Navigating the ADA and FMLA in Combatting Coronavirus

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Coronavirus (COVID-19) is increasingly affecting workforces in the United States, and how companies respond will be important both to retention and to future legal considerations that could arise. Specifically, the Coronavirus outbreak invokes many employment laws, two of which are the Americans with Disabilities Act (ADA) and Family and Medical Leave Act (FMLA).

A. Americans with Disabilities Act and Coronavirus

It is possible that an employee could invoke the ADA and claim an actual or perceived disability, as the ADA prohibits discrimination against both actual and perceived disabilities, as well as association with those with actual or perceived disabilities. Thus, as employers consider how to handle employee exposure and/or an actual diagnosis of Coronavirus, it is important to evaluate leave practices to ensure compliance with the ADA. Further, if leave policies are temporarily adjusted, such as allowing employees additional paid sick time, or not requiring the use of sick time for fourteen-day quarantines, it is important that these polices are adjusted and available to all employees with symptoms of Coronavirus or who have traveled to an at-risk location.

Another issue under the ADA as it relates to Coronavirus is determining whether an employee's presence in the workplace creates a direct threat due to that employee's condition, and what steps an employer can take when it in fact believes that an employee poses a direct threat. "The determination that an individual poses a 'direct threat' shall be based on an individual assessment of the individual's present ability to safely perform the essential functions of the job" and the factors to be considered such as "[t]he duration of the risk;" "[t]he nature and severity of the potential harm;" "[t]he likelihood that the potential harm will occur;" and "[t]he imminence of the potential harm." 29 C.F.R. § 1630.2(r). In addition, given that the Coronavirus has been designated a pandemic by the World Health Organization, employers may also inquire about symptoms employees are experiencing that could be signs of Coronavirus, including when an employee calls in or leaves work sick. Further, the U.S. Equal Employment Opportunity Commission advises that employers can also check the temperature of employees during a pandemic, again due to the risk that the employee will pose a direct threat to others.

Another way the ADA may be applicable to Coronavirus is that it could be invoked if an employee has travelled to an at-risk destination such as a country that is on the do not travel or at-risk travel list or a state in the U.S. that has a number of cases of Coronavirus and is thereafter disciplined or terminated as a result. The court in an Eleventh Circuit case regarding the forbidden travel of an employee to Ghana during the Ebola outbreak found that the ADA does not protect "a potential future disability that a healthy person may experience later" and thus no ADA violation was found. *EEOC v. STME, LLC*, 938 F.3d 1305, 1311 (11th Cir. 2019). However,

this does not mean employers should terminate individuals who have travelled to areas with Coronavirus. In addition to this not being an employee-friendly approach, another reason against adopting such a practice is that if the employee actually has Coronavirus, it is not a potential future disability and instead may be considered a disability and the employee may be entitled to an accommodation. It is important that the Center for Disease Control Guidance be followed by employees with respect to travel, including checking the CDC's Traveler's Health Notices, checking themselves for symptoms of acute respiratory illness before travelling, ensuring they know when to notify their supervisor or health care provider that they are sick, and following the company policy for obtaining medical care in other countries and states.

B. Family and Medical Leave Act and Coronavirus

As Coronavirus cases increase in the U.S., employers are being advised by governmental agencies to encourage individuals suffering from the symptoms of Coronavirus to stay home. If employees located in Indiana are calling off of work, encourage them to call the Indiana State Department of Health Epidemiology Resource Center at 317-233-7125 (317-233-1325 after hours) or email at epiresource@isdh.in.gov if they are experiencing symptoms such as fever, cough, and shortness of breath or have come in contact with someone suspected of having the Coronavirus. In addition, employers should consider whether the time off being requested by the employee falls under the FMLA.

Under the FMLA eligible employees are entitled to 12 weeks of unpaid, job-protected leave for the employee's own serious health condition or to care for an eligible family member with a serious health condition. 29 CFR Part 825. Under the FMLA, Coronavirus may constitute a serious health condition entitling the employee to unpaid, job-protected leave.

A serious health condition under the FMLA includes "an illness, injury, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider." 29 CFR Part 825.102. Continuing treatment gives rise to a serious health condition under a few circumstances, one of which is a condition that incapacitates the individual for a period of more than three consecutive calendar days while receiving continuing treatment. 29 CFR Part 825.115(a)(2). Although the U.S. Department of Labor, the federal agency responsible for enforcement of the FMLA, has not provided guidance on whether Coronavirus constitutes a serious health condition, Coronavirus and its impact on an individual has many of the characteristics of other serious health conditions and may exacerbate an employee's pre-existing health conditions, falling under the FMLA regulations. Therefore, employers should be proactive about providing FMLA leave to eligible employees infected with Coronavirus or employees taking care of family members infected with Coronavirus. It is important to keep in mind, however, that employees are not entitled to FMLA leave if they are refusing to come to work out of fear of contracting the virus.

Questions regarding the above information should be directed to **Elizabeth M. Roberson** or **Kate E. Trinkle**.