Dealer Advisory

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Comprehensive & Updated FAQs For Employers on the COVID-19 Coronavirus

Fisher Phillips, a law firm specializing in labor law, has assembled a cross-disciplinary taskforce of attorneys across the country to address the many employment-related issues facing employers in the wake of the COVID-19 coronavirus – especially now that the World Health Organization has declared the outbreak as a pandemic.

In an effort to provide members with updated resources to help your dealership deal with the COVID 19 outbreak, MADA and DADA are working with Fisher Phillips to provide this HR specific information, as it relates to the virus and your day to day operations.

We have listed below a few of the more common questions we are hearing from dealerships. **We encourage dealerships to visit the Fisher Phillips site for complete information.** The Fisher Phillips website will continue to be updated with important new information as needed.

BACKGROUND

A new virus first identified in Wuhan, China in late 2019 has been spreading across the globe and is now in the United States. The new coronavirus, COVID-19, is not a flu but a pneumonia-like infection. Coronaviruses, so called because of their crownlike shape, range from the common cold to SARS-CoV and 2012's MERS (Middle East Respiratory Syndrome). They differ from Avian (H1N1) influenza and swine flu.

On March 11, 2020, the World Health Organization (WHO) declared the COVID-19 coronavirus outbreak as a pandemic. This designation signifies that we are in the midst of a global disease outbreak, which occurs when a new virus emerges for which there is little or no immunity in the human population, begins to cause serious illness, and then spreads easily person-to-person worldwide. There have only been four influenza pandemics since 1900. The most recent pandemic declaration was the H1N1 outbreak in 2009.

Once a pandemic is declared, public health officials use the Pandemic Severity Assessment Framework to determine the impact of the pandemic. Two main factors are used to determine the impact of a pandemic. First, the clinical severity, or how serious is the illness associated with infection. Second, the transmissibility, or how easily the pandemic virus spreads from person-to-person. The CDC uses these two factors to determine which actions to recommend at a given time during the pandemic. It will be important to monitor the Centers for Disease Control's (CDC's) pandemic severity assessment, as the severity level greatly affects the actions that an employer may take during a pandemic.

WORKPLACE SAFETY ISSUES

What's the main workplace safety guidance we should follow?
The Occupational Safety and Health Administration (OSHA) recently published Guidance on Preparing Workplaces for COVID-19, outlining steps employers can take to help protect their workforce. OSHA has divided workplaces and work operations into four risk zones, according to the likelihood of employees' occupational exposure during a pandemic. These risk zones are useful in determining appropriate work practices and precautions.

- Very High Exposure Risk & High Exposure Risk are generally related to the healthcare system.
- Medium Exposure Risk: Employees with high-frequency contact with the general population (such as schools, high population density work environments, and some high-volume retail).
- Lower Exposure Risk (Caution): Employees who have minimal occupational contact with the general public and other coworkers (such as office employees).

What if an employee appears sick?
If any employee presents themselves at work with a fever or difficulty in breathing, this indicates that they should seek medical evaluation. While these symptoms are not always associated with influenza and the likelihood of an employee having the COVID-19 coronavirus is extremely low, it pays to err on the side of caution. Retrain your supervisors on the importance of not overreacting to situations in the workplace potentially related to COVID-19 in order to prevent panic among the workforce.

Can I take an employee's temperature at work to determine whether they might be infected?
The Americans with Disabilities Act (ADA) places restrictions on the inquiries that an employer can make into an employee's medical status, and the EEOC considers taking an employee's temperature to be a "medical examination" under the ADA. The ADA prohibits employers from requiring medical examinations and making disability-related inquiries unless (1) the employer can show that the inquiry or exam is job-related and consistent with business necessity, or (2) the employer has a reasonable belief that the employee poses a "direct threat" to the health or safety of the individual or others that cannot otherwise be eliminated or reduced by reasonable accommodation.

Taking an employee's temperature may be unlawful if is not job-related and consistent with business necessity. The inquiry and evaluation into whether taking a temperature is job-related and consistent with business necessity is fact-specific and will vary among employers and situations. The EEOC's position during a pandemic is that employers should rely on the latest CDC and state or local public health assessments to determine whether the pandemic rises to the level of a "direct threat." The assessment by the CDC as to the severity of COVID-19 will provide the objective evidence needed for a medical examination. If COVID-19 coronavirus becomes widespread in the community, as determined by state or local health authorities or the CDC, then employers may take an employee's temperature at work.

However, as a practical matter, an employee may be infected with the COVID-19 coronavirus without exhibiting recognized symptoms such as a fever, so temperature checks may not be the most effective method for protecting your workforce.

An employee of ours has tested positive for COVID-19. What should we do?
You should send home all employees who worked closely with that employee for a 14-day period of time to ensure the infection does not spread. Before the employee departs, ask them to identify all individuals who worked in close proximity (three to six feet) with them in the previous 14 days to ensure you have a full list of those who should be sent home. When sending the employees home, do not identify by name the infected employee or you could risk a violation of confidentiality laws. You may also want to consider asking a cleaning company to undertake a deep cleaning of your affected workspaces. If you work in a shared office building or area, you should inform building management so they can take whatever precautions they deem necessary.

One of our employees has a suspected but unconfirmed case of COVID-19. What should we do?
Take the same precautions as noted above. Treat the situation as if the suspected case is a confirmed case for purposes of sending home potentially infected employees. Communicate with your affected workers to let them know that the employee has not tested positive for the virus but has been exhibiting symptoms that lead you to believe a positive diagnosis is possible.

How can we distinguish between a "suspected but unconfirmed" case of COVID-19 and a typical illness?
There is no easy way for you to make this determination, but you should let logic guide your thinking. The kinds of indicators that will lead you to conclude an illness could be a suspected but unconfirmed case of COVID-19 include whether that employee traveled to a restricted area that is under a Level 2, 3, or 4 Travel Advisory according to the U.S. State Department, whether that employee was exposed to someone who traveled to one of those areas, or similar facts. You should err on the side of caution but not panic.

If COVID-19 becomes severe, inquiries into an employee's symptoms, even if disability-related, are considered justified by the EEOC as a "reasonable belief based on objective evidence that the severe form of pandemic influenza poses a direct threat." You must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

One of our employees self-reported that they came into contact with someone who had a presumptive positive case of COVID-19. What should we do?
Take the same precautions as noted above. Treat the situation as if the suspected case is a confirmed case for purposes of sending home potentially infected employees. Communicate with your affected workers to let them know that the employee is asymptomatic for the virus but you are acting out of an abundance of caution.

One of our employees has been exposed to the virus but only found out after they had interacted with clients and customers. What should we do?
Take the same precautions as noted above with respect to coworkers, treating the situation as if the exposed employee has a confirmed case of COVID-19 and sending home potentially infected employees that he came into contact with. As for third parties, you should communicate with customers and vendors that came into close contact with the employee to let them know about the potential of a suspected case.

Can an employee refuse to come to work because of fear of infection?
Employees are only entitled to refuse to work if they believe they are in imminent danger. Section 13(a) of the Occupational Safety and Health Act (OSH Act) defines "imminent danger" to include "any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act." OSHA discusses imminent danger as where there is "threat of death or serious physical harm," or "a reasonable expectation that toxic substances or other health hazards are present, and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency."

The threat must be immediate or imminent, which means that an employee must believe that death or serious physical harm could occur within a short time, for example, before OSHA could investigate the problem. Requiring travel to China or to work with patients in a medical setting without personal protective equipment at this time may rise to this threshold. Most work conditions in the United States, however, do not meet the elements required for an employee to refuse to work. Once again, this guidance is general, and employers must determine when this unusual state exists in your workplace before determining whether it is permissible for employees to refuse to work.

In addition, Section 7 of the National Labor Relations Act (NLRA) extends broad-based statutory protection to those employees (in union and non-union settings alike) to engage in "protected concerted activity for mutual aid or protection." Such activity has been defined to include circumstances in which two or more employees act together to improve their employment terms and conditions, although it has been extended to individual action expressly undertaken on behalf of co-workers.

On its own website, the National Labor Relations Board (NLRB) offers a number of examples, including, "talking with one or more employees about working conditions," "participating in a concerted refusal to work in unsafe conditions," and "joining with co-workers to talk to the media about problems in your workplace." Employees are generally protected against discipline or discharge for engaging in such activity.

WAGE & HOUR ISSUES

Must we keep paying employees who are not working?
Under the Fair Labor Standards Act (FLSA), for the most part the answer is "no." FLSA minimum-wage and overtime requirements attach to hours worked in a workweek, so employees who are not working are typically not entitled to the wages the FLSA requires.

One possible difference relates to employees treated as exempt FLSA " white collar" employees whose exempt status requires that they be paid on a salary basis. Generally speaking, if such an

employee performs at least some work in the employee's designated seven-day workweek, the salary basis rules require that they be paid the entire salary for that particular workweek. There can be exceptions, such as might be the case when the employer is open for business but the employee decides to stay home for the day and performs no work. A U.S. Department of Labor (USDOL) opinion letter addressing these matters can be accessed here.

Also, non-exempt employees paid on a "fluctuating-workweek" basis under the FLSA normally must be paid their full fluctuating-workweek salaries for every workweek in which they perform any work. There are a few exceptions, but these are even more-limited than the ones for exempt "salary basis" employees.

Of course, an employer might have a legal obligation to keep paying employees because of, for instance, an employment contract, a collective bargaining agreement, or some policy or practice that is enforceable as a contract or under a state wage law.

Finally, we caution employers to consider the public relations aspect of not paying employees who may not be working if they have contracted or are avoiding the COVID-19 coronavirus. Given the publicity surrounding this outbreak, it is possible that situations involving these kinds of issues could reach the media and damage your reputation and employee morale. Consider the big picture perspective when making decisions regarding paying or not paying your employees.

Can we charge time missed to vacation and leave balances?
The FLSA generally does not regulate the accumulation and use of vacation and leave. The salary requirements for exempt "white collar" employees can implicate time-off allotments under various circumstances. The USDOL has provided some guidance on this topic in an opinion letter that is accessible here. Again, however, what an employer may, must, or cannot do where paid leave is concerned might be affected by an employment contract, a collective bargaining agreement, or some policy or practice that is enforceable as a contract or under a state wage law.

EMPLOYEE LEAVE / ADA

Does family and medical leave apply to this situation?
Employees requesting leave could conceivably be protected by the Family and Medical Leave Act (FMLA) to the extent they otherwise meet FMLA-eligibility requirements. Even in the absence of state or federal protection, an employer's internal policies may extend protection to such individuals. Of course, there is nothing to prevent you from voluntarily extending an employee's leave, even in the absence of any legal obligation.

Generally, employees are not entitled to take FMLA to stay at home to avoid getting sick. As with many employment laws, the worst thing an employer (or as is often the case, an untrained supervisor) can do at times like this is to reject immediately an unorthodox leave request before the facts are in. When in doubt, the wisest approach is to work with counsel to ensure legal compliance, thereby minimizing exposure to costly litigation.

Does contraction of COVID-19 coronavirus implicate the ADA?
Generally, no, because in most cases the COVID-19 coronavirus is a transitory condition. However, some plaintiffs could make an argument that the ADA is implicated if the virus substantially limited a major life activity, such as breathing. Moreover, if an employer "regards" an employee with COVID-19 as being disabled, that could trigger ADA coverage.

Can I send employees home who exhibit potential symptoms of contagious illnesses at work?
Yes, sending an employee home who displays symptoms of contagious illnesses would not violate the ADA's restrictions on disability-related actions.

During a pandemic, may an ADA-covered employer ask employees who do not have symptoms to disclose whether they have a medical condition that the CDC says could make them especially vulnerable to complications?
Generally, no. However, if the pandemic becomes severe or serious according to local, state, or federal health officials, ADA-covered employers may have sufficient objective information to reasonably conclude that employees will face a direct threat if they contract COVID-19. Only then may ADA-covered employers make disability-related inquiries or require medical examinations of asymptomatic employees to determine which employees are at a higher risk of complications.

May an employer encourage employees to telework as an infection-control strategy?
Yes. The EEOC has opined that telework is an effective infection-control strategy. The EEOC has also stated that employees with disabilities that put them at high risk for complications of pandemic influenza may request telework as a reasonable accommodation to reduce their chances of infection during a pandemic.

View the complete FAQ from Fisher Phillips here:
https://www.fisherphillips.com/resources-alerts-comprehensive-faqs-for-employers-on-the-covid

Please contact DADA at (248) 643-0250 or MADA at (800) 292-1923 if you have any questions.

We thank Melanie Webber with Fisher Phillips for working with us to get this important information out to dealerships.

This advisory has been prepared in conjunction with
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