

9 Coronavirus Scenarios That Could Trip Up Employers

By **Vin Gurrieri**

Law360 (March 6, 2020, 10:51 PM EST) -- As the world teeters on the edge of a full-blown coronavirus pandemic and infections mount in the U.S., businesses are increasingly turning to lawyers for help navigating tricky workplace situations.

The World Health Organization as of Friday has confirmed over 95,000 cases worldwide of COVID-19, the disease caused by the coronavirus. The countries with the most confirmed infections so far are China, where it originated, as well as Italy, Iran and South Korea, according to the WHO.

In the U.S., Microsoft this past week confirmed that two of its workers had tested positive for COVID-19 in Washington, where about a dozen people have died from the virus. That prompted top company officials, citing recommendations from public health officials in King County, Washington, to urge employees in the region to work from home if feasible for at least the next three weeks.

For those who must physically come to work, Microsoft said it is enhancing cleaning and sanitizing procedures and urged workers to avoid clustering or making nonessential travel to coronavirus hotspots. The company also said that workers won't be required to travel if they have concerns about it.

Microsoft is only one company, but its situation is emblematic of the challenges many businesses face as the coronavirus outbreak deepens.

"Within the last two weeks especially, we've seen the red flag really going up as more cases have come to light in the United States," said Nathan Schacht of BakerHostetler. "It's really having a more urgent impact on employers."

Katherine Dudley Helms of Ogletree Deakins Nash Smoak & Stewart PC said that while initial questions from employers have centered on company travel and preparedness, they've evolved more toward issues related to workplace safety.

"There are a lot of levels on what the actual answer is on things, and those are the things that it is really important for employers to think through before they start dealing with them more than on a one-off basis," Helms said.

Here, attorneys offer guidance on nine potential scenarios that might vex employers as the dangers posed by the virus become more omnipresent.

A worker in the office has a bad cough; his manager is concerned. What should she do?

It's OK to check on them, but make questions thoughtful.

Although the manager may mean well by checking on the welfare of an employee, particularly if the worker's cough is truly bad or if he is sweating profusely and appears feverish, she may inadvertently run afoul of the Americans with Disabilities Act if her query delves into the worker's medical history.

"There is that line there with the ADA as to the types of questions you can ask," Schacht said. "You can certainly ask someone how they're feeling and see what their response is to that. But employers need to be very careful to not cross the line and ask those questions that could get into the disability zone."

Greenspoon Marder LLP partner Adam Kemper said it's perfectly within a manager's right to suggest that the worker seek medical attention or go home for the day and can prepare for such situations by communicating ahead of time exactly what coronavirus symptoms look like.

"To me, it's more of a common-sense answer: if you're beginning to feel sick, go to a doctor," Kemper said. "Provide guidance to your employees that if they are beginning to exhibit symptoms perhaps consistent with that of the coronavirus and here are some of those symptoms — you can literally provide them information — then it's time to go see a physician immediately."

"The employer can then go in and maybe sanitize workstations because they not only have an obligation to the sick employee, they have an obligation to protect [against] the threat of reasonable harm to those surrounded by the sick employee," he added.

An employer customarily has lunch catered or puts on events where employees help themselves to food. Is that still OK?

Maybe not.

Clare M. Gallagher, vice chair of Eckert Seamans Cherin & Mellott LLC's labor and employment team, said that employers might want to reconsider situations where food is left out, whether it's catered lunches, food spreads for conferences or cocktail hours at formal events with hors d'oeuvres — long staples of various work environments — given the way COVID-19 spreads, even if it means taking a small step like switching to box lunches.

"I was just at [an event], and it's everybody reaching, and you use the same utensils," Gallagher said. "Maybe a better way to do it is to give [employees] a stipend to go eat on their own. But the big 'everybody get together and have the communal food' is maybe not the best idea."

Public health officials declare an emergency and work is canceled as a result. Do workers have to be paid?

It depends.

One consideration for employers if workers can't physically make it to their usual workplace is whether they can telework, which would mean they are on the clock and must be paid the same as if they were physically in the office. But the issue becomes more complicated if workers are stuck at home with no work being performed.

If employees are nonexempt hourly workers, they generally only must be paid for time worked.

However, if work is canceled because of a health scare, employers can allow them to take paid time off they have accrued or maintain a flexible internal sick leave policy or, in some cases, must pay workers in accordance with any state or local paid sick time law, attorneys say.

But when it comes to salaried, exempt employees, the Fair Labor Standards Act requires that they be paid unless the business is closed for at least a full workweek and the person performs no work at all. So, if an exempt employee works on Monday and work is canceled for the rest of the week with no telework option available, employers must pay that exempt employee for the full week, attorneys say.

But if telework is available, Helms said employers have to be careful to track what employees are doing.

"You have exempt employees, they have their phones and may be getting calls, so you really have to keep track of whether or not they're working," Helms said, saying she recently advised a client who doesn't typically allow telecommuting that they "need to make very clear that an absolute requirement [is] that an employee working remotely keep accurate track of their time [since] that is one black-and-white thing in all of this."

Employees ask for masks and hand sanitizer at the workplace. Is an employer obligated to provide them?

No, but that doesn't mean it isn't still a good idea.

Masks, in particular, have become something of a fraught issue as people have increasingly started wearing them in public areas. In some workplaces like hospitals or medical clinics they can be an important safety device, and the Centers for Disease Control is recommending that health workers use them. But the CDC has not issued a similar recommendation for the general public and is insisting that only those who show symptoms of COVID-19 need to wear them.

Gallagher said that while it's not legally necessary for employers to provide basic hygiene products or masks, such measures can still make workers feel more at ease by communicating to them their employer is taking steps to make sure the workplace is clean and safe.

"I had a client ask that question [about masks] and I said, 'You know what, if it relieves some fears you can have them for people,'" Gallagher said. "And I think it's just good general health to provide the tissues, the hand sanitizer. But again, a lot of the medical information is, good hand-washing is by far the best precaution to take."

An employee demands to be removed from sitting next to an Asian colleague over coronavirus fear. Does an employer oblige?

Not if the separation is based solely on a person's national origin.

"That's another thing we're seeing is xenophobia," Helms said. "We are seeing people, because this thing originated in China, putting an Asian face on this. That's one thing we talk to employers [about] too, you've got to be careful and listen for discrimination and harassment because of this."

The analysis for employers should come down to whether there is any reason to suspect that individuals should be separated aside from their ethnic or national background, in which case they can assess the situation more closely.

Schacht noted that employers can ask workers, for example, about the details of any recent trips to virus hotspots on a case-by-case basis.

"If it's purely 'I don't want to sit next to so-and-so' who happens to be of Asian descent or some sort of national origin that has been in the news related to a country that has been impacted by this, certainly [employers] can't just base any decision upon that," Schacht said. "You certainly just can't lump someone into a category because of their descent or their national origin because that would cross that discrimination line."

An employee wants to use leave under the Family and Medical Leave Act because he's concerned about coronavirus spread. Can he?

Possibly, but it depends on the details.

Under the FMLA, which allows for job-protected leave of up to 12 weeks per year, workers first must provide their employer with some advance notice if they intend to use it. And leave under the law must be for a qualifying reason, such as themselves or an immediate family member suffering from a "serious health condition."

While Kemper noted that a worker likely won't be FMLA-eligible if they don't want to come to work solely out of fear of being exposed to the coronavirus without having actually contracted it, that assessment could change if a worker has some other medical condition.

"There is definitely the potential here for utilization of the Family and Medical Leave Act in connection with coronavirus," Kemper said.

"One thing I always remind my clients is they shouldn't be playing doctor in the scenario of addressing whether or not to give an employee [FMLA] leave," he said. "They're supposed to put the ball in the employee's court to get a note from a doctor and to get sufficient information to see whether or not this is the type of situation which would warrant leave. So, fear itself not combined with some other condition [is] probably not going to qualify you. But fear in combination with some other condition could very well get you [FMLA] time off."

A worker has recently traveled overseas to a country that isn't a high-risk coronavirus location. Can the employer ask them to stay home upon their return?

Yes.

In instances where employees travel internationally to a country other than China, Iran, Italy or South Korea, which have had the worst of the outbreak so far, Mayer Brown LLP partner Ruth Zadikany said some employers are dealing with whether an asymptomatic person can be asked to stay home for a time.

"At this point it sounds funny, but all bets are off in a way. People need to behave in a measured way and a nondiscriminatory way, employers do, but given what's been going on I think employers can tell employees you can work from home if that's possible," Zadikany said. "I think it's OK to do it but it's not required or necessary because you're not in a place [that] the CDC has denied as a huge risk factor to be there."

But if an asymptomatic employee lives with someone who has visited one of those hotbeds, Zadikany said the "stakes are a little higher" and employers are on solid ground and can ask that the employee stay home.

An employee is asked to go on a business trip but doesn't want to go. Do employers send them anyway?

Tread carefully.

Employers have to think long and hard when it comes to required business travel, even if it's not to a coronavirus hot zone, since even in those situations there may be a risk of contracting the virus either overseas or in airports.

Grace Shie, a Mayer Brown employment and benefits partner whose practice focuses heavily on global mobility and immigration issues, said she hasn't seen any businesses mandate travel and that businesses have been "understanding" if employees have expressed concerns any trips.

"What we've seen employers do, they've been very understanding. They're looking first to respect the health and welfare of their employees," Shie said. "Many of clients have canceled nonessential travel and now more recently have taken the next step of just putting a halt on all travel unless it's truly business critical. Usually business-critical positions are higher-level positions and they might be more willing because they've assessed that risk and are willing to travel."

An employee is sick but wants to show up for work anyway. Do you let them?

That's not a best practice.

Attorneys say it behooves employers to not have sick workers coming to work in an effort to tough it out.

Angela Burnette of Alston & Bird LLP, whose practice focuses on health care, said that the communication to workers of a company's preparedness plans are key in helping keep the workplace safe.

As part of that, she said one question that has come up involves how to encourage workers to stay home or self-quarantine if they feel ill or have recently traveled to a coronavirus hotbed, which can be a difficult thing to convince workers to do in certain fields.

"Some folks and some industries, you're not going to get paid unless you come in, and some industries or particular companies have a culture of 'no matter how sick I am I'm still coming in because we're soldiering on, this is what we do at this company,'" Burnette said. "Part of the communications [to employees] has been to remind people it's OK to stay at home if you're sick because that may not be the culture previously at the company."

--Editing by Brian Baresch and Emily Kokoll.