

LEGALLY SPEAKING

by Bob Dunlevey and Nadia A. Lampton
Taft/Law



WORKPLACE DO'S AND DON'TS COVID-19 CORONAVIRUS

The recent outbreak and fears associated with the Coronavirus Disease 2019 (commonly referred to as COVID-19) are causing substantial disruptions to our everyday routines, impacting businesses, employees, schools, parents, children, and hospitals, just to name a few. Literally everyone across the globe has been or will be impacted! The effects of COVID-19 are being felt nearly everywhere across the world and present unique challenges for employers and their customers trying to maintain business operations amid threatened and actual shut-downs, travel bans, and the cancellations of major industry events and conferences because of the outbreak. In the midst of what the World Health Organization has named a worldwide pandemic, employers must still wrestle with the day-to-day decisions associated with running a business. Some of these challenges include the rights and obligations of employers to send home employees if they are ill or if a customer mandates their removal from the customer's workplace. Other issues arise

as to the rights of employees to refuse to work for fear of contracting the virus. Employers should consider the following guidance on the key issues our clients are facing:

Q. May a non-union employer send home an employee because the employee has signs of a virus?

A. Yes. And, depending on the circumstances, they should! Section 5 of the Occupational Safety and Health Act requires employers to furnish 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.” According to the CDC, most employees in the United States have a low risk of infection with COVID-19; however, employers should examine their business and workforce to determine whether they have workers who may have exposure risk. To the extent an employer identifies an increased risk such that a recognized hazard exists, the employer should take necessary steps to rid the workplace of such recognized hazards.

The Americans with Disabilities Act also does not prevent an employer from sending an employee home who has shown signs or symptoms of COVID-19, because under most circumstances, the temporary or transitory illness would not be considered a disability requiring accommodation. Employers should take care not to perceive this condition as a disability as perception alone will trigger the ADA. In addition, the illness may very well be a direct safety threat. However, employers should also use caution in this regard and not immediately jump to the conclusion that an employee has the virus; thus, employers should re-train supervisors on how to effectively respond (and not over-react or create panic in the workplace) when an employee presents him or herself at work

with a fever or difficulty in breathing, both of which are indicators that the employee should seek medical evaluation.

Q. May a unionized employer send home an employee performing work at the location of a customer when mandated by that customer due to the employee showing signs of illness?

A. The rights of the employer are regulated by the terms of the collective bargaining agreement (“CBA”). Recently, an NLRB ruling accorded broader authority to make unilateral changes to CBAs. Therefore, a broadly written managements’ right clause coupled with this recent decision may very well accord the authority to management to send an employee home temporarily, even in the absence of a specific provision permitting such. The sending home of the employee arguably is a temporary layoff for circumstances beyond the control of the employee. The layoff provisions customarily regulate when and for what reasons a layoff may occur. The layoff provisions may very well accord to an employer the authority. The no strike/no lockout provisions also address the rights of employees to stop work and the right of employers to exclude employees from working. Managements’ rights and layoff provisions trump the no strike/no lockout provisions. Finally, if the CBA does not contain a zipper clause foreclosing negotiations during the term of the CBA, the employer may wish to compel union negotiations on an expedited basis to secure its rights to deal with these circumstances. However, this should be a last resort – management should look to the management rights provisions first to assess their ability to send an employee home before resorting to a reopening of the contract. Currently, most employees and union leaders are amenable to working together to overcome this threat. Also, remember,

under many CBAs a customer's mandate to send an employee home does not justify the violation of the CBA. The expulsion of an employee from the premises at the customer's insistence may very well exceed its authority under the contract for services between the customer and the employer. But, the employer probably does not wish to disregard a customer's request.

Q. May I ask an employee not to come to work or report to a jobsite because of symptoms of Coronavirus or other illness?

A. Yes. This assumes that the employee is not covered by a collective bargaining agreement. If covered, the terms of the CBA will control, as discussed above.

Q. Must I pay the employee for the compensation lost due to being sent home?

A. No (as of now). A non-exempt employee customarily is paid for hours actually worked. Unionized employees, however, may be subject to CBA terms such as guaranteed hours per day which require compensation. Executive, administrative and professional employees paid on a salary basis generally must be paid for the entire week if the employee performs any work during the work week. Some employers, however, are compensating employees required to stay at home because it is more financially beneficial to do this than to shut down the facility due to the spread of the virus. Be aware – Congress is considering legislation now that may impact employer obligations in this regard. Thus, stay tuned for updates in this area.

Q. If the employee is sent home for an extended period of time is the employee eligible for unemployment compensation?

A. Yes. Unemployment in most states is accorded to employees who are ready, willing and able to work, but have been displaced through no fault of their own. The employer sending the employee home would be such a circumstance. The only exception may be that the employee is not able to work due to a medical condition, which under some circumstances would foreclose the benefit.

Q. May an employee refuse to come to work in order to avoid contracting the virus?

A. It depends. In the non-union setting, the employee is protected by Section 13 of the Occupational Safety & Health Act, which permits employees to refuse to work if there is an imminent danger. If the employee's place of work has confirmed cases of the virus, this may meet the definition of an imminent danger expected to cause death or serious physical harm. While this is a close question, the National Labor Relations Act, Section 7, accords a broader right to employees to combine together and to take action regarding wages, hours and conditions of employment. The withholding of services by the employees would be cloaked with the protections of Section 7 and an employer's discharge or discipline of that employee would constitute an unfair labor practice under most circumstances. However, if the employer has remote-work options, the employee would not be free to refuse working from home, assuming that the employer has such mechanisms in place. Employers should assess their workforce and business needs now to determine whether remote work is an option for certain employees.

Q. May the employer request that the employee undergo testing for Coronavirus or demand that an employee's temperature be taken?

A. Typically, no, because testing and taking the temperature of an employee are generally prohibited by the Americans with Disabilities Act because such would be considered a medical examination. Medical examinations and disability related inquiries are only permitted if the employer can illustrate that such is job related and consistent with business necessity, or if the employer believes that the employee is a direct safety threat to him or herself or others. But, ADA guidance states that if a pandemic has reached a community as assessed by state or local health authorities or the CDC, then employers may measure employees' temperatures – this is precisely where we currently stand. Thus, employers can measure employees' temperatures, but should use caution when doing so. For example, employers should use the least intrusive means possible to measure employee temperatures (such as radar or non-contact thermometers as opposed to oral or other types). Employers should also ensure to maintain confidentiality in the process by having one designated person measure the thermometer, in private, and should maintain the results in a private, secure file and location. Employers should not share the results with any other employees. If an employee has a fever, then that employee should be sent home and the employer should take additional steps to determine whether that particular employee came into contact with others, but should do so without exposing the name of the affected employee.

Q. May an employer stop an employee from wearing a mask?

A. Yes. Unless the employee is actually treating someone who is infected with the virus, justification does not exist for use. Moreover, OSHA's Respiratory Protection Standard only addresses the use when it is necessary to protect the health of the employees and masks have not been shown conclusively to protect the health.

Employers should be careful, though, not to prohibit such a practice out of hand. If an employee requests to wear a mask, the employer should take steps to determine whether the request is a request for a reasonable accommodation under the ADA, such that the employer is obligated to engage in the interactive process. If the request is one solely related to the avoidance of contracting COVID-19, then the request is not related to a disability and would not be protected by the ADA.

Q. May the employer apply its PTO policy to an employee's forced time off?

A. Yes. Assuming that the PTO policy does not forbid the application of PTO for such circumstances, the employer may apply such. But, this may impact employee morale.

Q. Does a force majeure clause in the company's contract to perform services provide an excuse for not performing the services?

A. Probably not. A force majeure clause excuses a party from performing when circumstances arise beyond its control – i.e., acts of God – earthquakes, fire. Some clauses do not require a complete inability to perform, only that the performance be inadvisable or commercially impracticable. Most of these clauses are narrowly drawn and will not permit an employer to get out from a contract for services just because the virus epidemic has arisen. In addition, most of these clauses require timely notice, which should not be ignored. In any event, the specific contract language should be examined.

Q. May an employee use the Family and Medical Leave Act and stay at home in order to avoid contracting the virus?

A. Not coming to work for fear of exposure to the virus is not a qualifying event.

Q. Is OSHA requiring infected employees to log the Coronavirus as a workplace illness?

A. Yes. For employers with 10 or more workers, a log must be kept for illnesses that require medical treatment beyond first aid or keeps a worker away from work for at least one day. In recent guidance issued, the COVID-19 Coronavirus is considered an infectious disease such as Tuberculosis or Hepatitis A. But, remember the illness must be work related and this may be difficult to determine.

Conclusion

While the above guidance will assist employers in dealing with these thorny issues, common sense and civility should be the guiding principles impacting how employers and employees adjust to this unfortunate circumstance. Please be reminded that this is an overview of developing legal issues. It is not intended to be and should not be construed as legal advice.

For more specific information, contact **Bob Dunlevey**, Board Certified Specialist in Labor and Employment Law, at (937) 641-1743 or **Nadia A. Lampton** at (937) 641-2055.