

Be Prepared: Understanding the Impact That the Ebola Outbreak May Have on Employers

Two months ago, many Americans were unfamiliar with the term “Ebola.” It’s amazing how quickly things can change. Today, you cannot turn on your television or read a news article without hearing or seeing reference to this medical epidemic.

The questions/answers set forth below are intended to assist employers with their own preparedness, as well as quell any potential workplace pandemonium in response to this outbreak. Of course, employers who operate in a healthcare setting will have [additional obligations and issues](#) to address beyond what is discussed here.

Q: What is Ebola?

Ebola Hemorrhagic Fever, referred to as [Ebola](#), is a rare disease caused by a viral infection that can afflict both humans and nonhumans. If not properly treated or left totally untreated, Ebola can have potentially fatal consequences.

According to the [Centers for Disease Control \(CDC\)](#), Ebola is spread through direct contact with blood or bodily fluids (*i.e.*, saliva, mucus, sweat, tears, urine/feces, etc.) of an individual who is displaying symptoms of the virus. Ebola is not an airborne disease so the risk of transmission is relatively low if an individual has not been in close contact with the bodily fluids of an infected person.

The most common symptoms associated with the onset of Ebola are: fever, fatigue, muscle pain, headache, and sore throat. As the illness progresses, infected individuals may also exhibit additional symptoms, including, but not limited to: nausea, vomiting, diarrhea, a rash, and impaired organ function(s). The initial symptoms typically manifest themselves within 2 to 21 days following exposure to the virus.

Q: What employment laws should employers generally keep in mind in connection with this Ebola outbreak?

Ebola is not simply a medical issue. If employers are not careful in how they prepare for and respond to this outbreak, the following employment-related laws could be implicated:

- Americans With Disabilities Act (ADA) – *e.g.*, disability-related inquiries, medical examinations, regarding employees as being potentially disabled, etc.;
- Occupational Safety & Health Act (OSHA) – *e.g.*, adhering to OSHA directives and guidelines regarding cleaning and decontamination, use of personal protective equipment (PPE), following blood-borne pathogen standards, complying with hazard communication requirements, other circumstances that may fall within the General Duty Clause, etc.;
- Title VII of the Civil Rights Act (Title VII) – *e.g.*, ensuring that employment actions and decisions do not result in discrimination, harassment, or retaliation on the basis of race, ethnicity, or national origin;
- Family and Medical Leave Act (FMLA) – *e.g.*, ensuring proper notification to employees of their FMLA leave rights and proper designation of FMLA leave, where applicable; and
- National Labor Relations Act (NLRA) – *e.g.*, respect employees’ rights to lawfully discuss and raise safety concerns regarding Ebola in the workplace.

Q: May an employer take the temperature of an employee whom the employer believes may have been exposed to the Ebola virus?

In most cases, taking an employee's temperature would constitute a medical examination under the ADA. Employers are not permitted to conduct medical examinations in the workplace, unless the particular examination is job-related and consistent with business necessity.

Does the possible spread of Ebola in the workplace meet this standard? The CDC has issued a plethora of guidance and information concerning Ebola; however, the Equal Employment Opportunity Commission (EEOC), the federal agency whose guidance employers would rely upon in connection with workplace issues stemming from this outbreak, has yet to do so. As a result, the most analogous guidance that employers can refer to was issued by the EEOC in 2009 in connection with the [H1N1 pandemic](#).

We can infer from the 2009 EEOC guidance that an employer may be able to lawfully take an employee's body temperature if the following conditions are present: (1) the Ebola outbreak becomes sufficiently widespread or pandemic (as determined by the appropriate federal, state, and local health authorities); or (2) an employee exhibits symptoms consistent with Ebola and there are other contributing factors – *i.e.*, recent travel history, likelihood of exposure, etc. – to support an employer's need to conduct this type of medical examination under the ADA.

Q: To what extent may an employer ask an employee about his/her travel plans?

Employers may inquire about an employee's travel plans, provided that any such inquiries are narrowly-tailored. In this regard, employers may be permitted to ask whether the employee is traveling to a destination where the Ebola virus is prevalent or whether the employee has had contact with any individuals who may have been exposed to the Ebola virus. Employers should be mindful that inquiries into an employee's travel plans, to the extent any are made, should be done on a consistent, non-discriminatory basis.

Q: May an employer ask an employee who has returned from recent travel to West Africa (or another Ebola-afflicted region) to remain out of the physical workplace for a reasonable period of time (e.g., 21 days)?

It depends on the circumstances. In general, the ADA prohibits employers from excluding an individual from the workplace for medical reasons, unless he/she poses a direct threat to himself/herself or others. Therefore, an employer may only instruct an employee to stay away from the workplace if the employer has reason to believe that the employee's presence constitutes a risk. The governing standard here is one of reasonableness. For example, if the employee has traveled to a region where the virus is prevalent and exhibits symptoms of Ebola upon return to the United States, this could provide sufficient justification for the employer to temporarily keep the employee out of the workforce until either the virus incubation period has expired or the employee's symptoms subside.

In making this individualized assessment, employers must be careful not to regard or otherwise perceive an individual as being disabled based solely on an individual's travel history or the presence of flu-like symptoms. Likewise, employers must also exercise discretion when seeking additional information from employees, so as not to elicit information regarding other potential medical conditions which would run the employer afoul of the ADA.

Q: What recourse does an employer have if an employee refuses to come to work for fear of being exposed to the Ebola virus?

OSHA standards require employers to maintain a workplace free from hazardous conditions that could otherwise lead to death or serious injury. Accordingly, an employee may have the limited ability to remove himself/herself from the workplace if he/she reasonably believes that there is a condition or other circumstance that could cause significant harm. According to the CDC, the risk of transmitting the Ebola virus is relatively low, and there are only a handful of confirmed cases of Ebola presently in the United

States. Therefore, at this juncture and without the presence of other factors (as noted above), there is little reason to believe that Ebola presents an imminent and serious danger to employees in most workplaces.

An employee simply cannot refuse to come to work without articulating a rational and substantiated concern. Consequently, an employer has the ability to discipline employees who refuse to come to work and lack an objective, reasonable basis to justify their absence.

Q: What short-term practical measures should employers consider implementing in the workplace?

While different employers may choose to implement different cautionary measures depending on the nature of their business, the one universal and perhaps most effective way to approach this situation is to remain calm, objective, and level-headed. In other words, don't panic. Once employers have committed to addressing the outbreak in this manner, they may also wish to consider the following:

- Educate the workforce. Lack of information or misinformation spawns unnecessary hysteria. The more employees know about Ebola and how it is transmitted, the better equipped they will be to approach this outbreak in a pragmatic and reasonable fashion.
- Remind employees about proper infection control practices (*i.e.*, regular hand washing, sneezing/coughing etiquette, minimizing handshakes and other similar forms of contact where possible, etc.).
- Follow [OSHA guidance](#) regarding cleaning and decontaminating work surfaces that may contain or have been exposed to blood or bodily fluids.
- Consider whether telecommuting would be an effective infection control strategy for an employee who may need to remain out of the physical workplace due to Ebola-related concerns.
- Review and consider whether any business that needs to be conducted abroad (to areas impacted by Ebola or close in proximity thereof) can either be postponed or conducted remotely.
- Routinely monitor the workplace to prevent discrimination, harassment, and retaliation against employees as a result of this outbreak.

It remains to be seen just what type of impact the Ebola epidemic will have on workplaces in the United States. However, what is abundantly clear is that this situation is constantly changing. What may seem reasonable today may need to be modified tomorrow. As a result, employers must continue to be flexible in their approach to this outbreak and, where necessary, revise their strategies moving forward.

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