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ALERT

Employer Rights and Limitations Regarding the Ebola Crisis

By Bennett Pine

Employers are understandably concerned about the possible spread of the Ebola virus in the United States. They have voiced concerns about the spread of infection and appropriate control strategies to be followed in the workplace. At the same time, employers must be aware of legal limitations in employment laws regarding employee privacy and attendant matters that may prohibit certain inquiries, medical exams and other employer actions.

Common questions include, may an employer:

- Request health information from an employee who has traveled to West Africa and may be infected or exposed?
- Take the temperature of an employee?
- Require an employee to stay home from work?
- Require an employee to provide a doctor's note certifying fitness to return to work?

As a general proposition, other than permissible pre-employment physical exams, the federal Americans with Disabilities Act prohibits an employer from making most disability-related inquiries or requiring employees to undergo medical examinations once they have been hired. A very significant exception to this prohibition on employers exists where there is a "direct threat" of an employee posing "a significant risk of substantial harm to the health and safety" of the individual or others that cannot be eliminated or reduced by reasonable accommodation.

In 2009, the Equal Employment Opportunity Commission (EEOC) issued highly instructive guidance on "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act" (http://www.eeoc.gov/facts/pandemic_flu.html) designed to set forth rules for employers dealing with the epidemics posed by SARS, seasonal influenza and the H1N1 virus.

Most experts believe that if the current Ebola scare rises to the level of a pandemic and concomitant "direct threat" status, it clearly will fall within the EEOC's guidance and justify an employer's need to engage

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in disability-related inquiries and medical examinations. As of this writing, such a declaration has not yet occurred.

As of now, employers should follow the EEOC's preparedness guidance and monitor the Center for Disease Control and Prevention (CDC) Ebola alerts (<http://www.cdc.gov/vhf/ebola/index.html>). In the event the CDC declares a pandemic, the answers to the four questions posed above would clearly be yes.

For the time being, employers should avoid broad-stroke actions. They would be prudent to limit medical inquiries and examinations narrowly to employees arriving back from visits to affected areas in West Africa, and to employees who have otherwise been directly exposed to Ebola (e.g., medical workers, first responders, airline, mortuary and waste disposal employees) or otherwise been in close quarters with such an individual. In the interest of caution, and as a means of avoiding or limiting liability, employers may wish to consider paid leave and/or work-at-home restrictions for such high risk employees for the duration of the reported 21-day Ebola incubation period. However, the situation is fluid and restrictions may expand. As the EEOC's guidance provides:

During a pandemic, employers should rely on the latest CDC and state or local public health assessments. While the EEOC recognizes that public health recommendations may change during a crisis and differ between states, employers are expected to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location, and to make reasonable assessments of conditions in their workplace based on this information.

In the near term, most experts also believe that employers are well served to help their employees remain calm and avoid hysteria. This may be accomplished, in part, by providing educational material about Ebola, including the limited ways of contracting the disease, and encouraging employees to get flu shots and engage in regular hand-washing. The CDC's Ebola information sheet found at <http://www.cdc.gov/niosh/topics/ebola> is one such useful resource.

We will continue to monitor this delicate and developing situation. ▲

