



Ebola Preparedness

Insights

11.03.14

How should an employer respond when it learns that an employee is planning a trip to West Africa to visit family? What if other employees refuse to come to work because they fear that the returning employee may have been exposed to Ebola Virus Disease? Recognizing that the healthcare setting presents special challenges related to infection control and clinical care, how can any employer prepare in advance for situations like those described above?

Based on extensive news media coverage of the spread of Ebola in West Africa, and the recent transmission of the virus in the United States, many employers are scrambling to answer these questions. The right response depends on several factors and there is no one-size-fits-all solution. But employers can get out in front of these issues and reduce potential liability by taking some proactive steps:

Communicating With Employees And Customers

Even if the domestic spread of Ebola is contained, many employers will still face questions from employees and patients about how this situation is being handled. To help reassure workers, you should prepare all managers, not just those with direct patient-care responsibilities, to: 1) provide pertinent information from the CDC and other health organizations; 2) explain steps the hospital is taking to protect employees, patients, and the general public; and 3) reaffirm that the hospital takes health and safety very seriously and will take appropriate, lawful action to protect them. All employers should also consider appointing an internal leader to develop a protocol for handling employee complaints and concerns.

Asking Employees About Travel Plans

If an employee travels to West Africa, or is otherwise potentially exposed to Ebola, you can and should ask certain questions. For example, you may inquire about employees' travel plans, whether they had contact with anyone who was exposed to Ebola, and whether employees are experiencing any flu-like symptoms. But be careful to ensure that no inquiry is likely to reveal an employee's disability, which can lead to liability under the Americans with Disabilities Act (ADA).

Taking An Employee's Temperature

So far, healthcare workers potentially exposed to Ebola have been taking their temperature twice daily to monitor for fever, which is typically the first symptom. The Equal Employment Opportunity Commission considers taking an employee's temperature to be a medical examination which is

Commission considers taking an employee's temperature to be a medical examination, which is normally prohibited *unless* the employer determines it is job-related and consistent with business necessity.

So, depending on where the employee traveled and the likelihood of exposure, taking employee temperatures may violate the ADA. As the CDC guidance continues evolving, employers should re-evaluate this strategy. This situation also presents opportunities to remind employees of basic hygiene practices (e.g., regular hand washing, recommended flu shot), which are especially important during the flu season.

Quarantining Exposed Employees

This is an increasingly common consideration among employers, particularly where telecommuting is not an option. Realistically, an employer cannot “quarantine” an employee. But you could place an employee on leave of absence during the 21-day incubation period, to determine whether the employee is infected. This option presents potential liability under the ADA, however. The ADA not only prohibits employers from discriminating against employees who are disabled (being infected with Ebola would likely be considered a disability), it also prohibits discrimination against an employee “regarded” as disabled. So for most employers, this is currently not the best option.

If you place an employee on leave of absence, you must decide whether or not to pay the employee for this time. While paying or not paying the employee does not affect whether there was a substantive ADA violation, paying the employee reduces the risk that the employee will file a charge with the EEOC and it limits potential damages in the event of litigation.

What If Other Employees Refuse to Work?

If other employees refuse to work because they are afraid of becoming infected with Ebola, their refusal may be a protected work refusal under OSHA's whistleblower protections, or similar state laws. Additionally, if several employees refuse to work, essentially go on strike, this work refusal would likely be protected under the National Labor Relations Act. Therefore, employers must consider whether refusal to work is protected before taking any adverse action, such as termination.

Obviously, the Ebola outbreak is an evolving situation and employers need to carefully consider their response, to maintain workplace safety and to avoid potential liability under a variety of federal and state laws. The strategies listed above can help employers navigate this challenging situation. As with any situation involving potential liability, you should consult legal counsel to discuss specific situations.

For more information, contact the authors at KTroutman@fisherphillips.com or 713.292.0150; or MKorn@fisherphillips.com or 803.255.0000.

Related People



Matthew R. Korn
Partner
803.740.7652
Email



A. Kevin Troutman
Senior Counsel
713.292.5602
Email