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Communicable Diseases

What 's an Employer to Do?

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In the past year, communicable disease outbreaks have dominated the headlines. Ebola arrived in the United States last fall; measles resurged this winter; and this year's influenza strains were some of the deadliest in recent memory. In light of these public health threats, employers are struggling to ascertain their rights and obligations toward their workforce, including those who are infected, exposed, or at-risk.

What Is a Communicable Disease?

Communicable diseases are medical conditions that can be passed from one person to another. They vary widely in severity, ranging from minor illnesses like the common cold to acute conditions like Ebola. Communicable diseases also differ in method of transmission, with some conditions like influenza being transmitted through contact with an infected person or surface, and other conditions like tuberculosis being transmitted without any such contact.

Because of the differences among various communicable diseases, a "one-size-fits-all" formula is of little utility in dealing with concerns in the workplace. Rather, an employer should develop a flexible approach that can be applied to a variety of scenarios involving different communicable diseases. In doing so, the company should take into consideration laws that apply to employers generally and to the industry particularly and characteristics that are unique to the employer's workplace, workforce, and customers.

Which Laws Are Likely to Be at Issue?

When considering what actions can be taken to prevent or contain a single incident or a widespread outbreak of communicable diseases, employers should keep in mind a number of laws.

1. *The Family and Medical Leave Act (FMLA) and any state medical leave statutes.* These statutes require covered employers to provide qualified employees with leave to cope with the employee's own or a family member's medical condition. Under the federal FMLA,

a covered employer must provide qualifying employees with 12 weeks of unpaid leave for their own or a family member's "serious health condition." Thus, to determine whether a qualifying employee is entitled to FMLA leave due to a communicable disease, the employer must assess whether the disease at issue amounts to a "serious health condition."

This is generally a case-by-case determination. The FMLA regulations define a "serious health condition" as "an illness, injury, impairment or physical or mental condition that involves inpatient care or continuing treatment by a health care provider." Employers should be able to evaluate fairly easily whether an employee meets the "inpatient care" prong, but will likely face more difficulty assessing whether an employee is receiving "continuing treatment." Generally, an employer or an employee's family member is receiving continuing treatment if he or she has been unable to work for at least three consecutive days, and has received a minimum amount of treatment from a medical provider.

In short, a bout of influenza that lasts a day or two and does not require hospitalization or treatment by a medical provider is not a "serious health condition" under the FMLA. But a case of influenza that requires hospitalization or lasts at least three days and requires treatment by a medical provider would likely qualify as a "serious health condition." Regardless of whether the communicable disease at issue qualifies as a "serious health condition" under the FMLA, employers should be sure to check whether the employee would be entitled to leave under any more generous applicable state or local law.

2. *The Americans with Disabilities Act (ADA) and state disability anti-discrimination statutes.* These statutes are designed to prevent discrimination on the basis of disability. Under the ADA, a covered employer is prevented from making disability-related inquiries or medical examinations except under certain circumstances and discriminating against qualified employees with actual or perceived disabilities. Employers also have the affirmative duties to provide reasonable accommodations to qualified employees with actual disabilities and maintain confidentiality of an employee's medical information. The Equal Employment Opportunity Commission (EEOC), the federal agency in charge of enforcing the ADA, has issued guidance to assist employers in applying the ADA to outbreaks of communicable diseases, particularly pandemics.

The ADA prohibits employers from making disability-related inquiries or conducting medical examinations of their employees, unless doing so is job-related and consistent with business necessity. This means

the employer must have a reasonable belief, based on objective evidence, that the employee's ability to perform essential job functions will be impaired by a medical condition or that an employee will pose a direct threat due to a medical condition. Note that there are different rules for applicants, which is outside the scope of this article.

In light of these mandates, whether an employer makes a disability-related inquiry or requires a medical examination of an employee who may have been exposed to a communicable disease likely turns on the nature of the objective evidence regarding exposure, the characteristics of the disease, and the nature of the workplace. If a teacher at a daycare center revealed that she was at Disneyland when visitors were exposed to the measles, an employer would likely be justified in requesting the employee undergo tests to confirm whether she is immune to the disease. In contrast, an employer would likely have greater difficulty requesting such testing of a law firm paralegal who traveled on a plane from Los Angeles in the days after the measles outbreak. In that case, the employer would lack objective evidence that the paralegal posed a direct threat because of her potential exposure to the measles.

The ADA also prohibits employers from discriminating against qualified employees who are disabled or who are perceived to be disabled. In the case of an employee who has a communicable disease, the initial question for the employer is whether that employee is disabled under the statute. Generally, a disability includes a condition that "substantially limits one or more major life activities," or "being regarded as" having a disability. Whether a communicable disease is a disability is therefore likely to depend on the severity of the disease in the particular case at issue. Influenza or H1N1 is unlikely to rise to the level of a disability, but measles or Ebola would probably amount to a disabling condition. Regardless of whether a communicable disease is a disability, it is unlikely that an employer would run afoul of the ADA by asking an employee who poses a direct threat to the health and safety of others. That said, the employer should consider offering telecommuting as a potential reasonable accommodation for an employee capable of working during the illness.

Finally, the ADA requires that information obtained through disability-related inquiries and medical examinations be kept confidential and stored separate from ordinary employment records. This prohibition raises the question of whether there is any way for employers to inform the workforce and the public about potential exposure to a communicable disease by an employee. In such situations, it is advisable to follow the guidance of the CDC and your jurisdiction of public health. Ordinarily, when employers do share such information, they do not reveal the identity of infected individual to whom others

were exposed, but do provide enough information for those who were exposed to identify themselves and know to seek medical attention if they experience symptoms.

3. Title VII of the Civil Rights Act and state anti-discrimination statutes. These statutes prohibit discrimination on the basis of membership in various protected classes, including race, color, religion, gender and national origin. Employers should keep these statutes in mind when responding to a potential or actual communicable disease outbreak. Again, the more information an employer has about the disease and the outbreak, the better positioned the employer will be to protect the health and safety of the workplace while avoiding a claim of discrimination.

For example, during the Ebola outbreak last fall, a number of employers faced the question of whether they could and should prohibit employees who had traveled to certain West African countries from returning to work until the incubation period for Ebola had passed. Employers needed to be careful not to assume that their employees from West African countries were exposed to Ebola. Rather, the critical inquiry was whether an individual's travel placed him or her at higher risk for contracting and transmitting the disease. Employers were best served by educating themselves about the levels of Ebola in the countries that the employee had visited, obtaining information from the employee regarding any potential contact with infected individuals, consulting the guidance of their jurisdiction's public health department, and making case-by-case determinations about whether an employee should be sent home.

4. Federal and State Reasonable Accommodations Requirements. Federal and state statutes, including the ADA and Title VII, require employers to make reasonable accommodations to non-essential employment functions and requirements for persons with disabilities and persons of faith. These accommodations are most likely to arise when employers seek to implement prevention programs, such as a mandatory vaccination program. Under these statutes, employers cannot force all employees to be vaccinated; rather, most employers will be required to exempt employees who are unable to be vaccinated because of a medical condition or who refuse to be vaccinated based on their religious beliefs. That said, the employer may take other steps to protect the employee, his or her coworkers, and the public, such as requiring the employee to wear a mask or ensuring that the employee is not exposed to particularly vulnerable populations.

Best Practices

- Institute a policy asking employees to stay away from the workplace if they are exhibiting symptoms of a communicable disease.
- If you ask employees to leave work if they are exhibiting symptoms, make sure to treat all employees consistently.
- Consider placing employees with or exposed to certain communicable diseases on paid leave or converting such employees to temporary work-at-home status.
- If you ask employees not to come to work or to leave work due to exposure, make sure that there is public health information regarding the spread and severity of the illness to justify this approach.
- Be aware of competing public health needs. If the employee must be quarantined, for example, do not take any adverse employment action as a result.
- If your organization does not provide sick leave, consider doing so to avoid creating an incentive for employees to come to work sick.
- Review the EEOC's pandemic preparedness guidance when assessing how to handle a communicable disease outbreak.
- Be aware of industry-specific rules and regulations. For example, depending on the state, there may be special rules in foodhandling, healthcare, hotels, public swimming pools, and school/day care settings.
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