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CLIENT ALERT NOTICE (#2)

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CORONAVIRUS IN THE WORKPLACE
PRACTICAL GUIDANCE FOR EMPLOYERS

Under the [Occupational Safety and Health Act](#) (“OSHA”) and similar federal, state, and local employment laws, employers have a general duty to provide employees with a workplace that is free from recognized hazards likely to cause harm. The Coronavirus pandemic, however, is forcing employers to make tough decisions that could possibly lead to legal liability.

This Alert is intended to provide practical guidance to employers on how to address COVID-19 illnesses and infectious disease concerns, in an effort to protect employees and maintain a safe and healthy workplace. To do so, employers must consider a variety of laws regarding job-protected leave, anti-discrimination, retaliation, and employee privacy issues. Employers must also factor in disease prevention measures, workplace attendance, policies concerning working remotely, and inquiries regarding an employee’s health status as well as the health of members in their family and/or household.

While so much remains unclear about COVID-19 with respect to the contagiousness of the disease and its effects, the Centers for Disease Control and Prevention (“CDC”) posted [Interim Guidance for Businesses and Employers](#) in March 2020, and employers should regularly check the CDC’s website for updates. Businesses can endeavor to prevent or decrease the spread of COVID-19 in the workplace by reducing exposure and transmission amongst employees, maintaining healthy business operations, and generally keeping the work environment clean and safe. Employers must be ready to respond to varying levels of disease transmission in a flexible manner, and be prepared to refine their COVID-19 response plans, as necessary.

Regular Prevention Reminders: By now, we are all familiar with the CDC and [World Health Organization](#) (“WHO”) guidance on washing hands frequently, practicing social distancing, and staying home if you are sick, but to prevent further infection, employers should continue to remind employees of these recommendations on a regular basis.

Employer Testing and Sending Employees Home: The [Americans with Disabilities Act](#)

(“ADA”) prohibits employers from making disability-related inquiries and/or requiring medical examinations, unless the employer: (1) can show that the inquiry or exam is job-related and consistent with business necessity; or (2) has a reasonable belief that the employee poses a “direct threat” to the health or safety of that individual or others - that cannot otherwise be eliminated or reduced by a reasonable accommodation.

With this in mind, employers may and should send employees home if they are exhibiting potential COVID-19 symptoms or they have knowledge that a member of the employee’s household has been diagnosed with the virus. Employers must prohibit employees from entering the workplace, or send employees home, if they have knowledge that the employee has been diagnosed with the virus. A decision of this nature would not violate the ADA for multiple reasons. First, if the illness ultimately turns out to be something like the common cold, allergies, or the flu, then it would not have constituted a covered disability under the ADA anyway. Second, even if the illness does not turn out to be a severe case of COVID-19, then the employer’s actions would be warranted under the “direct threat” analysis. As stated above, the ADA creates an exception or defense for employers concerning handling actions of an employee that pose a “direct threat” to the health or safety of that person or others in the workplace.

The “direct threat” analysis also comes into play with respect to medical testing, including testing employees for fevers. The ADA normally prohibits mandatory medical examinations of employees (including taking temperatures) and, in 2009, the EEOC issued guidelines about pandemic preparedness in which it cautioned employers that even a pandemic does not necessarily justify medical examinations. Nonetheless, with WHO declaring a pandemic, and the CDC now recommending that employers in certain geographical areas start checking employee’s temperatures, this type of evaluation may be deemed justified if the employer can show that the testing was necessary to respond to the “direct threat” of COVID-19.

It is important to note, however, that employers may not rely on speculation or unofficial information when making determinations about whether there is a “direct threat” in a particular circumstance and must treat all employees equally, regardless of race, color, gender, national origin, sexual orientation, religion, disability, and/or any other recognized protected class.

Returning to Work: Employers should encourage employees who exhibit or are suffering from any Coronavirus symptoms [e.g., fever, cough, and/or shortness of breath] or have a sick family member in their household, to notify their supervisor and to immediately go or stay home. The employee should follow the CDC guidance to determine whether the symptoms they are experiencing can be COVID-19 and follow the [recommended steps](#) to help prevent the spread of the disease to other members of the workforce.

Employees should be directed not to return to work until the [CDC’s criteria with regard to discontinuing home isolation](#) are met. In sum, the CDC recommends that people with COVID-19 symptoms who were directed to self-isolate at home and care for themselves, may discontinue self-isolation when: 1) at least three (3) days have passed since recovery [which has been identified as the time after respiratory symptoms such as cough and shortness of breath has improved and one no longer has a fever without the use of fever reducing medication]; and 2) at least seven (7) days have passed since the symptoms first appeared. Of course, if the employee is able to be tested, proof of a negative result, should be accepted. It is not advisable, however, to condition an employee’s return to work on a negative COVID-19 test since such a condition may violate aspects of the ADA.

Notification: While there is a fine line between guarding a person's medical privacy and protecting a company's workforce, the CDC recommends that employers make their employees aware of potential workplace Coronavirus exposure so that workers can seek medical advice and take appropriate steps to protect themselves and prevent further transmission. To meet the obligations under the ADA and other state and local employment laws, however, the employer should avoid disclosing the identity of that employee [even if co-workers are able to deduce who has been exposed based upon the circumstances or other identifying factors]. Employers are, therefore, advised to consult with counsel before crafting any notifications or communications regarding the infection in an effort to maintain confidentiality and avoid inappropriately revealing an employee's medical information.

Cleaning/Disinfecting: Employers, especially those dealing with a confirmed case in the workplace, should engage increased cleaning and disinfection efforts, both as a means of reducing the risk of further exposure, and as a proactive step to help manage employee and patron concerns, under the circumstances. The [CDC has issued guidance](#) on cleaning and disinfecting areas where symptomatic individuals have been present.

At the outset, the guidance recommends closing off areas used by the persons infected with Coronavirus and waiting as long as possible [at least 24 hours] before starting to clean and disinfect so as to minimize the potential for exposure to individuals performing the cleaning. Outside doors and windows should be opened, and ventilating fans could be used to increase circulation in the area. The cleaning staff should sanitize and disinfect all workplace areas, including surrounding offices, bathrooms, kitchens, and other common areas used by the infected person as well as shared electronic equipment, such as copiers, computers, phones, and postage machines. The focus should be on frequently touched surfaces, i.e. doorknobs, elevator buttons, on/off buttons, phone receivers, etc.

Avoid Discrimination & Retaliation: To prevent stigma and discrimination in the workplace, use only accepted guidance to determine the risk of a COVID-19 infection. Do not make determinations of risk based upon race, religion, color, or country of origin, and make sure to preserve confidentiality of employees or patrons who have been diagnosed with a confirmed Coronavirus infection. Employers cannot be expected to be omniscient when it comes to evaluating its employees or protecting the workplace, but they can be expected to continue to do what the CDC, OSHA, WHO, and state and local governmental agencies advise in terms of hygiene and sanitation. This includes sending home sick employees, and being flexible with policies, as circumstances require. If employers take the steps recommended by the various authorities, it would be difficult to argue that they have fallen short of their responsibilities.

Information about COVID-19 is changing daily, however, we will continue to monitor and provide updates as further guidance and regulations are released. As the country attempts to combat COVID-19, our attorneys are here to answer your questions and/or research any issues that may arise during the crisis. [Mitchell Pollack & Associates, PLLC](#) is also available to assist you, should you wish to update/revise your employee handbooks, bylaws, or rules and regulations to incorporate new provisions such as: a) what to do during a pandemic/health crisis; b) rules for working remotely and accessing confidential server data from home; and/or c) what is required to request leave under the FFCRA, FMLA, or any other Federal, State and/or local law. Please stay safe and if there is a particular topic that you are interested in, let us know and we will endeavor to compile the requested information.

By.: Eileen M. Burger, Esq.