Coates' Canons Blog: COVID-19: Monitoring Employee Health at Work

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We've all heard the stories about travelers having their temperatures taken at the airport. COVID-19 may soon be circulating widely enough in North Carolina that there will be pressure on employers to monitor the health of employees who report to work. Monitoring employee health can take a number of forms. This blog post will discuss the lawfulness of each in turn.

Background

Coronaviruses are a large family of viruses, some of which infect humans and some of which infect animals. The most familiar coronaviruses are that those that cause the common cold. The novel coronavirus that is circulating worldwide and has now been declared a pandemic was first detected in Wuhan, China in December 2019. It has now been identified worldwide with an escalating number of cases in North Carolina and throughout the United States. The disease the virus causes has been named "coronavirus disease 2019," abbreviated "COVID-19".

The new coronavirus, or COVID-19, is a respiratory illness that spreads from person to person, as well as when a person comes into contact with the virus on surfaces such as door handles and equipment. In this respect, COVID-19 is much like the common cold or flu, only the symptoms of this virus appear to be more severe, at least in some people.

Those who are actively sick with COVID-19 can spread the illness to others with whom they are in close contact. The CDC defines close contact as:

- being within approximately 6 feet of a person with COVID-19 for a prolonged period of time, such as when caring for, living with, visiting, or sharing a health care waiting area or room with a person with the new coronavirus; or
- having direct contact with infectious secretions of a person with the new coronavirus (for example, being coughed on).

According to The Johns Hopkins Center for Health Security, patients who become sick with COVID-19 most often present with a cough, fever, and in the more serious cases, an underlying viral pneumonia. In China, approximately 80% of those with illness developed mild symptoms, 15% required hospitalization and 5% became critically ill. COVID-19 has a 1-14 day incubation period, with most patients becoming symptomatic around Day 5. Some people who get infected have no symptoms. Johns Hopkins says there is some evidence that some people who are infected but do not develop symptoms can pass along their infection to others. If true, this will make public health's ability to control the disease vastly more difficult. The CDC reports that the virus appears to be able to spread easily and continuously.

It is clear that the workplace has the potential to be a place where COVID-19 spreads. That is why North Carolina public health officials are requiring individuals with COVID-19 to isolate at home (or in the hospital, depending on how sick they are) until they are better and no longer pose a risk of infecting others.

But what about that time before an employee is diagnosed with COVID-19? Can an employer ask its employees about their health? Can it take an employee's temperature? Can it send someone home for a single cough?

Monitoring Employee Health: Questioning Employees

An employer may regularly monitor its employees' health. Monitoring can take a number of forms. The least intrusive

might be to ask employees whether they have a fever, chills, cough, or sore throat. Those are among the symptoms of COVID-19. They are also, however, the symptoms of seasonal flu and sometimes of the common cold. But it doesn't matter whether the employee or the employer thinks the symptoms belong to COVID-19 or are "just a cold." In either case, the employee may be sent home and told to stay home until he or she is well. In a 2009 guidance geared toward the H1N1 flu, the CDC recommended that employers ask this of all employees at the start of each workday or the start of each shift.

Asking employees whether they have a fever, chills, cough, or sore throat does not violate the Americans with Disabilities Act (ADA). The ADA prohibits employers from asking current employees questions about a disability. In its Enforcement on Disability-Related Inquiries and Medical Examinations of Employees, the EEOC says that a disability-related inquiry is "a question (or series of questions) that is likely to elicit information about a disability." Fever, cough, sore throat and the like are not usually symptoms of a disability, which is why in an earlier guidance about pandemic preparedness, the EEOC expressly says that such questions do not violate the Americans with Disabilities Act.

If an employee admits to or displays any such symptoms, he or she may be sent home and told to stay home until they are well. There is no right to work when sick. Requiring an employee who is exhibiting symptoms of a cold, the flu or COVID-19 does not violate the ADA. In its Interim Guidance for Businesses and Employers, issued in response to the COVID-19 outbreak, the CDC specifically recommends that employees who have symptoms of a respiratory illness stay home and not come to work until they are free of fever (that is, their temperature is below 100.4° F or 37.8° C using an oral thermometer), and free of signs of a fever, and any other symptoms *for at least 24 hours*, *without the use of fever-reducing or other symptom-altering medicines* (e.g. cough suppressants).

In addition, the CDC recommends that employers *separate and send home immediately* any employees who appear to have respiratory illness symptoms (that is, cough, shortness of breath) when they arrive at work or develop such symptoms during the workday (note that it also suggests providing alcohol-based hand sanitizers that contains at least 60-95% alcohol throughout the workplace).

Taking Temperatures

Employers may also take the temperature of all employees reporting to work. Normally, the taking of an employee's temperature is considered a medical examination under the Americans with Disabilities Act. As noted above, the ADA prohibits employers from making medical inquiries of current employees. It also prohibits employers from requiring employees to undergo medical examinations because, like medical questions, medical examinations may disclose the existence of a disability. So how is it that it could be lawful for an employer to take its employees' temperatures?

According to the EEOC, seasonal flu is not a disability, so monitoring questions and the taking of temperatures that are designed to identify employees with the flu do not violate the ADA. COVID-19 is not seasonal flu nor is it pandemic flu, but on its website, the EEOC refers employers with questions about COVID-19 to its 2009 document on pandemic flu preparedness. In that guidance, the EEOC says that in a pandemic, an employer will be permitted to ask any health questions and to take an employee's temperature if the employer has reasonable belief that the virus causes severe illness and is a direct threat to other employees or the public. Note that there are no federal or state requirements that the person asking questions about employees' health, taking temperatures or deciding who should be sent home be medical professional.

The caveat to the EEOC's blessing of the health monitoring of employees is that the decision that a serious disease is present within a local community is one that must be made by state or local health authorities – it is not one that can be made by an individual employer and not one that can be made in anticipation of the actual spread of disease.

As of the date of this blogpost, there are forty cases of COVID-19 in North Carolina in sixteen different counties. As of this date, therefore, it would premature for every North Carolina local government to begin taking the temperature of its employees – even of those employees who are exhibiting symptoms such as cough or sore throat. These employees should be sent home. In those counties with a larger number of cases, local government employers should consult with their local health director to confirm a local outbreak before beginning to take their employee's temperatures.

Can We Claim Business Necessity to Take the Temperatures of Employees Who Are in Close Contact with the Public?

An exception to the rule that employers may not make medical inquiries or require medical examinations is set forth in

subsection (c) of the ADA regulation at 29 CFR § 1630.14:

A covered entity may require a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity.

Think of the many positions in local government that involve daily interaction with members of the community: law enforcement officers, paramedics, city and county clerks, registers of deeds, zoning and building inspectors, social services case workers, parks and recreation instructors – not to mention public school teachers – just to name a few. Would it not perhaps be job-related and consistent with business necessity to take the temperatures of those employees who interact with the public on a regular basis even before COVID-19 becomes widespread? After all, a measure like this could help prevent the disease from spreading within the community.

Close contact with the public has never been the basis for finding a medical inquiry or examination to be job-related and consistent with business necessity. The argument for allowing temperature-taking of employees with a high degree of public interaction would be that such employees would constitute a direct threat to the health and well-being of the public if they were to be unknowingly contagious. But the EEOC would likely reject this reasoning. As it notes in its guidance on pandemic preparedness (and remember that it was drafted in anticipation of a H1N1 pandemic),

If the CDC or state or local public health authorities determine that the illness is like seasonal influenza or the 2009 spring/summer H1N1 influenza, it would not pose a direct threat or justify disability-related inquiries and medical examinations. By contrast, if the CDC or state or local health authorities determine that pandemic influenza is significantly more severe, it could pose a direct threat. The assessment by the CDC or public health authorities would provide the objective evidence needed for a disability-related inquiry or medical examination.

So if the local health director were to determine that the COVID-19 were widespread in a jurisdiction, an employer would be able to take the temperature of public-facing employees. But that is the same rule as it is for taking the temperature of all employees. There are no “early” exceptions for those local government employees with regular interaction with the public.

Sending a Symptomatic Employee Home

An employee exhibiting signs of respiratory illness or answering affirmatively to questions about whether they are experiencing fever, cough, sore throat or chills may be sent home, as may an employee whose temperature is taken and is found to be higher than 100.4 degrees. These employees may be told to stay home until they have been symptom-free or fever-free for twenty-four hours. Sending employees home, however, raises some additional issues, such as whether they can or should be allowed to work from home, whether an employer must pay employees who have been sent home sick, and what if anything to tell other employees with whom the sick employee works. An employee being sent home with respiratory symptoms or because they have a temperature is not necessarily sick with COVID-19. So an employer’s usual policies about working from home while sick, use of paid leave and employee medical confidentiality will apply. But let’s review some of the basic legal principles governing these situations anyhow.

Working from Home

Whether or not an employee can and should work from home will be different for different employees. Some work, mostly office work that is done on the computer, is easily accomplished remotely. Other work, such as public safety and public works, must almost always be done at the worksite and in the community. The law permits employers to allow those who can work from home to do so even if other employees may not. The law also allows employers to allow only some from the group whose work is functionally appropriate for working from home to do so and to tell others that they may not. It is easy to imagine, for example, that a supervisor may prefer probationary employees or those on a performance improvement plan to work under direct supervision and may not wish to allow them to work remotely.

Paying Employees Who Have Been Sent Home

From an employee's standpoint, the ability and the permission to work from home means that the employee will not lose any pay. From an employer's perspective, it means the work will get done even if the employee isn't physically present. When an employee can be trusted to work from home, all parties benefit.

Employees whose jobs do not allow them to work remotely or employees whose symptoms prohibit them from working remotely may be allowed or required to use accrued paid sick leave, accrued paid vacation leave, or compensatory time off accrued under the Fair Labor Standards Act (FLSA) if a nonexempt employee, or accrued under an employer's policy for exempt employees. With the exception of the FLSA comp time, each individual employer's policy controls which kind of accrued paid leave may be used in such a situation and which order they must be used in – and even with respect to FLSA comp time, an employer may require that it be used before accrued sick or vacation leave.

Nonexempt employees who do not have any accrued paid leave do not have to be paid as the FLSA only requires employers to pay nonexempt employees when they physically work.

Exempt employees do not have to be paid if they do not work for an entire workweek. Where an exempt employee works for less than a full workweek, he or she may be required to use accrued paid leave for the time that they are absent. If they do not have accrued paid leave, the FLSA allows a public employer to deduct the time lost from the employee's salary on a pro-rata basis. This is an exception from the usual rule that is available only to government employers.

What May Be Disclosed About a Co-Workers Illness to Other Employees?

In general, an employer may not disclose any information about a specific employee's health to anyone else in the workplace. The confidentiality of an employee's health information is governed by the Americans with Disabilities Act, and although it is also covered by the confidentiality of North Carolina's various personnel privacy statutes, where there is a conflict, the ADA's rule prevails. For example, under N.C.G.S. §§160A-168(c)(3) and 153A-98(c)(3), the city and county personnel privacy statutes, those in an employee's supervisory chain of command may have access to an employee's entire personnel file. The ADA effectively amends that section inasmuch as it prohibits supervisors and managers from learning anything about an employee's medical condition except for information "regarding necessary restrictions on the work or duties of the employee and necessary accommodations." Similarly, the ADA allows that "first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment."

Nevertheless, so long as an employer does not reveal who is sick, it may advise co-workers that they have been exposed to a suspected or confirmed case of COVID-19 and refer them to their health care providers for follow-up. Where there has been close contact between an infected employee and co-workers – that is, the infected employee and a co-worker have been within six feet of each other for ten minutes or more – the employer may require co-workers to work from home for the next two weeks to better protect the rest of its workforce and the public.

Links

- www.centerforhealthsecurity.org/our-work/publications/confronting-the-coronavirus-perspectives-on-the-response-to-a-pandemic-threat
- www.cdc.gov/coronavirus/2019-ncov/about/transmission.html
- www.law.cornell.edu/uscode/text/42/12112
- www.eeoc.gov/policy/docs/guidance-inquiries.html#4
- www.eeoc.gov/facts/pandemic_flu.html
- www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html
- www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm
- www.law.cornell.edu/cfr/text/29/1630.14
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- www.ncleg.net/enactedlegislation/statutes/html/bysection/chapter_160a/gs_160a-168.html
- www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-98.html