Insights

How Much Can Employers Control Employees' Summer Travel During COVID-19? A lot.

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As the country begins to reopen and employees begin taking summer vacations, employers are receiving more questions and having to make more decisions about how to handle employee travel and return to work issues due to COVID-19. Can employers require employees to notify them of their travel plans, even if just domestic travel? Can employers prohibit employees from any out of state travel? Can employers require employees to self-quarantine at home following travel? And does the employer have to pay the employee if it requires the employee to self-quarantine?

With respect to whether employers can require employees to notify them of their travel plans, the answer is not only “yes”, but also that employers should require this notice from their employees. Employers are currently (and rightly) focused on meeting their obligation to create a safe workplace under the Occupational Health and Safety Act (OSHA) due to COVID-19 by disinfecting workplaces, taking temperatures, requiring face coverings, and encouraging social distancing, in addition to other efforts. Asking for travel to be reported is yet another beneficial step employers can take to protect their employees. In addition, it allows the employer to evaluate whether it has heightened responsibilities due to the place of travel. For example, is the employee traveling to a destination that is seeing a high incidence of COVID-19 cases, or is the nature of the travel or activity such that the chance of exposure is significantly higher? One final piece of advice here is to be consistent. If you are going to ask some employees about travel, ask all in order to avoid the potential for discrimination claims.

This brings us to whether employers can prohibit employee travel. Maybe, but this approach is not advisable, and in some situations could be unlawful. Some states, such as California and New York, have laws prohibiting employers from restricting lawful employee activity outside of the workplace and outside of the scope of employment. In addition, public employers certainly have additional legal considerations, including whether limiting the right to travel invokes free speech issues or violates other constitutional rights. A further concern would be administering this policy in a non-discriminatory way. One additional legal concern is how a travel ban would impact an employee’s right to take medical leave under the Family and Medical Leave Act to care for a family member who is located in another state. There are also business considerations at play. Is such a ban necessary, particularly if employees are largely working remotely? How would such a policy impact employee morale and mental health, especially following the months-long shelter-in-place that most have been subjected to? What are the business reasons for such a policy? Is the goal to ensure there are sufficient staff healthy enough to continue working? How would such a policy affect employee retention? Given all of these legal and business issues, the better approach likely would be to educate employees on the risks of travel and advise employees regarding the employer’s policy for returning to work post-travel, which may include completion of a health questionnaire or a period of self-quarantine.

Can an employer require employees to self-quarantine post-travel? Yes, although the employer may want to balance the risk presented by such travel given the means of transportation, location to which the employee traveled, and prevalence of COVID-19 in that area with the organization's business need for workers to return to the workplace, a workplace that the employer is likely taking significant steps to make as safe as possible. This decision can also be impacted by the nature of a particular employer's workplace, including the degree of contact with others and whether the employee is interacting with vulnerable populations. A good approach here would be to conduct a risk assessment based on the U.S. Centers for Disease Control's (CDC) guidance to determine whether self-quarantine is recommended based on the travel involved.

Finally, is an employer required to pay an employee whom it requires to self-quarantine? It depends. First, the employer should consider whether the employee is an exempt or non-exempt employee under the Fair Labor Standards Act. If non-exempt, the employer must only pay the employee for hours the employee works. However, the employer should still consider what rights to pay the employee may have under the employer's policies. If the employee is an exempt employee, only full workweeks can be unpaid, and the employee cannot perform any work during that workweek or must be paid for the entire workweek. Again, however, the employer should consult its policies, as it may have the ability to require the employee to use his or her available paid time off or vacation. Another consideration here would be whether the employee has an employment agreement or there is a collective bargaining agreement that impacts whether the employee must be paid during the employer-mandated time off. Further, some employees may be able to work remotely while self-quarantining, which may be a win-win.

Bottom-line, employers should continue to evaluate CDC guidance on travel and the status of outbreaks of COVID-19 and take reasonable precautions to ensure the health and safety of its employees. Remain consistent when requiring employees to report personal travel, work to educate employees on both travel precautions and your expectations regarding return to work post-travel. And finally, perform an individualized assessment of the risks associated with particular travel given an employee's degree of personal interaction with your other employees, customers, and any particularly vulnerable populations in developing your approach to employee travel.

If you have any questions about information found in this article, please contact **Amy J. Adolay** or any other member of the Krieg DeVault LLP **Employment Law team**.

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