COVID-19 Employment Law Update: Guidance For Employers from the CDC and OSHA; Employers Rights and Responsibilities Under the ADA and State Anti-Discrimination Laws

Client Alert

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The Centers for Disease Control and Prevention's (CDC) official declaration of COVID-19 as a pandemic has a significant impact on employer and employee rights and obligations in the workplace under various state and federal statutes and regulations.

Further, while New Jersey Governor Phil Murphy issued Executive Order 107 on March 21, 2020, effectively closing all non-essential retail businesses as well as most recreational and entertainment establishments within the state, New Jersey employers that continue operations must comply with the many applicable state and federal laws governing the workplace. Moreover, recently signed legislation (A3848) explicitly precludes employers in New Jersey from terminating an employee because they request or take time off from work because they are likely to have an infectious disease.

A pandemic presents challenges for employers seeking to comply with the Occupational Safety & Health Act's (OSHA) dictates, as well as other applicable state and federal anti-discrimination laws - notably the Americans With Disabilities Act (ADA) - which continue to operate as a check on employment decisions aimed at maintaining a safe working environment.

CDC's Interim COVID-19 Guidance

The CDC recently issued **guidance** to employers regarding COVID-19, prior to designating it a pandemic. Importantly, the CDC stressed to employers the importance of not making risk determinations based upon race or country of origin. Additionally, while employers may, and should, disclose if an employee becomes infected, employers are obligated to maintain the confidentiality of the employee's health information and not disclose the identity of the infected employee. It is also recommended that employers encourage healthy employees to work from home, if possible, and for sick employees to remain out of the workplace until they are symptom-free for at least 24 hours. Of course, this Interim Guidance needs to be considered together with Governor Murphy's

Executive Orders 107 and 108, which were issued on March 21, 2020, and other subsequently issued guidance.

Finally, employers are strongly encouraged to develop a COVID-19 response plan narrowly tailored to their respective business operations. These plans should include maintenance of reliable dissemination of COVID-19 communications, regular workplace sanitation efforts, and encouragement of appropriate employee anti-infection and respiratory etiquette (coughing into one's elbow, regularly washing hands, etc.). Employers are equally encouraged to dutifully monitor communications from the CDC, the Department of Labor, and other state and local health authorities to ensure compliance with laws based on the most up-to-date information.

OSHA's COVID-19 Guidance

The COVID-19 pandemic magnifies the importance of an employer's responsibility to maintain a safe and infection-free workplace. Although OSHA contains no specific standard covering COVID-19, some OSHA requirements may apply to preventing occupational exposure to the virus.

By way of example, OSHA requires all employers to furnish to each worker "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." In the context of COVID-19, an employer must endeavor to maintain a reasonably sanitized workplace to avoid the spread of the disease. This dictate also requires careful consideration of the sanitizers and sterilizers that are used. Where workers are exposed to hazardous chemicals, employers must comply with OSHA's Hazard Communication standard, Personal Protective Equipment (PPE) standards, and other applicable OSHA chemical standards.

OSHA's PPE standards apply to employers that require employees to regularly use gloves, eye, face, and respiratory protection. These standards are especially important during a pandemic for employers in the healthcare industry. When respirators are necessary to protect workers, employers must implement a comprehensive respiratory protection program in accordance with the Respiratory Protection Standard. OSHA has issued **temporary guidance** related to enforcement of respirator annual fit-testing requirements for the healthcare industry during the COVID-19 pandemic.

Employers must also continue to be mindful of OSHA's anti-retaliation provisions when dealing with workers who raise concerns about the safety and health conditions of the workplace. OSHA's Whistleblower Protection Program enforces the provisions of more than 20 industry specific federal laws protecting employees from retaliation for raising or reporting concerns about hazards or violations of various laws. Indeed, OSHA encourages all employees aggrieved by alleged employer retaliation to file a complaint as soon as possible to seek legal redress with a court of competent jurisdiction within the legal time limits - some of which may be as short as 30 days from the date of the alleged retaliation.

Employers' ADA Rights and Responsibilities During the COVID-19 Pandemic

Employers are also precluded under the ADA from terminating an employee because they have been diagnosed with COVID-19 or have displayed symptoms of the virus but may take other employment actions necessary to prevent spread of the virus at the workplace. The degree of latitude afforded to employers to make employment decisions during a pandemic depends upon whether the illness is more severe than the flu or the H1N1 viral outbreak during the spring/summer of 2009. If the CDC determines that the illness is severe, then the virus is

considered a "direct threat" to the workplace. The ADA allows an employer to take more stringent employment actions to address a direct threat (e.g., spread of a viral infection) from harming other employees in the workplace, up to and including, terminating the infected employee if no reasonable accommodation can be offered.

Currently, although the CDC recognizes that COVID-19 is unlike the flu or H1N1 virus, as of March 23, 2020, it has determined COVID-19 to only be of mild severity, considering that individuals age 65 and younger do not typically succumb to the virus absent any serious pre-existing or underlying immuno-deficiency or pulmonary health problems.

Although the CDC has not explicitly declared that COVID-19 is significantly more severe than the flu or H1N1 virus, at least symptomatically, the EEOC has recently determined that COVID-19 meets the definition of a "direct threat" and has cleared employers to take some measures consistent with such a determination, which is not surprising considering the CDC's recent acknowledgment of the community spread of COVID-19.

Specifically, the EEOC has cleared employers to take the following employment actions:

- Ask employees if they are experiencing influenza-like symptoms, such as fever or chills and a cough or sore throat (this information must be maintained as confidential medical records in compliance with the ADA);
- Take employees' temperatures - although it is important to note that those infected with COVID-19 sometimes do not display symptoms of a fever;
- Require sick employees to remain home;
- Encourage employees to telework as an infection-control strategy;
- Require employees to adopt infection-control practices, such as regular hand washing, at the workplace;
- Ask an employee why he or she has been absent from work if the employer suspects it is for a medical reason;
- Screen for COVID-19 in its pre-employment process, so long as this screening is applied to all incoming employees;
- Delay the start date of an applicant that is diagnosed with COVID-19 or has symptoms of the disease; and
- Withdraw a job offer if the employee has COVID-19 or symptoms of the viral infection in order to ensure the safety of the workplace.

The "severe" designation may change throughout the course of the COVID-19 pandemic. Employers are thus strongly advised to keep abreast of those changes and use best efforts to obtain public health advice that is contemporaneous and appropriate for their location. Employers must also make reasonable assessments of conditions in their workplace based on available up-to-date information.

Employer Rights and Responsibilities Under State Anti-Discrimination Laws

It is also important for employers to consider the impact of state laws during the COVID-19 pandemic, as they may further limit an employer's rights and/or expand its responsibilities beyond those prescribed by the federal laws explained above.

On March 19, 2020, New Jersey Attorney General Gurbir Grewal issued guidance to employers and business owners concerning New Jersey's Law Against Discrimination (LAD) within the context of the COVID-19 pandemic. AG Grewal's guidance primarily tracks the CDC's imperative that employers refrain from discriminating against employees based upon race, age, disability, and national origin stereotypes connected with the virus. Additionally, not only are employers precluded from taking adverse employment action (termination, suspension, etc.) based upon these protected categories in connection with the pandemic, AG Grewal explicitly reminded employers of their legal duty to take affirmative steps to ensure a workplace free from harassment in connection with the pandemic.

AG Grewal's guidance also appears to track the EEOC's guidance banning termination of employees based upon perceived (or real) symptoms of the virus. However, left unclear is whether his interpretation of the LAD would include the EEOC's green light for employers to delay an employee's start date, or withdraw a job offer, if they are diagnosed or display symptoms of COVID-19.

Important COVID-19 Take-Aways

As employers conduct business within a variety of industries, there is no one-size-fits-all rubric for navigating the statutory frameworks explained above. What is clear is that employers must continue to observe strictures of the ADA, and state laws such as the LAD. Moreover, the actions an employer may take will also depend upon the current scientific and medical information about the virus that is available at the time.

Another factor to consider will be the inevitable strains placed upon healthcare service providers that are currently being experienced and that are likely to increase over time. It is therefore recommended that employers proactively seek legal counsel (1) to develop a legally sufficient COVID-19 response plan, (2) prior to taking any final employment actions connected with the pandemic, and (3) to keep regularly abreast of the most current information available concerning the pandemic to limit potential liability by ensuring compliance with OSHA, the ADA, and other applicable state and federal laws.

Please contact Mr. Clymer or another member of the firm's employment practice with questions or to discuss the sufficiency of your COVID-19 response plan.

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