CORONAVIRUS – KEY ISSUES FACING HEALTH CARE EMPLOYERS

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With concerns over the spread of a novel coronavirus ("COVID-19"), hospitals and health care providers face a unique situation as employers and care providers. As a result, health care employers will need to navigate a variety of legal obligations in preparing for and responding to potential COVID-19 cases, as well as potentially ill and exposed employees. Further, this blog post does not address state-specific considerations.

Please note that advice and recommendations from the CDC, OSHA, WHO, state departments of health and others in the industry are rapidly evolving, and health care employers must stay abreast of those recommendations. This article does not address infection control measures, treatment, testing or other non-employment law considerations.

PREPARING FOR COVID-19

Even before potential exposure has occurred, hospitals and health care providers should prepare for potential COVID-19 cases and for potentially ill and exposed health care personnel:

- The CDC recommends appropriately training and educating health care personnel, and ensuring that they have practiced the appropriate use of personal protective equipment
- The CDC has issued guidance regarding, among other important topics, Infection Control in Healthcare Personnel, Interim Guidance Healthcare Facilities: Preparing for Community Transmission of COVID-19 in the United States and guidance related to steps that health care entities can take to prepare for COVID-19. These documents suggest steps that health care providers can take in order to protect the workforce.

PROVIDING A SAFE WORKPLACE FOR EMPLOYEES

Workers have a right to a safe workplace. Regulations issued under the OSHA recognize that "as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace." 29 C.F.R. §1977.12(b)(1). As a result, the fear of a mere potential risk does not provide protection to the employee from discipline.

However, when a workplace danger presents the risk of serious injury or death to the employee, the employee may "refuse in good faith to expose himself to the dangerous condition." 29 C.F.R. §1977.12(b)(2). The circumstances where employees would be protected are:

- When an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace;
- There is no reasonable alternative than to refuse in good faith to expose themself to the dangerous condition;
- The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances, then confronting the employee, would conclude that there is a real danger of death or serious injury;
- There is insufficient time, due to the urgency of the situation, to eliminate the danger through resorting to regular OSHA enforcement channels; and
- The employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

29 C.F.R. 1977.12(b)(2). OSHA recently issued guidance on preparing workplaces for COVID-19. In addition, some of the OSHA safety standards applicable to COVID-19 are:

- OSHA's Personal Protective Equipment standard, 29 CFR 1910.132, provides additional information about how to select and use appropriate personal protective equipment, training and other requirements;

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- OSHA's Respiratory Protection standard, 29 CFR 1910.134, covers the selection, use and fit of appropriate respirators, including respirators; and
- Employers must ensure that they comply with OSHA's Bloodborne Pathogens standard, 29 CFR 1910.1030, to protect workers who may be exposed to blood or other potentially infectious materials.

Additional information can be found at the OSHA COVID-19 Website and the CDC's Interim Infection Prevention and Control Recommendations for Patients with Confirmed Coronavirus Disease 2019 (COVID-19) or Persons Under Investigation for COVID-19 in Healthcare Settings.

In the event of potential employee exposure, the CDC has issued interim guidance for health care workers related to potential exposure in a health care setting.

ADA – DISABILITY? REGARDED AS? REASONABLE ACCOMMODATION? DIRECT THREAT?

It is possible that an actual COVID-19 infection would qualify as a disability under the ADA. But, even if there is no actual infection or impairment, employees who might be "*regarded as*" being infected (or having a "*record of*" infection) could be protected under the ADA. To that end, employers should continue to apply policies, including leave and reasonable accommodation policies, equitably.

In addition, employers need to consider:

- Employee confidentiality;
- The appropriateness of an employee medical exam if exposure to COVID-19 may have occurred;
- Inquiry as to an employee's recent travel;
- What can or should be said to others in the facility about an employee's condition;
- Whether to engage in the good-faith interactive process to identify a reasonable accommodation;
- Telework from home as a reasonable accommodation, and in the context of limiting employee exposure;
- Only when an employer can demonstrate that a person with a disability will pose a "direct threat" can it lawfully exclude the individual from employment or other employment-related activities;
- Whether the employee who is sent home be paid; and
- Referring to the EEOC's guidance on employment issues involving pandemic flu, which contains an excellent list of questions and answers that employers face in dealing with infectious disease issues in the workplace. The EEOC has also weighed in on Coronavirus specifically, as well, and has stated that "The ADA and Rehabilitation Act rules continue to apply, but they do not interfere with or prevent employers from following the guidelines and suggestions made by the CDC about steps employers should take regarding the Coronavirus."

FMLA – SERIOUS HEALTH CONDITION?

The FMLA protects employees who have a "*serious health condition*" or are "*needed to care for*" a family member who has a serious health condition. An employee who has no symptoms of disease likely would not have a serious health condition that would entitle the employee to FMLA leave. However, it is likely that an employee who has COVID-19 would have a serious health condition as that term is defined in the FMLA.

The Department of Labor has weighed in and has provided a guidance document related to COVID-19 and other public health emergencies under the FMLA.

FLSA – WAGE AND HOUR CONSIDERATIONS

The Department of Labor has also weighed in on COVID-19 and other public health emergencies under the Fair Labor Standards Act.

HIPAA – PATIENT AND EMPLOYEE PRIVACY

Unfortunately, health care workers may have a new-found curiosity in patient health information, including the health status of their co-

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workers. To avoid violations and problems:

- Remind employees of their obligations under HIPAA;
- Ensure that access to protected health information is secure; and
- Impose appropriate discipline in the event of a privacy breach.

NLRA – EMPLOYEE PROTECTED RIGHTS AND CONCERTED ACTIVITY

The National Labor Relations Act provides protections for private non-supervisory employees to engage in concerted activity for their mutual aid and protection. Indeed, there is a specific provision in the law that allows employees individually or as a group to cease work "*in good faith because of abnormally dangerous conditions... at the place of employment.*" This means that private employees who in good faith believe that their working conditions are abnormally dangerous would be protected if they walked out because of that belief. Private employers should therefore consider:

- The employee's expressed reasons for refusing to work;
- The employee's right to cease work even if there is a collective bargaining agreement that contains a no-strike clause;
- The steps taken to ensure that the workplace is safe;
- Urging employees to return if conditions are not abnormally dangerous;
- Getting all the surrounding facts before disciplining or discharging employees;
- Suspending an employee pending investigation; and
- Obtaining willing replacements for workers who refuse to work.

Besides the protected right to cease work, private employees have the right to privately or publicly complain about wages, hours and working conditions (e.g., COVID-19 preparedness). Employers should consider:

- That non-defamatory statements on social media or other media about safety issues or management's lack of preparedness would likely be protected;
- That public demonstrations that do not disrupt work or block ingress or egress to the facility (whether or not a union is involved) would likely be protected;
- Caution before taking any adverse action against an employee for expressing safety-related views and opinions;
- Whether to suspend an employee pending investigation of all the surrounding circumstances; and
- That unions and labor organizations may use the current COVID-19 crisis to urge changes and improvements to protect employees and patients.

GOVERNMENT HOSPITALS AND FREE SPEECH

Although government hospitals are not covered by the NLRA, all of their employees, including managers and supervisors, enjoy free speech protections under the First Amendment of the U.S. Constitution. But of course, those rights have limits, including:

- The speech must be about matters of public concern;
- The speech must be in a public forum; and
- The speech (or other activity) must not disrupt patient care or normal operations of the facility.

Employees of government hospitals also may be protected under state laws governing public employees.

THE BOTTOM LINE FOR HEALTH CARE EMPLOYERS

We continue to learn more about COVID-19 and the impact it will have on our communities. As we have seen, official guidance is subject to

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rapid change and the CDC's COVID-19 website should be accessed frequently to ensure procedures are up to date. And as with all developing issues, employers facing COVID-19 should consult with legal counsel as they work to navigate these complicated issues.

If you have any questions on issues discussed in or related to this post, please contact Mary Kate Liffrig at mliffrig@hallrender.com or (720) 282-2033, or your regular Hall Render attorney.

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