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Client Alert: Issues for Employers to Consider in Confronting Ebola

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CLIENT ALERT | 10.17.2014

One person with Ebola, technically known as the Ebola hemorrhagic virus, and sometimes called the Ebola Virus Disease, has died in the United States. Two others, health care workers who treated the first patient, have been diagnosed with the illness.

The near-constant media coverage that has resulted may have employers of all sizes thinking about how their businesses will maintain continuity of operations should Ebola spread further. There are a number of different facets to that question, including how various federal employment laws might impact an employer's response to Ebola.

Neither the U.S. Equal Employment Opportunity Commission (EEOC) nor the Centers for Disease Control (CDC) have issued any Ebola-specific guidance for employers generally. The CDC has issued various protocols relating to response to Ebola and related considerations, which can be found on its [website](#). The Ohio Department of Health also has information on its [website](#). In the meantime, for those employers getting an early start, here are five issues to consider.

Occupational Safety and Health Act

There is currently no specific Occupational Safety and Health Administration (OSHA) standard or directive for viral hemorrhagic fevers, including Ebola. OSHA does, however, have Ebola resources on its website. One such [resource](#) contains information on the control and prevention of the disease. This material discusses OSHA's guidance for employers in specific industries in which Ebola is more likely to be a concern. The guidance focuses on health care workers, airline and travel industry personnel, mortuary and "death care" workers (OSHA's term, not ours), laboratory workers and emergency responders, among others. The article primarily reminds employers of existing OSHA directives regarding personal protective equipment (PPE), bloodborne pathogens, hygiene and disposal of contaminated clothing. A more generic final section of the article titled "Workers in Critical Sectors" suggests steps that can be taken in high risk occupations.

Disability Discrimination

The Americans with Disabilities Act (ADA) should play a role in employer planning for the response to the Ebola virus. The ADA prohibits “disability related inquiries” as well as “medical examinations” of employees and applicants under certain conditions. The ADA also permits employer action when an employee presents a “direct threat” to him or herself, or to co-workers, even if that threat arises from the employee’s disability.

The most likely ADA-related issues in Ebola planning and response relate to screening of employees for fevers or other symptoms. The EEOC categorizes fever screening as a “medical examination.” Under the ADA, all medical examinations must be “job related and consistent with business necessity” or justified by information suggesting that the employee poses a direct threat. Whether fever screenings meet such tests will depend on the specific facts of each workplace, whether there is any likelihood of Ebola risk in the geographic area, and whether there is any objective basis on which to test particular employees. Similarly, any additional steps an employer could take to address possible Ebola exposure among its employees will depend on the unique circumstances the employer faces in its industry and the job responsibilities of the employees at issue.

To date, the EEOC has not issued any specific guidance to employers on these difficult questions. About five years ago, however, when the world confronted the H1N1 influenza pandemic, the EEOC issued a guidance titled “[Pandemic Preparedness in the Workplace and the Americans with Disabilities Act.](#)” While the H1N1 virus and Ebola are clearly different, the guidance provides at least some insight into the EEOC’s view of various potential responses to the spread of a viral disease in the U.S. Among other things, the Guidance instructs employers to follow relevant CDC Guidelines and recommendations of state and local health authorities.

Title VII of the Civil Rights Act

In addition to their ADA-related obligations, employers may not discriminate on the basis of race or national origin. While the primary outbreaks of Ebola have occurred in West Africa, any Ebola response or preparation plan should focus on all employees, regardless of race or national origin. For example, while an employer might inquire about recent travel of all employees in order to identify any who might have recently traveled to Africa, it should not limit those inquiries solely to individuals of West African descent. Similarly, employers should take steps to prevent and respond to any racial or national origin-based harassment of employees of Western African descent.

Family Medical Leave Act

Family Medical Leave Act (FMLA) leave is available to certain employees for serious health conditions. Certainly, an employee with Ebola would have a serious health condition and be entitled to leave under the FMLA. Likewise, an employee requesting leave to care for a child, spouse, or parent with Ebola would also qualify for leave.

The more difficult question, however, is whether employers may require employees who are suspected of Ebola exposure, either through travel or contact with a person who has Ebola, to “quarantine” themselves away from the workplace (*i.e.*, take forced time off). Such a response is not advisable in all cases, but may

be permissible in others. Certainly, for an employee with no symptoms, the employer could not count any forced leave against the employee's FMLA entitlement. Instead, the employer would need to consider a leave under some other employment policy. Employers who provide paid leave in such a case will lessen (but not eliminate) the likelihood of any employment-related liabilities arising from the forced leave.

National Labor Relations Act

Employees concerned about the spread of Ebola could demand safety measures from their employers. Federal labor law protects collective action by a group of employees, like **aircraft cleaners** or nurses, for such a purpose. Moreover, employees who learn of co-workers who may have recently traveled to Africa or are suspected of having been in contact with those who may be infected might refuse to come to work out of fear for their safety. Employers should be prepared to respond to developments of this type in a lawful manner. Educating the workforce in advance, encouraging sick employees to stay home, providing or encouraging flu vaccinations and taking some of the safety-related steps suggested by OSHA, may help the proactive employer head off any unnecessary employee anxiety about Ebola.

As the Ebola crisis continues, Vorys will monitor the various federal employment agencies and pass along any guidance that may be issued. In the meantime, employers with particular concerns regarding the Ebola virus should take steps to ensure that their proactive efforts to prepare are consistent with applicable employment restrictions. Should you have any questions, please contact your Vorys employment lawyer. Employers in the health care industry may also want to contact their Vorys health care lawyer.