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M E M O R A N D U M

TO: Ohio Providers Resource Association

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RE: COVID-19 (Coronavirus) - Employment Law Considerations

With the spread of COVID-19 (Coronavirus), employers are coping with the difficulty of crafting policies and response plans in a rapidly changing environment. This memorandum attempts to answer common employment-related COVID-19 questions and to provide some guidelines regarding steps employers should or should not take in response to the current COVID-19 situation.

As is typically the case, every employer's situation may be different and those differences may be important in the actions the employer may or may not take. Thus, this memorandum should not be considered to be legal advice. Any agency desiring legal advice on their specific circumstances should consult qualified employment or regulatory counsel.

Employees at Work

Can employers send employees home if they appear sick? *Yes. Employers can send sick employees home and ask that they not return until symptom-free.*

How much information may an employer request from employees who report feeling ill at work or who call in sick? *Employers may ask if they are experiencing symptoms related to COVID-19, such as fever, cough, and difficulty breathing. Employers must maintain all information about employee illness as a confidential medical record. Given the severity of COVID-19, the inquiries are justified by a reasonable belief based on objective evidence that COVID-19 poses a direct threat.*

Can employers force employees to use sick and/or vacation time when not working? *Yes, if consistent with existing policies or contracts, such as collective bargaining agreements.*

Can employers require employees to follow good hygiene and wear certain protective equipment? *Yes. Employers should educate all employers about proper hygiene and provide*

ample supplies for hand washing and cleanliness. Note that, at present, CDC guidance indicates that personal protective equipment should only be used by healthcare personnel caring for patients with confirmed or possible COVID-19.

Should an employer request that employees inform the employer about a diagnosis of COVID-19? *Yes. Such disclosure is required to enable employers to be proactive in protecting other employees and sanitizing the work area. Employers should take measures to protect employees' confidential information, but local and/or state health officials may also need to be notified.*

Can employers take employees' temperatures? *Measuring an employee's body temperature is considered by the EEOC to be a medical examination. Under the ADA, a current employee may not be required to undergo a medical examination unless it is job related and consistent with business necessity. However, the EEOC has indicated that temperature taking would be permissible (i.e., job related and consistent with business necessity) if COVID-19 becomes more widespread in the community as assessed by state or local health authorities or the CDC. According to a Joint Order to Limit Access to Ohio's Nursing Homes and Similar Facilities issued by the Ohio Department of Health (ODH) and Department of Veterans Services on March 11, 2020, access to all "homes" (which is defined in the rule to include nursing homes, residential care facilities, homes for the aging, and veterans homes operated under Chapter 5907 of the Revised Code) should be limited to those personnel that have been screened for COVID-19 each time they enter the home in accordance with the U.S. Centers for Disease Control and Prevention (CDC), Centers for Medicare and Medicaid Services (CMS), and ODH guidance. Such screening "should include questions about . . . body temperatures above 100.4 degrees or higher." This Joint Order did not mandate specifically taking temperatures. But, given the severity and widespread nature of COVID-19 and recent pronouncements from the World Health Organization and state authorities, employers most likely have a reasonable basis for taking employees' body temperatures, particularly for employees who are involved in patient/client care.*

Agencies should understand, however, that temperature taking is not a panacea. Not everyone who has a fever has COVID-19 or a contagious condition. Also, a person may not have a fever but could still have COVID-19 and be contagious.

If an employer is taking temperatures, employees must be paid for the time it takes to do the readings and any time waiting in line for the test. The employer should also conduct the temperature process in a private area, one employee at a time. It is preferable to use a less invasive testing procedure (e.g., forehead thermometer) rather than taking temperatures orally. In addition, the test may be a subject of mandatory bargaining in a union environment. Because this is an area that could be very dependent on individual agency circumstances, it is best to consult qualified employment or regulatory counsel prior to adopting a temperature-taking program.

Travel Considerations

Can employers still require employees to travel for work? *In most cases, yes. Under current conditions, employers can likely still require work travel. However, individualized factors, such as the location of the travel and the degree of risk present in that location, may come into play. Employers should follow the travel guidance issued by the CDC. Employers should also evaluate any reasonable accommodation requests under the ADA (and comparable state laws) and whether the employer is meeting its requirements under OSHA to provide a safe workplace. Employers are free to cancel or postpone company-directed travel to reduce the risk of infection. Moreover, as a result of Governor DeWine's order of March 12, 2020, any planned employer events involving more than 100 people should likewise be postponed.*

Can employers prohibit employees from traveling to high risk areas for personal travel? *Probably not. However, employers can discourage such travel, and likely can require employees to disclose travel locations for themselves and individuals with whom they live. Further, employers can inform employees that travel to defined high-risk areas may result in a required period of quarantine upon their return, as well as informing employees regarding the effect of such a quarantine on their accrued vacation or sick leave benefits if their position or the agency's IT infrastructure does not allow them to work from home on a temporary basis.*

Can employers require employees to submit to a medical exam after returning from travel or after being quarantined? *If based solely on COVID-19 fears – no, not yet. A medical exam can only be required if it is job-related and consistent with business necessity. This threshold is met if the circumstances pose a direct threat to the health or safety of the workplace. According to the CDC and the EEOC, COVID-19 does not rise to that level at this time.*

ADA and FMLA Considerations

Is COVID-19 a serious health condition under the FMLA? *Very likely, yes. Please note that employees may not have timely access to physicians to complete FMLA paperwork should the healthcare system become overburdened. Employers can certify a condition as a serious health condition under the FMLA without a physician certification. If employers are going to deviate from their FMLA policies and procedures, they should do so under limited and published parameters.*

Is COVID-19 a disability under the ADA? *In most cases, due to its transitory nature, probably not. However, serious cases of COVID-19 could rise to the level of a disability. Also, COVID-19 could impact or worsen an existing disability. Each case should be analyzed individually. Employers should also be cautious about a "regarded as" disability claim under the ADA. It is always best to deal with the facts of any employee's medical condition, not the employer's supposition or stereotype about the medical condition.*

Should employers consider reasonable accommodations under the ADA for COVID-19? *Yes. Employers may still have to engage in the interactive process under the ADA for employees who may be impacted by COVID-19. For example, employees with compromised respiratory function may ask to work remotely as an accommodation or to take a leave of absence. If the condition rises to the level of a substantial limitation, the employer will have to evaluate whether the request is reasonable or presents an undue hardship. Even if the condition may not strictly qualify as a disability, consideration of available accommodations may still represent the best practice.*

What should an employer do if it receives information that an employee, *who does not otherwise have COVID-19 symptoms,* has a medical condition that the CDC says could make that employee especially vulnerable to complications from COVID-19? *Given statements by public health officials concerning the severity of the COVID-19 situation, the employer may have sufficient objective information to reasonably conclude that the employee will face a direct threat if he or she contracts COVID-19. The employer should consider reasonable options for accommodating that employee and should engage with the employee to identify what those options may be. Of course, the employer must keep this information confidential.*

May an employer encourage employees to telework as an infection-control strategy? *Yes. In addition, employees with disabilities that put them at high risk for complications from COVID-19 may request telework as a reasonable accommodation to reduce their chances of infection.*

May an employer require employees who have been away from the workplace to provide a doctor's note certifying fitness to return to work? *Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, because of the current severity of COVID-19 situation, they would be justified under the ADA standards for disability-related inquiries of employees. However, note that doctors and other health care professionals may be too busy during and immediately after a pandemic to provide fitness-for-duty documentation. For that reason, the CDC recommends that employers should not require a healthcare provider's note for employees who are sick with acute respiratory illness to validate their illness or to return to work.*

<u>Wage and Hour Issues</u>

If employers send employees home, must the employees be paid? *Maybe. Non-exempt employees must only be paid for hours worked (including hours worked from home), or if utilizing paid leave. However, exempt employees who perform any work in a workweek must be paid for the entire workweek, subject to very limited exceptions. Employers should be aware of and comply with the applicable Fair Labor Standards Act regulations regarding when it is*

permissible to deduct from the salary of exempt employees. Specific questions should be directed to qualified employment law counsel.

Can an employer pay an employee to not work? *Yes. Some employees cannot afford not to work, which could create an incentive to work while ill. Providing additional paid leave while an employee is out sick or caring for a family member may help to limit the spread of COVID-19 in the workplace. But be careful to apply such policies in a non-discriminatory manner, and be wary of compromising your ability to function effectively.*

Staffing Issues for Providers

If a provider encounters staffing issues resulting from employee absences due to COVID-19, is sharing or lending of employees between providers a viable solution? *Before implementing such a solution, providers should consult with qualified employment counsel. Such employee-sharing arrangements have the potential to create issues in a variety of areas of employment law, including joint employment and wage-hour law, as well as labor law for employers with unionized employees. There could also be various regulatory-related issues, such as whether shared/loaned staff have the requisite background checks, testing, skills, training, and certifications required by ODODD.*

To resolve staffing issues resulting from the impact of COVID-19, is using day activities staff to provide residential services (or vice versa) a viable solution? *Depending on the skills, training, certifications, testing, and background checks required for the work to be done, moving staff between day activities and residential services has the potential to create employment law issues. Consequently, it may be prudent to consult qualified employment or regulatory counsel before implementing such a solution. It would also be prudent for employers to start reviewing staff compliance with any regulatory requirements for various roles in advance of potential staffing gaps.*

Business Considerations

What other steps should employers take? *Employers should carefully craft a contingency plan to mitigate the economic impact of both COVID-19 and any resulting economic slowdown. Employers should craft messages for both employees and stakeholders that clearly outline the steps being taken, address the expectations of employees and other business partners, and inform employees that they will work with them through this difficult time. Responses should be measured and informed.*

Future Considerations

Do the guidelines change if COVID-19 becomes a pandemic in the U.S.? *Most likely, yes. If COVID-19 becomes a pandemic in the U.S. or is declared an emergency by local public health*

officials, the analysis of what is considered a direct threat or is consistent with business necessity under the ADA likely changes, which may provide employers with greater flexibility in responding to the situation. Employers will need to stay up-to-date with guidance and directives from the CDC and state and local health officials, and will need to carefully consider their options and obligations to protect employees and the workplace.