

Considerations for pandemic preparedness

David A. Kushner
Willcox Savage

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With the Ebola outbreak dominating headlines in late 2014, and with this year's H3N2 flu strain reaching "epidemic" status, many well-intentioned employers have asked just how far they can go to protect their workforce from potential "pandemics."

Although guidance on pandemic response is relatively limited, the Americans with Disabilities Act creates a number of limitations on possible employer inquiries and responses to a pandemic. The ADA generally prohibits employers from requiring medical examinations or making disability-related inquiries, except when such examinations or inquiries are job-related and consistent with business necessity.

Likewise, an employer cannot normally exclude a worker from the workplace for disability-related reasons unless the worker poses a "direct threat" to the safety of the worker or others. Whether an employee poses a direct threat is an extremely fact-specific inquiry, and must not be made based on the employer's subjective fears.

Typically, an employer must make a direct threat determination related to a pandemic based on current and objective medical evidence, such as from the Centers for Disease Control.

While every workplace and every potential pandemic is different - and employers should seek medical and legal advice before taking action to prepare for or respond to a pandemic, there are a number of steps that most employers can safely take when confronted with a pandemic or other significant outbreak. In 2009 after the worldwide H1N1 flu pandemic, the EEOC put out a technical assistance document on pandemic preparedness, in which it specifically authorized employers to take the following actions under appropriate pandemic circumstances:

- **Requesting information from employees:** During a pandemic or similar high-risk outbreak, an employer can typically ask an employee whether they are experiencing symptoms of the condition subject to the outbreak. For example, during a flu pandemic, it would be lawful for an employer to ask employees who appear sick or who call in sick, whether they are experiencing flu-like symptoms.

- **Sending employees with flu-like symptoms home for the duration of a short-term illness:** Because flu-like symptoms do not typically rise to the level of a disability, and because flu-like symptoms may pose a direct threat during a flu or similar pandemic, during a pandemic an employer may lawfully require workers with flu-like symptoms to leave the workplace.
- **Asking employees about potential exposure:** During an outbreak like the Ebola scare, it is generally permissible for an employer to ask employees who have traveled whether their travel included locations that are subject to health advisories.
- **Requiring telework:** During a sufficiently severe pandemic outbreak, the EEOC has suggested that an employer can require teleworking as an infection-control strategy. However, employers must be careful about choosing the employees who will be required to telework in a non-discriminatory manner, and should consult legal counsel before taking broad action.
- **Requiring handwashing and other personal protective measures:** An employer may institute policies requiring its workforce to wash their hands during the workday, or to take other similar protective measures.

While the foregoing employer actions would generally be permissible during a pandemic, employers should not take the following actions during a pandemic without first seeking medical and legal advice.

- **Mandatory temperature checks:** A mandatory employee temperature check is considered a medical examination under the ADA, and should not be required without first seeking legal advice.
- **Required vaccines:** Likewise, with very limited exceptions, an employer may not require employees to take any particular vaccine or medicine.
- **Terminating or punishing employees who are deemed exposure risks:** One of the main purposes of the ADA is to prohibit employers from taking adverse employment actions against employees based on unfounded fears about an employee's condition. Thus, there are very limited circumstances in which an employer can terminate an employee based on that employee's exposure or risk of exposure. An employer should contact employment law counsel before taking any adverse actions against an employee on the basis that the employee has contracted a condition subject to the pandemic.

David A. Kushner is a partner in the employment law group of Willcox Savage. He can be reached at dkushner@wilsav.com or 628-5668.