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Ebola: Employment Law Considerations

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The United States Centers for Disease Control and Prevention (CDC) has declared the 2014 Ebola epidemic the largest in history. While the outbreak has primarily affected certain countries in West Africa, the transmission of the virus in the United States to a few individuals has caused widespread fear among the public, even though the actual risk of the disease spreading is extremely low. Nevertheless, employers must be mindful of the various employment laws when determining how they will manage workplace concerns about the virus and plan for continuing operations in the unlikely event that an employee has been exposed to the virus.

First and foremost, employers cannot refuse to hire an individual or prohibit an employee from coming to work simply because that person is West African or may have recently visited a West African country. Similarly, employers should also be proactive in dealing with any harassment of West African employees that may occur. The fact that other employees may not want to work with a particular person out of fear of contracting Ebola is of no consequence. Title VII of the Civil Rights Act of 1964 (Title VII) and analogous state and municipal laws prohibit employers from discriminating against employees or applicants for employment based on their race or national origin, and even mass hysteria associated with an Ebola outbreak does not change this fundamental principle.

Employers similarly cannot discriminate against a person who has Ebola or who is even regarded as having Ebola. Employers also cannot necessarily ask employees or job applicants about their medical conditions or subject them to medical examinations to determine if they have Ebola. Even taking an employee's temperature, a method used to determine whether a person may have Ebola, is considered by the United States Equal Employment Opportunity Commission (EEOC) to be a medical examination. The Americans with Disabilities Act (ADA) and analogous state and municipal laws protect employees and applicants from disability discrimination and prohibit employers from making disability-related inquiries or conducting medical examinations unless they are job-related and consistent with business necessity. Such inquiries and examinations meet this stringent standard only if they are supported by objective evidence that employees or applicants pose a direct threat to themselves or the health of other individuals. Thus, with respect to Ebola, employers should consider inquiring about an employee's or applicant's condition only if there is clear and convincing evidence that an employee or applicant has actually been exposed to the virus or is showing symptoms of the disease.

To the extent that an employer may have sufficient grounds for questioning or examining a particular employee or applicant (e.g., the person at issue exhibited symptoms or is known to have been in contact with an Ebola patient), the examination must not be a fishing expedition for any illnesses or disabilities, and any information learned must be kept confidential and maintained in a medical file separate from the employee's personnel file. Employers must be wary of their obligations under HIPAA and remind employees that even health information related to this highly dangerous disease must be protected. In short, an employee's medical privacy is to be respected even if he or she has Ebola.

Determining whether an employee or applicant may be examined is a complicated decision. Employees or applicants may not be screened simply because they are originally from West Africa or have recently visited the region; a direct threat still is required. Similarly, disability-related inquiries should not be limited to persons of West African descent; such practices would likely violate the ADA and Title VII as well as analogous state and municipal laws. Even requiring a medical examination for all persons returning from West Africa may not constitute a business necessity under the ADA because currently there are no travel restrictions from that region and the risk of transmission of Ebola is extremely low. However, an employer likely is permitted to ask its employees about their travel plans, whether they had contact with anyone exposed to Ebola and whether they are experiencing any flu-like symptoms or fever.

For covered employers and employees, the Family and Medical Leave Act (FMLA) and state and municipal paid sick leave laws also may come into play if employers require employees suspected of being exposed to Ebola to quarantine themselves during the virus' 21-day incubation period. If the employee is not symptomatic, then the mandatory leave should not be counted against the employee's FMLA entitlement. In addition to FMLA implications, placing an employee on a forced leave of absence generally is ill-advised if that employee is not exhibiting any symptoms because it would violate the ADA, which prohibits discrimination against employees who are "regarded" as disabled and would be applicable even if the employee is not actually infected with Ebola. If an employer nevertheless requires employees to take time off, it is recommended that the mandatory leave be paid (if feasible) to minimize the scope of liability. The better practice from an employment law perspective is to ask employees returning from affected areas to monitor their health for 21 days, to seek immediate medical care if they develop a fever or exhibit any other Ebola symptoms and to consider working from home with pay as a safety precaution. Only if an employee's exposure to Ebola objectively poses a threat would an employer be legally justified in requiring that employee to stay home and obtain medical clearance before returning to work.

The EEOC has not yet issued any Ebola-specific guidance for employers. However, in 2009 (in response to the H1N1 virus), the EEOC released guidance on pandemic preparedness in the workplace and the ADA. While Ebola and the H1N1 virus differ in certain respects, the EEOC's technical assistance document is instructive. Of particular significance, the EEOC advises employers to rely on the CDC and state or local health assessments and to make reasonable assessments of their workplace conditions based on the public health advice.

Given the complex legal landscape, employers should consult with legal counsel about the facts and circumstances of specific situations prior to taking any action in response to Ebola. Fox Rothschild will continue to monitor the relevant government agencies and share any related guidance that may be issued. In the meantime, employers should not act

based on fear and are encouraged to prepare for responding to any Ebola developments by putting a plan in place and communicating it to their employees as soon as possible. Employers should educate employees about Ebola, including how it is transmitted, its symptoms and how they can protect themselves against it, including basic hygiene practices.

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