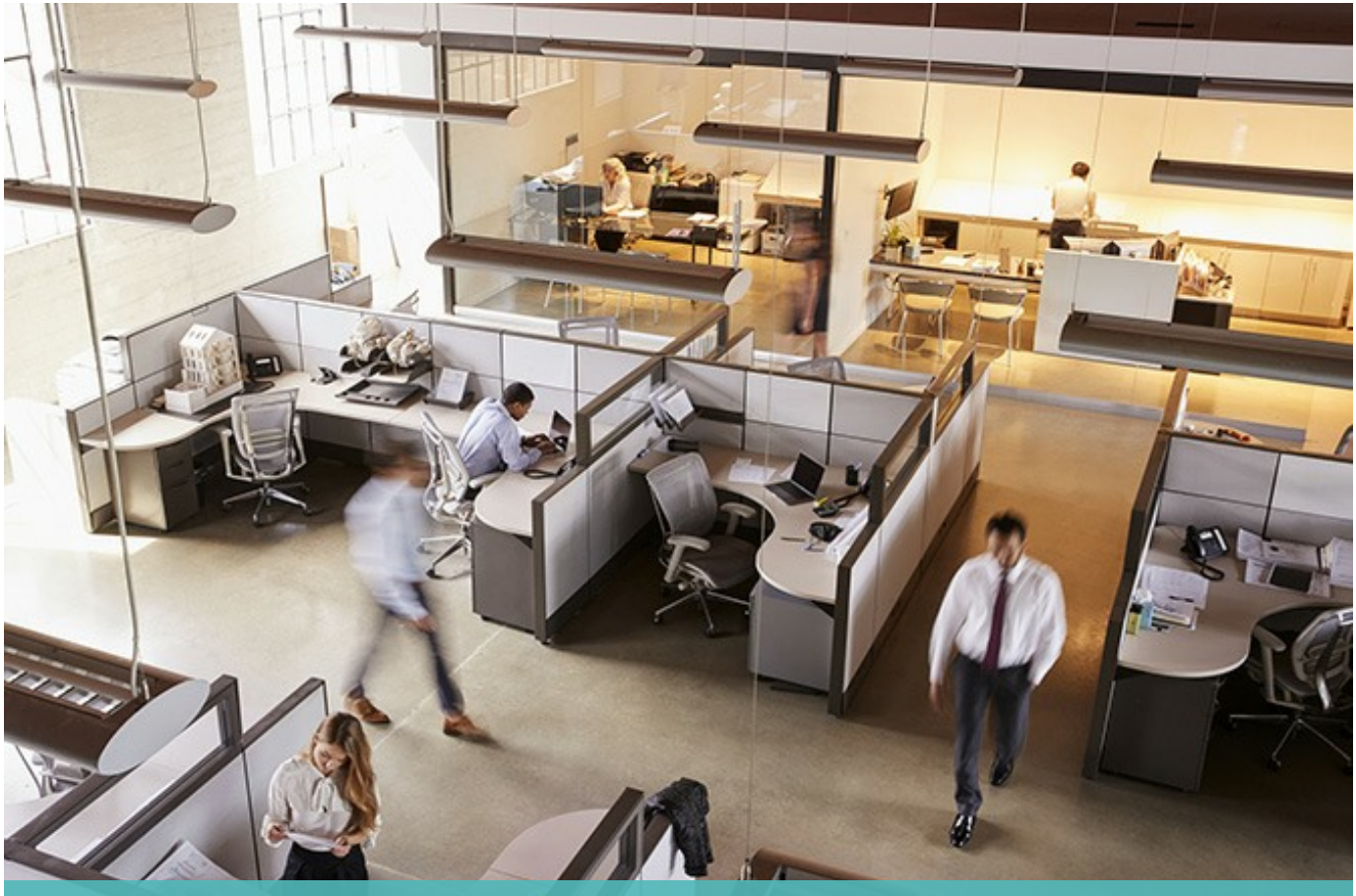


Coronavirus: What is an employer to do?



Ryan Neumeyer | Wednesday, January 29, 2020

As the United States evacuates citizens from Wuhan, China, and in the wake of news that it may be possible for the coronavirus to spread before a person is symptomatic, many employers are wondering what, if anything, they should be doing to keep their workplace safe. As when similar widespread health concerns have occurred in the past, such as the H1N1 flu in 2009, the Occupational Safety and Health Administration (OSHA) and the Equal Employment Opportunity Commission (EEOC) have provided guidance.

Workplace safety precautions during the coronavirus outbreak

Any time there is a widespread virus outbreak, OSHA advises employers to identify risk levels in workplace settings and implement appropriate response measures such as good hygiene, cough etiquette, the use of personal protective equipment and encouraging employees who are ill to stay home. In addition, employers should reduce the frequency, proximity and duration of contact between people (both employees and customers) to reduce the opportunity for spreading a virus. OSHA has suggested the following precautions be implemented in every workplace in the case of a pandemic:

- Encourage sick employees to stay home. Such absences may qualify for leave under the FMLA.
- Encourage employees to wash their hands frequently with soap and water, or use sanitizer if soap and water are not available.
- Encourage employees to avoid touching their nose, mouth and eyes.
- Provide customers and the public with tissues and trash receptacles, in addition to a place to wash or

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disinfect their hands.

- Encourage employees to cover their coughs and sneezes with tissues.
- Encourage employees to wash their hands or use hand sanitizer after they sneeze or cough.
- Avoid close contact with coworkers and customers (maintain separation of at least six feet).
- Avoid shaking hands and always wash hands after contact with others.
- Discourage employees from using other employees' phones, desks, offices or other work tools and equipment.
- Use email and phones to communicate as much as possible.
- Minimize meetings. When meetings are necessary, avoid close contact by keeping separation of at least six feet where possible. Ensure that there is proper ventilation in the meeting room.
- Reduce all visitors to the workplace as much as possible. If family visitors are allowed on site, the employer should consider restricting or eliminating that option during a pandemic.

ADA considerations during coronavirus outbreak

In addition to addressing safety concerns that will arise during a pandemic, employers must avoid potential liability as they respond to the crisis. With respect to job applicants, the EEOC notes that the Americans with Disabilities Act (ADA) operates normally to preclude all disability-related questions and medical exams until after a conditional offer has been made.

With respect to current employees, arguably, a pandemic would provide sufficient justification to require employees to receive a medical exam to determine whether they are infected. Further, the ADA always allows voluntary medical exams, provided that an employer complies with the confidentiality requirements of the ADA. The EEOC has recommended a model survey that could be issued to all employees in preparation for a pandemic. [The model survey is available here.](#)

It is possible that an infection could create a reasonable accommodation issue under the ADA if the sickness left the employee with a lingering condition that was disabling. It is more likely that those who are infected or suspected of being infected may be able to prove that they were regarded as being disabled. Practically speaking, infected employees must be treated the same as non-infected employees under the ADA, so long as they are physically and mentally able to effectively perform the essential functions of the job (with or without a reasonable accommodation). If an infected employee poses a direct threat to his or her own safety or the safety of others, however, the ADA does not prevent an employer from placing the employee on leave. An employer who has concerns about a threat posed by a specific employee should obtain solid medical authority regarding the risk posed by the employee before relying on health risks in making employment decisions.

Would FMLA apply in the case of a coronavirus illness?

Depending on the severity of an individual's illness, a coronavirus case most likely will be considered an FMLA-qualifying serious health condition that would allow an employee of a covered employer (generally, an employer with 50 or more employees) to take job-protected FMLA leave, with healthcare benefit continuation, to care for themselves or a close relative (a parent, spouse or child). Employers should make sure that they are up to speed on FMLA leave policies and procedures, including when to recognize a condition as FMLA-qualifying in the absence of a specific employee request for FMLA leave, and what forms to use to document FMLA leave (updated per the new FMLA regulations).

If an extremely cautious employer requires an employee to take time off work even though the employee

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does not have coronavirus or symptoms related to it, the time away from work cannot be charged as FMLA time or under the employer's sick leave policy.

Employers with questions or concerns about workplace safety policies, procedures or preparedness can contact the attorney listed below or any member of [McDonald Hopkins' labor and employment team](#).



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