Coronavirus Alert

The Coronavirus and its Impact on Employers: FAQs on Employment Practices, Benefit Plan Issues, and Safeguarding Employees and the Workplace

Introduction

As companies continue to struggle with how to respond to the Novel Coronavirus 2019 (COVID-19) outbreak, an understanding of your obligations as an employer, as well as proactive and clear employee communications, can help your workforce navigate what has become a national ordeal. Our National Employee Benefits Practice—including our Health and Productivity, Absence, Disability, and Life, and Compliance Departments—put together FAQs that cover questions we have received from employers on their legal duties and obligations, how their existing benefit programs can help, and how to ensure a safe and healthy workplace. Given the rapidly evolving nature of this situation, we will continue to provide periodic updates on these issues.

Frequently Asked Questions (FAQs)

Absence and Disability Issues

Q. Can employers mandate quarantine (in absence of symptoms) for those coming back from high-risk travel areas? Will that time be paid?

A. Yes, and maybe.

An employer may require an employee who has recently traveled to high-risk areas to work from home to ensure the employee does not actually have the COVID--19 virus (incubation period is around 14 days). See EEOC's guidance opining that teleworking is an effective infection-control strategy. Additionally, the employer may require the employee to obtain a fitness-for-duty/return-to-work notice from their physician before returning to work. Any leave of absence required by the employer should be administered in conjunction with the employer's policies, and may be paid or unpaid.

Given the various community responses, it is important to remember that multiple paid sick leave laws require an employer to allow use of paid sick leave (or a PTO equivalent) for certain closures due to a public health emergency or where the employee's or a family member's presence may jeopardize the health of others because of a communicable disease, regardless of whether the communicable disease has actually been contracted. For example, Arizona's paid sick time law provides that an employee can use paid sick leave for: (1) closures of the employee's place of business due to a public health emergency; (2) an employee's need to care for a child whose school or place of care has been closed due to a public health emergency; or (3) to care for oneself or a family member when it has been determined that their presence in the community may jeopardize the health of others due to exposure to a communicable disease, regardless of whether they have actually contracted the communicable disease. The following jurisdictions have similar paid sick leave provisions: San Diego, California; Chicago, Illinois; Cook County, Illinois; Montgomery County, Maryland; Michigan; Minneapolis, Minnesota; St. Paul, Minnesota; New Jersey; New York City, New York; Westchester County, New York; Oregon; Pittsburgh, Pennsylvania (effective 3/15/20); Rhode Island; Vermont; Washington; Seattle, Washington; and Tacoma, Washington.

Employees actually infected by the virus and experiencing symptoms, as well employees with an infected family member for whom they are caring, may be entitled to FMLA leave, a state parallel, and/or state paid family and medical leave (if otherwise eligible). However, if the employee (or family member possibly needing care) is not exhibiting signs or symptoms of the virus, the employer should not count any of the leave against the employee's FMLA/state parallel/PFML allotment until there is evidence of a serious health condition actually rendering the employee unable to work (or requiring care of a family member).

Q. Can employers require medical screenings in order to be eligible to work onsite (e.g., manufacturing, healthcare)?

A. No. Generally, employer actions such as measuring an employee's body temperature is deemed a medical examination under the Americans with Disabilities Act (ADA). The ADA prohibits employee disability-related inquiries or medical examinations unless they are job-related and consistent with business necessity. Generally, a disability-related inquiry or medical examination of an employee is job-related and consistent with business necessity when an employer has a reasonable belief, based on objective evidence: (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. For more information, employers can review the EEOC's guidance here.

However, it is important to point out that an employer may require post-offer medical examinations to new employees if all entering employees in the same job category are required to undergo the medical examination and if the information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record.

Q. Many employers are mandating all employees work from home. How should they handle pay for employees who are unable to perform their job duties at home, or for non-exempt employees?

A. Whether to pay employees unable to perform their duties from home is up to the employer and dependent on multiple federal, state, and local laws. Employers must also consider any relevant policies they have and apply them to this circumstance accordingly. Further, as discussed herein, employers should consider certain the paid sick leave laws throughout the country, and whether FMLA, a state parallel law, or paid family medical leave may apply.

Q. As an employer, do we need to be tracking self-imposed quarantines and reporting?

A. It is a good idea for employers to track these items and they should be in contact with the CDC and local public health officials regarding potential exposures in the workplace. Employers should comply with reasonable requests from government agencies, while otherwise keeping employee private health information confidential.

Additionally, OSHA recordkeeping requirements mandate that covered employers record certain work-related illnesses and injuries on their OSHA 300 log. Although items like the common cold and flu are normally exempt, OSHA has deemed COVID-19 a recordable illness when a worker is infected with COVID-19 on the job. Employers can learn more by visiting OSHA's website.

Q. Would an employee who contracted COVID-19 at work, including work-related travel or visiting a customer or client worksite, be entitled to workers' compensation benefits?

A. Potentially. In general, illnesses or injuries arising out of or in the course of employment are industrial injuries. As such, an employee who contracts a contagious disease at work or while traveling for work could be deemed to have an industrial injury and may be entitled to workers' compensation. One hurdle for the employee may be whether it is possible to determine exactly where and when an employee contracted the contagious disease. However, in many states, laws tend to lean in favor of providing benefits when there are disputes as to the source of a contagious disease.

Benefit Plan Issues

Q: If an employee is placed on a mandatory quarantine in a hospital, would the group health plan pay for the hospital stay?

A: The group health plan will pay in accordance with its written plan provisions and cover benefits available under the terms of the plan. Generally, there are not pandemic or quarantine related exclusions in group health plan provisions, but employers should contact their insurance carriers or TPAs to better understand the benefits available under the terms of the plan for this situation.

Q. Do we need to consider HIPAA privacy rules in light of the spread of COVID-19?

A. Yes. The government recently issued a reminder to all employers that they must comply with the HIPAA Privacy Rule regardless of the COVID-19 outbreak. Additionally, the U.S. Department of Health and Human Services issued a reminder regarding the HIPAA Privacy Rule. Note that where an employee discloses to another employee that they are experiencing COVID-19 symptoms, this information does not technically fall within the definition of PHI under the Health Insurance Portability and Accountability Act (HIPAA). However, if the group health plan receives the same information in the course of processing a claim, that information would be PHI and protected under HIPAA. Regardless, employers should adhere to HIPAA's minimum necessary standards and only disclose this type of information to other employees with a legitimate need to know to process claims or administer employment related actions. Disclosure of de-identified or more general information is preferable for the workplace.

A HIPAA public health exemption exists where covered entities may, disclose PHI, without written patient authorization, to public health authorities legally authorized to receive it, for the purposes of preventing or controlling disease, injury, or disability. This exemption generally applies where a public health emergency has been declared and, to date, the Centers for Disease Control (CDC) have not yet made such a declaration.

Q. Should we maintain group health plan benefits for an employee on quarantine or on a leave related to COVID-19?

A. Eligibility for benefits should always be administered pursuant to the written terms of the plan. As set forth above, an individual diagnosed with COVID-19 may be eligible for FMLA leave, including the continuation of group health benefits. Employers should also have a policy in place for the continuation of group health benefits for individuals impacted by the outbreak but not otherwise eligible for FMLA leave, or those who exhaust FMLA leave and are not otherwise eligible under state law for continuation of benefits. Employers who don't have a benefits continuation policy in place should determine and document a policy moving forward that not only addresses this acute situation, but situations that arise in the normal course of employment.

Q. How are health insurance carriers addressing this issue?

The state insurance departments of at least four states have required or reached some agreement with health insurance carriers to waive cost sharing related to COVID-19 testing. See our Alert for more information on this topic. In addition, certain national health insurance carriers are deeming that coverage preventive so it does not impact HSA eligibility for those covered on a high deductible health plan (HDHP).

Q. Are there any other benefit plan resources we can provide our employees during this time?

A. Many employers sponsor an Employee Assistance Program (EAP) that can provide support and information for individuals experiencing the effects of the COVID-19 outbreak. Please check with your EAP provider for available resources for your workforce.

Q: Will our STD or LTD policy pay benefits if an employee is impacted by COVID-19?

A. STD and LTD policies do not generally contain exclusions for communicable diseases or a pandemic, but employers should review their policy provision and contact their carriers with specific questions about an employee's eligibility for benefits. Note that a short term disability policy would generally not pay during a quarantine period unless and until an individual displays symptoms.

Workplace Health & Productivity Issues

Q. What guidance is there to mandate preventive cleaning at facilities?

A. Employers should be working closely with facilities to ensure access to supplies and request tenant email distribution of updates on potential exposure. Employers should also review the CDC's Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019.

Additionally, there is the potential for OSHA violations if an employer exposes employees to COVID-19 without protective measures. OSHA's general duty clause requires employers to provide 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." The agency could look and determine whether it was recognized in the industry that exposure in the workplace was a hazard. If so, OSHA would expect the employer to take feasible measures to protect employees and could subject the employer to citation if an employer fails to take such action. One such measure an employer should take is complying with all guidelines from the CDC and other public health officials regarding preventative cleaning at facilities.

Q. If there is an exposure, what requirements do employers face to ensure appropriate cleaning protocols are enacted to protect employees?

Employers should identify all employees who worked closely with the exposed employee and send them home for a 14-day period of time to ensure the infection does not spread. When sending the employees home, it is important that the exposed employee is not identified by name to avoid any possible HIPAA or other confidentiality issues. Employers should also engage a cleaning company to undertake a deep cleaning of all impacted workspaces.

Additionally, if there is an exposure in the workplace, some employees may refuse to work, citing workplace danger. Employees may be entitled to refuse to work if they believe they are in imminent danger. Section 13(a) of the Occupational Safety and Health Act (OSH Act) defines "imminent danger" to include "any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act." OSHA discusses imminent danger as where there is "threat of death or serious physical harm," or "a reasonable expectation that toxic substances or other health hazards are present, and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency." Employers should complete a thorough analysis and determine whether this standard exists before determining whether it is permissible for employees to refuse to work. In any event, employers should carefully consider the issues involved here and come up with a plan that works for all parties involved.

Alliant Insight: Employers considering whether to mandate employees work remotely should contact their IT departments as part of those discussions to ensure that no issues will arise with system access.

Helpful Resources

https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html

https://www.eeoc.gov/facts/pandemic_flu.html

https://www.osha.gov/SLTC/covid-19/additional_resources.html

warranty of any kind. Alliant Insurance Services disclaims any liability for any loss or damage from reliance on this document. This document does not create an attorney-client relationship nor does it constitute attorney advertising.