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MEDICAL INQUIRIES AND EXAMINATIONS OF EMPLOYEES DURING THE COVID-19 PANDEMIC

The following is a summary of issues and guidance related to the ability of employers to make medical inquiries and/or administer medical examinations of employees in the unprecedented circumstances presented by the COVID-19 pandemic. We note that this guidance may change, as circumstances change in an employer's community and in the world.

Medical Inquiries

An employer's ability to make medical inquiries of employees is generally subject to certain limitations under the Americans with Disabilities Act (the "ADA"). Current guidance[1] from the U. S. Equal Employment Opportunity Commission ("EEOC"), which has enforcement authority under the ADA, provides that employers may ask all employees who will be physically entering the workplace whether they have COVID-19, or symptoms associated with COVID-19, or if they have been tested for COVID-19. This is because the EEOC has concluded that COVID-19 poses a direct threat under the ADA—that is, it poses a significant risk of substantial harm to the employee or others.

Symptoms associated with COVID-19 include, for example, cough, sore throat, fever, chills, and shortness of breath. As public health authorities and doctors learn more about COVID-19, they may expand the list of associated symptoms. The EEOC has instructed employers to rely on the CDC, other public health authorities, and reputable medical sources for guidance on emerging symptoms associated with the disease.

An employer may exclude those with COVID-19, or symptoms associated with COVID-19, from the workplace because, as the EEOC has stated, their presence would pose a direct threat to health or safety under the ADA. Employees who are teleworking, however, are not physically interacting with coworkers, and therefore the employer would generally not be permitted to ask such employees these questions.

[1] The EEOC has explained that this guidance may change as the risk level from the COVID-19 virus subsides and as a vaccine or other effective treatments are developed. The EEOC is urging employers to stay up-to-date on the latest guidance and information provided by the Centers for Disease Control ("CDC") on the health risks and mitigation measures related to COVID-19.

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Currently, employers are permitted under the ADA to bar an employee from physical presence in the workplace if he or she refuses to answer questions about whether he or she has COVID-19, symptoms associated with COVID-19, or has been tested for COVID-19. To gain the cooperation of employees, however, employers may wish to ask the reasons for the employee's refusal. The employer may be able to provide information or reassurance that they are taking these steps to ensure the safety of everyone in the workplace.

Medical Examinations and Temperature Testing

The EEOC has indicated that employers are permitted to conduct daily temperature testing of all employees who enter an employer's premises. According to the EEOC, if such testing is conducted in a non-discriminatory manner, it would not constitute a violation of the ADA. However, the EEOC has cautioned that not all employees who may have contracted COVID-19 will exhibit a fever.

Employers are permitted to maintain a log of temperature tests and to keep records of any other information that they obtain from employees regarding symptoms or potential exposures to COVID-19. These records must be kept confidential as described below.

An employer may require an employee to leave the premises and remain home if the temperature test reveals that an employee has a fever. Furthermore, an employer may bar an employee's presence in the workplace if he or she refuses to have his or her temperature taken.

Confidentiality of Medical Information

The ADA requires that all medical information about a particular employee be stored separately from the employee's personnel file, thus limiting access to this confidential information. An employer may store all medical information related to COVID-19 in existing employee medical files. This includes an employee's statement that he has the disease or suspects he has the disease, or the employer's notes or other documentation from questioning an employee about symptoms.

The identity of workers exhibiting a fever or other COVID-19 symptoms should only be shared with members of company management with a true need to know.

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Notification and Reporting

The ADA permits employers to notify public health authorities that an employee has tested positive for COVID-19. As the EEOC has explained, COVID-19 at this time poses a direct threat both to individuals with the disease and to those with whom they come into contact.

Employers may also notify other employees in the workplace who may have been exposed to an individual who has tested positive for COVID-19. Employers may not, however, reveal the employee's name or other identifying information. In a small workplace, coworkers may be able to guess the identity of the employee, but employers may not confirm this information.

Occupational Safety and Health Administration ("OSHA") Considerations

Under OSHA's recordkeeping requirements, COVID-19 is a recordable illness, and employers are responsible for recording cases of COVID-19, if: (1) the case is a confirmed case of COVID-19, as defined by CDC; (2) the case is work-related as defined by 29 C.F.R. § 1904.5[2]; and (3) the case involves one or more of the general recording criteria set forth in 29 C.F.R. § 1904.7.

In areas where there is ongoing community transmission, employers other than those in the healthcare industry, emergency response organizations (e.g., emergency medical, firefighting, and law enforcement services), and correctional institutions may have difficulty making determinations about whether workers who contracted COVID-19 did so due to exposures at work. In light of those difficulties, OSHA has explained that it "is exercising its enforcement discretion in order to provide certainty to the regulated community."

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[2] Under 29 CFR § 1904.5, an employer must consider an injury or illness to be work-related if an event or exposure in the work environment (as defined by 29 C.F.R. § 1904.5(b)(1)) either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness. Work-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the work environment, unless an exception identified in 29 C.F.R. § 1904.5(b)(2) specifically applies.

Whiteman Osterman & Hanna LLP can assist with these issues and more, as you and your business work to navigate the novel and difficult decisions arising from the COVID-19 pandemic. For assistance with issues related to medical inquiries and examinations, please contact:

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