otherwise discriminate against an employee

complying with an isolation or quarantine order issued by the state Department of Health and Environment Control or the state Board of Health and Environment Control.

2. What inquiries can we make into an employee's medical condition?

- Employers may ask employees about symptoms that are consistent with the Coronavirus, including cough, respiratory issues, sore throat and fever.
- Per the EEOC, asking an individual about symptoms of a cold or the flu is not likely to elicit information about a disability. Employers may ask employees if they are experiencing symptoms such as fever, chills, cough, or sore throat.
- While typically prohibited, if the pandemic becomes severe and widespread as determined by health authorities, employers may measure employees' body temperature. Consult with a compliance officer or attorney before implementing this measure.
- Bear in mind that all employee medical information must be kept confidential. It is recommended that employer establish a Coronavirus task force to limit the number of employees who may have access to confidential medical information.
- Employers may institute infection control practices, such as environmental hygiene, frequent handwashing, and sneeze/cough etiquette. Employers should encourage sick employees to stay home.
- The EEOC advises that employers may begin planning for employee absences during a pandemic. Employers may make nondiscriminatory inquiries to identify employees who may not be able to work during a pandemic. The EEOC provides the following compliant questionnaire as an example:

Directions: Answer "yes" to the whole question *without specifying the factor that applies to you*. Simply check "yes" or "no" at the **bottom of the page**.

In the event of a pandemic, would you be unable to come to work because of any one of the following reasons:

- If schools or day-care centers were closed, you would need to care for a child;
- If other services were unavailable, you would need to care for other dependents;
- If public transport were sporadic or unavailable, you would be unable to travel to work; and/or;
- If you or a member of your household fall into one of the categories identified by the CDC as being at high risk for serious complications from the pandemic influenza virus, you would be advised by public health authorities not to come to work (e.g., pregnant women; persons with compromised immune systems due to cancer, HIV, history of organ transplant or other medical conditions; persons less than 65 years of age with underlying chronic conditions; or persons over 65).

Answer: YES_____ , NO_____

3. If an employee is confirmed to have Coronavirus, should we notify other employees?

- If an employee is confirmed to have Coronavirus, employers should inform fellow employees of their possible exposure in the workplace, but maintain confidentiality as required by the Americans with Disabilities Act ("ADA"). The ADA requires strict confidentiality, and your compliance officer or attorney should review your disclosure before release or you risk possible ADA violations.
- Additionally, if an employee is confirmed to have the Coronavirus, you may be required by the state or local Department of Health to notify employees and/or post a notice informing visitors of the infection

event. Property owners and businesses have a similar duty to warn invitees of hazards which are not open and obvious which may include an infection event.

II. Medical Documentation

Can we require medical documentation to validate an employee's illness or confirm that they may return to work?

- Yes, you may require a doctor's note in this particular circumstance; however, the CDC recommends against doing so as medical providers and facilities may be extremely busy and unable to provide timely documentation.

III. Telework

Can employees work from home during a public health emergency?

- Yes. To the extent that an employee's work is able to be performed in a remote setting, an employer may encourage or require employees to telework as an infection control strategy, based on timely information from public health authorities regarding pandemic conditions. Telework could be considered as an alternative to PTO. Employers should ensure that they offer the ability to telework in a nondiscriminatory manner.
- Employees with disabilities that put them at high risk for complications or contracting the Coronavirus may also be entitled to telework as a reasonable accommodation under the ADA to reduce their risk of contracting the illness.

IV. Paid Time Off ("PTO")

Must we provide paid sick leave to employees who are out of work because they have Coronavirus?

Please see the client alert explaining the new federal Emergency Paid Sick Leave Act.

V. Family and Medical Leave Act ("FMLA")

1. Must we provide FMLA leave to employees who have the Coronavirus and/or employees whose family members have the Coronavirus?

- Possibly. First, you must determine whether you are a covered employer under FMLA. Then, you must determine if the employee is eligible for FMLA. If you are a covered employer and the employee is eligible, the Coronavirus may be covered by FMLA.
- The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave in a designated 12-month leave year for specified family and medical reasons which include "serious health conditions." Serious health condition includes an illness, injury, impairment, or physical or mental condition that involves inpatient care (overnight stay in a hospital) or continuing treatment by a health care provider. The Coronavirus could meet the definition of a serious health condition and may qualify for FMLA leave. Please consult your attorney regarding individual cases.
- An employee on FMLA leave is entitled to the continuation of group health insurance coverage under the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period.
- Remember that employers have five business days from becoming aware of a potential FMLA covered absence to provide notice to the employee of their eligibility for FMLA leave and whether medical certification will be required.

2. Are employees entitled to FMLA leave to stay at home with their children because of daycare or school closures?

- Please see the client alert explaining the new federal Emergency Paid Sick Leave Act.

VI. Travel

1. Can I prohibit employees from traveling?

- Prohibiting employees' personal travel because of the potential risk of Coronavirus may subject employers to the risk of a "regarded as disabled" claim under the ADA.
- Additionally, some states prohibit employers from making employment decisions based upon an employee's legal after hour activities. There are no prohibitions on personal travel restrictions in the Carolinas.
- Employers can discuss with employees the risks of traveling to regions with a greater risk of infection (airport screening, potential quarantine/inability to return home, etc.).

2. What if an employee refuses to report to work or travel because of Coronavirus risk?

- Employees generally do not have a right to refuse work and may be subject to discipline for doing so. However, there are multiple exceptions to this rule.
- Under the federal Occupational Safety and Health Act ("OSHA"), employers are prohibited from retaliating against employees for raising concerns about situations that present an imminent and serious risk to their life or health. North Carolina has a similar, state law prohibition. Employee complaints about the risk of travelling to areas with Coronavirus cases should be discussed with your attorney.
- Additionally, union employees may have specific rights under their collective bargaining agreement as to unsafe work locations or conditions.
- Further, employees with disabilities that put them at high risk for complications or contracting the Coronavirus may also be entitled to reasonable accommodations including no travel, telework or unpaid leave.

VII. Personal Protection Equipment

1. Am I required to provide employees with personal protective equipment ("PPE") (respirators, gloves, etc.)?

– It depends upon your industry. OSHA's standards require employers to assess the workplace to determine if hazards are present, or are likely to be present, in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation, or physical contact. If such hazards are present, or are likely to be present, the employer must provide each affected employee with the types of PPE, such as eye, face, or head protection that will provide protection from the hazards identified. In assessing and responding to the potential hazards, it is reasonable for the employer to rely on information provided by OSHA (https://www.osha.gov/SLTC/covid-19/) or the Centers for Disease Control (https://www.cdc.gov/coronavirus/2019-ncov/index.html) regarding which employees require PPE.

2. Do I have to allow an employee's use of a respirator or face mask in the workplace?

- No, unless otherwise required by a federal, state or local safety code or as a reasonable accommodation to an employee with a disability.
- Further, regardless of whether the employee's use of a respirator is voluntary or mandatory, specific OSHA requirements must be satisfied. For voluntary use, these requirements include the delivery of a

specific written notice to the employee and medical certification that the employee is able to use the respirator. For mandatory usage of respirators, there are even more comprehensive requirements (written respiratory program, fit testing, etc.).

VIII. Temporary Shutdowns

- If employers need to temporarily suspend or limit operations, they will need to consider the need to comply with the Worker Adjustment and Retraining Notification Act ("WARN Act"). The WARN Act may require advance notice to employees of a plant closure or mass layoff.
- Additionally, employers who limit operations or employees' hours will need to consider whether such reductions entitle their employees to unemployment compensation.

IX. Customers

Can we ask sick customers to leave our facilities?

- Possibly. Title III of the ADA generally prohibits public accommodations from discriminating against disabled individuals. However, you may deny goods or services to individuals if their participation would result in a direct threat to the health and safety of others, but only when this threat cannot be eliminated through an alteration of policies, practices, procedures, or providing auxiliary aids and services. This is a factintensive determination that must be supported by reasonable evidence and judgment regarding 1) the nature, duration, and severity of the threat; 2) the probability the threat will occur; and 3) whether reasonable modifications of polices, practices, or procedures will diminish the threat.
- While North Carolina has declared a state of emergency over the Coronavirus, and South Carolina may in the near future, to minimize risk of ADA violation, you should exercise caution and consider a refund as to any customers requested to leave.
- Further, any contract or terms of sale agreements between you and the customer may control. Such contracts should be reviewed by your attorney.

X. Contracts and Force Majeure

Can a contract be cancelled due to public health concerns?

- This depends on the contract. Contracts may contain provisions that allow parties to suspend contractual performance for unforeseen acts of God or "force majeure" events. However, this is specific to each contract and the terms vary. Please have your attorney review your contracts for more specific advice.

It is anticipated that the Coronavirus will have a continuing effect on employers for at least the near future. Employers should begin preparing now for how they will respond to employee absences, employee requests for leave and other business disruptions.

If you have any questions, please do not hesitate to contact me at:

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For the most up-to-date legal and legislative information related to the coronavirus pandemic, please visit our Shumaker COVID-19 Client Resource Center at shumaker.com. We have also established a 24/7 Legal & Legislative Helpline at 1.800.427.1493 manned by Shumaker lawyers around the clock.

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