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EMPLOYMENT RELATED CONCERNS DURING PERIODS OF PANDEMIC FLU

Fortunately the recent outbreak of the 2009 H1N1 flu virus has not spread or been as severe as once anticipated. However, in light of the recent events, employers should be reminded that preparing for a pandemic flu or similar crisis and managing their workforces during such times raises a variety of employment-related legal issues.

OSHA and ADA Implications

While the Department of Labor's Occupational Health and Safety Administration ("OSHA") places certain requirements on employers to ensure the health and safety of their workforce,¹ employers also should be aware of other employment-related legal implications associated with managing a pandemic. The federal Equal Employment Opportunity Commission ("EEOC") recently issued a notice which discusses potential implications under the Americans with Disabilities Act for employment actions taken related to the H1N1 flu virus. The notice is available at www.eeoc.gov/facts/h1n1.html

The EEOC notice regarding ADA Compliance provides some helpful guidance and reminders for employers regarding when medical examinations can be requested of new and current employees. The notice also provides a sample ADA-compliant survey employers may provide to employees prior to a pandemic in an effort to evaluate potential absenteeism during a pandemic. Prior to implementing such a survey, employers should consult legal counsel to evaluate when and how such a survey may be used.

Wage, Hour and Leave Issues

In addition to discrimination concerns, employers should be aware of the wage and hour implications under both state and federal law. An employee's ability to use sick pay and paid time off will likely be dictated by an employer's policy. Therefore, employers may want to consider revising sick pay and paid time off policies to address pandemic type situations. An employer may wish to prohibit employees suspected of having been exposed to influenza from reporting to work for a period of time. With respect to exempt (i.e. salaried) employees, employers will need to be wary of deducting from these individuals' salaries if an employer requires they not report to work. While deductions are permissible under very specific circumstances, employers should verify

¹ Guidance from OSHA regarding pandemic influenza can be found at the following link: http://www.osha.gov/Publications/influenza_pandemic.html. Additionally, OSHA guidance specific to health care providers can be found at the following link: http://www.osha.gov/Publications/OSHA_pandemic_health.pdf.

with legal counsel that they are complying with the Fair Labor Standards Act as well as applicable state law prior to making such a deduction.

Leave policies, including leave covered by the Family Medical Leave Act, will also be implicated and may be used by a much larger portion of the workforce during such periods of time. Therefore, employers should be prepared to handle an influx of requests for leave.

Future Preparedness Planning

As an additional aid to employers, the Department of Health and Human Services ("HHS") has also prepared a list of pandemic flu workplace related questions and answers accessible at the following link: http://www.pandemicflu.gov/faq/workplace_questions/index.html. The question and answer format includes a section that provides guidance for employers regarding pre-pandemic workplace planning.

For purposes of addressing future pandemic situations, employers should develop an emergency preparedness plan if they have not already done so. Such a plan should address many concerns and issues. Some of the important components of an emergency preparedness plan related to the management of employees include items such as: developing/refining a telecommuting policy to facilitate circumstances when operations need to be moved from a centralized office; stressing the importance of workplace hygiene and ensuring necessary supplies are available (such as masks and hand sanitizer); identifying critical employees and positions that will be necessary to continue operations; cross-training employees to cover the critical positions when there are high levels of absences; and, creating a communication plan that will address how information will be conveyed to employees, including information about the pandemic, when and where employees should report to work, and instructions for employees if they will be absent and how to report an illness.

Conclusion

While the progression and severity of the H1N1 flu virus may have slowed, employers should use this time as a reminder that preparing for these issues prior to the onset of a pandemic will better facilitate management of their workforces when future pandemic situations arise.

Should you have any questions, please do not hesitate to contact your regular Hall Render attorney or Kevin Stella: kstella@hallrender.com 317-977-1426, Robin Sheridan rsheridan@hallrender.com 414-721-0469, Carrie Turner cturner@hallrender.com 414-721-0458 or Jennifer Richter jrichter@hallrender.com 317-977-1477.

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