FOLEY & LARDNER LLP

# Coronavirus FAQs for Employers No. 2

**09 March 2020**

*Coronavirus Resource Center*

*Foley & Lardner LLP's Labor & Employment Practice Group published twenty (20) FAQs with respect to employer-employee obligations and inquiries relative to the novel Coronavirus on Friday, February 28. This is our second installment to the Coronavirus FAQs. We will continue to publish additional FAQs based on inquiries from clients – sharing answers and best practices as this workplace challenge continues to develop.*

**No. 21: We recently received products that were shipped from one of the countries that the centers for disease control has designated "Level 3". My employees [or customers] are refusing to handle the product. What should I do?**

There is still a lot about the COVID-19 virus that is unknown especially about how it spreads. However, based upon government information available as of March 9, 2020, it would appear there is a very low risk that the virus would survive on the surface of goods for the days or weeks it takes to ship products from one of the countries designated Level 2 or Level 3.

Under the Occupational Safety and Health Act ("OSHA") employees have a right to refuse to do work only when (1) the employee reasonably believes that doing the work or handling the product, would place the employee in serious and immediate danger; (2) the employee has asked the employer to fix that hazard; (3) there is insufficient time to report the alleged hazard to OSHA; and (4) there is no other way to handle the material. In a workplace where employees are represented by a union, the applicable collective bargaining agreement may also provide guidance as to how such disputes are resolved.

On a more practical level, if the employer can somehow sanitize the product or otherwise offer personal protection such as gloves, this may make any refusal to handle "unreasonable" under the circumstances.

Employers are cautioned against representing they know there is absolutely no risk of transmission from surface contact exposure. Instead, they should direct employees [customers] to the relevant portions of the CDC or WHO websites where these issues are addressed.

**No. 22: In your first set of FAQs you advised respecting employee's privacy rights by not broadcasting to the workforce that a specific Employee has contracted COVID-19, been exposed to COVID-19, or has traveled to an area the CDC has designated a hotspot. However, the CDC website suggest *we do tell* all employees. Which is it?**

Our earlier guidance was predicated on employee privacy rights that arise from a variety of state and federal anti-discrimination laws as well as the privacy laws. However, these are not normal times. What we now

suggest in the case where an employee who has contracted the virus or was been clearly exposed but is currently asymptomatic is to immediately contact your local public health agency and obtain their guidance as to who to tell and how to communicate it. It is likely they will want to take the lead in communicating the information that will then provide the employer with a modicum of protection against the claim of invasion of employee privacy rights.

**No. 23: The above answer discusses employee privacy rights but you failed to say anything about HIPAA? Don't I have to respect employees' HIPAA privacy rights?**

In our experience, there is a great misconception within the HR community that the type of employee health information an employer typically possess is protected by the HIPPA privacy rule. As explained below, in fact most employee health data held by an employer is not HIPAA protected. The HIPPA privacy rule only applies to "Covered Entities" which are defined by the regulations as 1) a health insurance plan; 2) a healthcare clearinghouse; and 3) a healthcare provider who transmits any health information in connection with a transaction related to the above (for example, a hospital submitting claim information to an insurance company). The rule also extends privacy rights only to "Protected Health Information" (PHI). The rule excludes from the definition of PHI, "individually identifiable health information … and employment records held by a covered entity in a roll as employer."

Given these definitions, most of the medical information obtained about an employee in the context of dealing with the Coronavirus outbreak will not be subject to the HIPPA Privacy Rule. Important Cautionary Note: An employer who self-insures its Group Medical insurance coverage will likely be subject to some aspect of the HIPPA Privacy Rule.

Nevertheless, just because HIPPA may not apply to the type of employee health information an employer possess, employers need to be cognizant of other employee privacy rights flowing from federal and state laws, and the general desire of most employees for privacy over their medical condition.

**No. 24: Our HR department and/or ERP system is the repository of our employees' emergency contact information, which may or may not identify the relationship status of the emergency contact and the employee. We usually only provide the emergency contact information to managers on a need-to-know basis, but under the current circumstances, and the possible quick spread of COVID-19, should we expand access to employee emergency contact information to managers?**

Generally no, but the answer will somewhat depend on state law. HR (and the ERP system) should be the repository of the contact information, not the manager. Employers should make it clear to employees that the information will be kept confidential, shared only on a need-to-know basis and used only in an emergency. The forms should be maintained in a confidential manner, but in a way that allows swift access when needed. If, however, an employee is sick or showing signs or symptoms of being infected, then yes, that individual's emergency contact information can be shared with a manager who needs to reach out to the contact. The relationship status for the purposes of an emergency contact in this case would be a permitted disclosure.

By the way, the emergency contact form should not require the employee to identify their relationship with the individual identified, but can (and should) ask if the company can discuss the employee's medical information with that individual. The employee can, however, voluntarily provide the relationship information.

As we noted above in a prior response, the CDC's guidelines provide that if an employee is confirmed to have COVID-19, the employer is to notify employees of their possible exposure to COVID-19 in the workplace. However, employers must maintain confidentiality and not identify the affected employee, as the ADA and state medical privacy laws generally prohibit employers from disclosing employees' confidential medical information to other employees (including managers), such as whether the individual has a communicable disease.

Instead, employers should consult local public health officials and, if advised to inform other employees, can inform potentially affected employees that an unidentified individual with whom they may have had recent contact has tested positive for COVID-19 and they should monitor themselves for the development of symptoms, including potentially seeking medical treatment. Alternatively, an employer may ask the affected employee whether it can share his or her name with other potentially impacted employees. A response to this request must be voluntary, but such a request is not generally advised except under very limited circumstances. You should seek legal counsel before disclosing any employee information to other employees.

**No. 25: If an employee is quarantined while traveling on business and does not work, must I pay them?**

There is no simple answer that will address every factual permutation that this question presents. The general rule is that if an employee is not working (or in the lingo of the Fair Labor Standards Act "being permitted or suffered to work"), then the employer does not have to pay the employee. Of course, an exempt employee who has worked any amount during the work week, should be paid his or her regular salary for the work week.

However, employees who contract diseases while in the course and scope of their employment are likely entitled to worker's compensation benefits. While workers' compensation laws are state specific, if workers' compensation is available, it will provide *partial* replacement for lost wages. The issue of course will be if the employee contracted the Coronavirus while on the job or did he or she contract the virus and bring it to the job? Under the latter scenario, it would be expected that workers' compensation benefits would not apply. Therefore, now would be a good time to review the details of your workers' compensation policy to determine what, if any, conditions triggered by Coronavirus may be covered. If there is no wage loss coverage through workers' compensation, employer flexibility will buy greater cooperation from employees and maintain positive morale during very trying circumstances.

Finally, employers should remember that if the employee is part of a bargaining unit subject to a collective bargaining agreement, the collective bargaining agreement may address these compensation issues and an

employer must comply with it or possibly be subject to a grievance for violation of the agreement.

Foley will continue to keep you apprised of relevant developments. Click here for Foley's Coronavirus Resource Center for insights and resources to support your business during this challenging time.