Workplace FAQs For Healthcare Providers And 8-Point COVID-19 Action Plan

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The healthcare industry is truly on the front lines of the nation's and the world's response to COVID-19. As a result, healthcare providers, their employees, and affiliates are likely already well-versed on the virus and how to handle it in a clinical setting. But healthcare providers may need help understanding and managing the impact that COVID-19 is likely to have on their workforce.

To assist healthcare employers, Fisher Phillips' Healthcare Industry Practice Group has created an eight-point action plan and provided answers to frequently asked questions (FAQs). Just like the outbreak itself, this situation is extremely dynamic. We will continue to update these FAQs and action plan, but we also recommended staying abreast of the CDC's guidelines and updates.

FAQs FOR HEALTHCARE EMPLOYERS

Who is a healthcare provider?

This is an important question with respect to complying with the newly-passed Families First COVID Response Act (Act), which is explained in detail at this link. Among other things, the Act establishes and requires Emergency Paid Sick Leave and expands the Family and Medical Leave Act (FMLA) for certain employees. But "healthcare providers" can be excluded from these benefits. Therefore, a threshold compliance issue for healthcare employers is: who (or what) is a healthcare provider?

The current answer may be incomplete. It is certainly not intuitive. Without clarifying regulations from the Secretary of Labor for the Act – which we expect in the coming weeks – the best answer is

ATTORNEYS

Laurel K. Cornell

A. Kevin Troutman

Jaklyn Wrigley

SERVICES

Healthcare

Workplace Safety and Catastrophe Management

found in the regulations for the FMLA. Section 825.125(a) of the FMLA regulations defines a healthcare provider as:

- A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or
- Any other person determined by the Secretary to be capable of providing healthcare services.

Subsection (b) of the same regulation includes others capable of providing healthcare services include, but limited to the following:

- Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;
- Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing with the scope of their practice as defined under State law;
- Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. When an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirements from an employer than the employee or family member submit to examination (through not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement;
- Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and
- A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

Currently, therefore, nurses and many other hands-on caregivers are ***not*** considered health care providers and would therefore not be excluded from benefits established by the Act. (Keep in mind this relatively narrow definition was written when Congress was identifying healthcare providers who could certify an employee's need for FMLA leave.) For now, nevertheless, only those jobs listed above could be excluded from coverage under the Act, regardless of the nature and function of their employer's business.

In other words, the fact that a registered nurse works for a hospital or surgical center does not mean that they would be considered a health care provider for purposes of this emergency legislation. Stay tuned for more developments and discussion regarding this question.

Another threshold issue is a company's employee count for purposes of coverage by the above-referenced legislation because employers with 500 or more employees are not covered by these emergency measures. These questions typically arise when more than one corporation operates in some or all respects as a single employer. Answers to these questions can be complex and far-reaching (beyond the COVID-19 crisis), so they should be discussed with counsel before making a determination.

What if an employee appears sick?

If any employee presents at work with a fever or difficulty in breathing, this indicates that they should seek medical evaluation (regardless of the COVID-19 crisis). While these symptoms are not always associated with coronavirus and the likelihood of an employee having coronavirus may be low (depending on the healthcare services you provide), it pays to err on the side of caution, particularly because healthcare workers are collectively at greater risk. Ensure that all members of the management team understand how to address this situation in order to prevent panic among the workforce and patient population and reduce further spread.

Can healthcare providers ask an employee to stay home or require them to leave work if they exhibit symptoms of the COVID-19?

Yes, you are permitted to ask employees to seek medical attention and get tested for COVID-19. You are also permitted to require employees to leave work – even if they refuse. The CDC states that employees who exhibit symptoms of influenza-like illness at work during a pandemic should leave the workplace.

During the H1N1 pandemic, the Equal Employment Opportunity Commission (EEOC) stated that advising workers to go home is not disability-related if the symptoms present are akin to the seasonal influenza or the H1N1 virus. The EEOC has confirmed that this same guidance applies to the COVID-19 crisis.

Can healthcare employers require employees over the age of 65 who are without symptoms to stay home without pay?

Generally speaking, the answer is no. But employers may be able to encourage established high-risk employee populations to consider reassignment, staying home or working remotely.

When can employees return to work if sent home because of suspected COVID-19 infection?

If an employee contracted COVID-19 and quarantined in-home, they can cease in-home isolation once they have either been confirmed to be no longer contagious as a result of medical testing by a medical professional, or (1) have been without fever for at least 72 hours, (2) other symptoms – such as a cough or shortness of breath – have improved, and (3) at least 7 days have passed since the symptoms first appeared.

How should an employer respond if an employee who would not be exposed to COVID-19 patients asks to wear a face mask while working?

Obviously, employees involved in direct patient care should use all necessary personal protective equipment (PPE), which will often include masks, gloves, gowns and other protections. In non-patient-care jobs, the CDC does not recommend that people who are well wear a facemask as protection from respiratory diseases, including COVID-19.

If an employee requests to wear a facemask, employers should evaluate the employee's specific circumstances, as an employee with an underlying disability may need to wear a mask as an accommodation. Employers may also consider permitting an employee to wear a facemask even if there is no legal requirement to do so, particularly where the employee is concerned about exposing a vulnerable family member.

Can employers mandate temperature testing of their employees?

Under the current circumstances, yes. Taking an employee's temperature will be considered a medical examination under the Americans with Disabilities Act, which normally restricts an employer's ability to conduct temperature testing. But, because COVID-19 has reached pandemic status, employers may measure body temperature.

Employers should take reasonable steps to ensure the confidentiality of this information and should use a nurse (or other clinician) to conduct this testing in a private room. Temperature readings should not be retained in employees' personnel files (because they represent medical information). Also, keep in mind that some people with COVID-19 will not have a fever.

Although temperature can be tested in a variety of ways, a forehead scan - the method that involves the least risk to the tester – should be used where possible. In all cases, the tester should follow Standard Precautions and use appropriate PPE.

Please remember that state-specific requirements may also apply. For instance, in California, your organization may be subject to the California Consumer Privacy Act, which will require you to provide a compliant Notice prior to taking an employee's temperature.

What about visitors?

You may be able to test temperatures of visitors. Generally, medical inquiries to visitors must be necessary. Under the current circumstances, workplace and patient safety is necessary, though this may depend on the nature of care that your organization provides. State law may also apply to either prohibit this testing or impose additional requirements (e.g., a Notice pursuant to the California Consumer Privacy Act).

If an employer does take temperatures, what precautions should be exercised to protect the individuals who performs that function?

In a nutshell, the protection should match the protective measures used when taking patient temperatures. In other words, employers must conduct an evaluation of reasonably anticipated hazards and what precautions can be taken, including PPE, to protect the employee from exposure.

Employers must assess the risk to which the individual may be exposed. The safest thing to do would be to assume the testers are going to potentially be exposed to someone who is infected. Based on that exposure, employers must determine what mitigation efforts can be taken to protect the employee by eliminating or minimizing the hazard, including PPE.

Different types of devices can take temperature without exposure to bodily fluids. For instance, the tester could wear a face shield or N95 respirator in case someone sneezes or coughs. The CDC and OSHA recommend that healthcare workers exposed to COVID-19 patients wear gowns, gloves, National Institute for Occupational Safety and Health (NIOSH)-certified, disposable N95 or better respirators, and eye/face protection (e.g., goggles, face shield). Because testers could be exposed to COVID-19 patients, we suggest healthcare employers take these precautions for them and any other employee who might be exposed.

As an additional note, employers should use respiratory protection as part of a comprehensive respiratory protection program that meets the requirements of OSHA's Respiratory Protection standard (29 CFR 1910.134) which includes medical exams, fit testing, and training.

Planning for Success:

8 Steps Healthcare Providers Should Consider Taking Now

1. **Thoroughly familiarize yourself with OSHA guidance for workers with potential occupational exposure to COVID-19.**
   To comply with OSHA, healthcare employers that are actively treating patients with suspected or confirmed cases of COVID-19 should ensure their workforces are using controls to prevent exposure. The control measures can include, but are not limited to, implementing safe work practices, requiring PPE for employees at risk of exposure, and

isolating potentially infectious individuals. While these are clearly not new requirements for healthcare providers, the present circumstances are. Thus, it is especially important to continue following these developments. Healthcare employers should also determine whether there are any state-specific requirements that must be followed to protect healthcare workers, such as CAL/OSHA.

2. **Also familiarize yourself with CDC guidance related to healthcare employees who are caring for patients with possible or confirmed COVID-19.**
Healthcare employers in the current global crisis bear significant responsibilities – not only to patients, but also to employees. To minimize disruption to your operation and protect your workforce, you should immediately ensure implementation of current CDC guidance related to healthcare personnel who are caring for patients with confirmed or possible COVID-19. This includes the use of PPE, using Standard Precautions, and exercising consistent and thorough hygienic measures.

3. **Communicate with <u>all</u> of your employees.**
Most healthcare employers have probably already done this – at least for hands-on providers. But healthcare employers should ensure that each member of its workforce, including volunteers, has received adequate information about the employer's response to and precautions concerning COVID-19 – not just providers. This information should of course describe mandatory hygiene practices and advise what employees should do if they have been exposed to a confirmed case of COVID-19 or if they are experiencing symptoms consistent with COVID-19. Do not assume that all employees know best practices simply because they work in healthcare. Now, perhaps more than ever, it is vital to strike a calm, clear and confident posture in communicating with the entire workforce, emphasizing that everyone is dealing with this crisis together.

4. **Take additional precautions with food service and nutrition, to the extent that your organization provides such services.**
Hospitals, and certain other healthcare providers, provide nutrition or food services to patients, employees, and others. Many healthcare providers rely on third parties to operate food services, while others do not. Regardless of your model, healthcare providers that serve food to patients, employees, and/or others, should ensure that appropriate measures are taken to reduce the possibility of contamination.

   For instance, you should consider temporarily discontinuing the use of any self-service bars

(salad, potato, burger, etc.). You should ensure the workers providing food services (whether yours or a third party's) are trained on heightened sanitary measures. While COVID-19 has not been proven to be transmitted through food, the virus can survive on solid surfaces such as silverware and serving pieces for several hours, if not several days.

5. **Certain providers should prepare for an upsurge in work and a worker shortage.**
As the outbreak grows, healthcare employers offering primary and emergency care should expect a significant increase in demand. While everyone hopes that the preventative measures being implemented by the government and private business owners will #flattenthecurve, it is likely that at least some parts of the healthcare infrastructure will become severely taxed for a period of time.

   These healthcare employers should anticipate and prepare for a worker shortage. Not only are employees of primary and emergency care providers more likely to be exposed to COVID-19, making it more likely that they will contract the virus, they share the general concerns that workers across all industries are having. They may be extremely worried that patient interaction poses too great a risk to them or their families, especially family members who at higher risk. Or, they may simply be overwhelmed by family obligations due to school closures. Whatever the reason, you may start to see the pool of available workers shrink.

   To combat this, healthcare employers may, if feasible, consider increasing pay for certain work during critical times, add new workers (perhaps borrowing from healthcare providers not providing coronavirus-related care and have temporarily reduced or ceased operations), and cross-train workers to perform multiple positions (where possible). The most promising strategy in the near term is likely for providers to focus exclusively on immediately necessary services, cancelling elective or routine procedures and then reassigning employees who have been freed up as result. This could be especially helpful if recovery-room nurses and other respiratory care professionals can be temporarily reassigned to deal with COVID-19 issues.

   During this time, it is especially vital for leaders to recognize that everyone is dealing with additional stress. Thus, it is paramount for leaders to be as visible and access as possible and more importantly, to convey a sense of calm assurances, recognizing that the workforce will get through this situation together.

6. **Offer telework options where possible.**
While many healthcare jobs require the employees' physical presence at the facility, not all

do. Healthcare employers would be wise to evaluate whether certain positions can shift to telework. Not only will this subject fewer employees to COVID-19 exposure, but it provides at least a layer of protection if a "shelter in place" order that impacts your operations (e.g., because you are not an essential business or the employee doesn't provide a service that is integral to your operations) is imposed or members of your workforce are required to quarantine.

To clearly communicate expectations regarding telework, employers should review their remote work policy (or implement one, if there is none), in collaboration with their employment attorney. Among other things, this policy should prohibit off-the-clock work by non-exempt employees and address workplace safety and ergonomics considerations, as well as instructions for business expense reimbursement.

7. **Healthcare employers who are temporarily reducing operations may consider short-term modifications of "benefits eligibility" policies and standards.**
Many healthcare employers use "hours worked" measurements to determine whether employees maintain full time status for purposes of benefit eligibility. In the event your operations are being temporarily reduced, either to comply with CDC guidance or out of an abundance of caution, you may want to consider relaxing (or suspending) your benefits standards for this period of slow down so that normally classified full-time employees do not suffer a loss. Before implement such steps, employers must confer with the applicable benefit plan insurer or administrator or their ERISA attorney.

8. **Ensure compliance with any existing collective bargaining agreement.**
Many healthcare employers are parties to collective bargaining agreements. Therefore, before you take any steps to tailor your workforce-related response to COVID-19, you should ensure your response does not violate the agreement and first notify the union, if required.

Conclusion

We will continue to monitor this rapidly developing situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. If you have any questions about this situation or how it may affect your school, please contact any member of our Healthcare Industry Practice Group or your Fisher Phillips attorney. You can also review our nationwide Comprehensive and Updated FAQs for Employers on the COVID-19 Coronavirus and our FP Resource Center For Employers, maintained by our Taskforce.

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.