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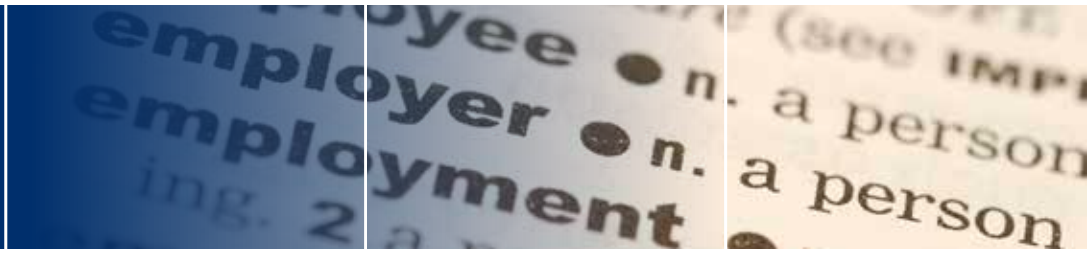

NEWSLETTER
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Top 10 Considerations for Employers Addressing Ebola and Other Dangerous Contagious Diseases in the Workplace

The Ebola virus is the current example of workplace issues facing employers when a potentially deadly infectious disease spreads in the population.

Until July 2014, the Ebola virus contained in the West African countries of Guinea, Liberia and Sierra Leone presented no real risk to Americans on American soil. Since that time, just over a dozen patients have been treated for and/or diagnosed with the Ebola virus on U.S. soil. Employers continue to face very real legal implications as a result of employees traveling, including to West African nations, and the same principles apply to management of workplace concerns when employees risk exposure to other community-based dangerous infectious diseases.

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Lisa Handler Ackerman
Of Counsel, Chicago
312.821.6144
lisa.ackerman@wilsonelser.com

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The Centers for Disease Control (CDC) has published the *Top 10 Things You REALLY Need to Know About EBOLA,* including:

- Symptoms of Ebola appear anywhere from 2 to 21 days (with an average of 8 to 10 days) after exposure
- The Ebola virus is not airborne but rather spread through direct contact with blood or bodily fluids from a person sick with Ebola
- A person infected with Ebola cannot spread it to others until symptoms begin
- A person traveling to countries where Ebola outbreaks exist does not pose a danger to his co-workers, friends and family upon returning home as long as he does not have symptoms of the virus.

In its *advisory* for humanitarian aid workers returning home, the CDC advises persons exposed to the Ebola virus to monitor their temperature twice daily for 21 days and watch for other symptoms commonly associated with Ebola. The CDC maintains that employees and volunteers can continue their normal activities, including work, during this 21-day period.

LEGAL IMPLICATIONS OF EBOLA IN THE WORKPLACE

For the purpose of this discussion, it is presumed that the Ebola virus is a disability covered under the Americans with Disabilities Act (ADA) and a serious health condition under the Family and Medical Leave Act (FMLA). The Equal Employment Opportunity Commission (EEOC) has not issued guidance specific to the Ebola virus and the CDC has not categorized the Ebola virus as a pandemic. Yet, the EEOC *Guidance* on "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act," published in 2009 in the face of the pandemic influenza, provides a practical resource for employers addressing personnel issues that arise if an employee is exposed to or is diagnosed with the virus.

A common scenario that Wilson Elser's Employment & Labor practice clients have been posing goes something like this:

> *An employee advised that he plans to travel to a West African nation where there has been an Ebola outbreak. How can we protect the workplace from potential risks when the employee returns to work?*

The following are common questions our attorneys have fielded, along with an explanation of the various legal implications involved.

1. May an employer create a policy prohibiting employees from traveling to West African countries where the CDC has issued nonessential-travel advisories, and terminate an employee for violating this policy?

The short answers are "No" and "No." An employer puts itself at risk of a discrimination claim if it takes an adverse employment action against an employee for traveling to a specific region. A blanket policy can give rise to a disparate-impact claim by an employee alleging the policy adversely impacts persons of a particular national origin or race.

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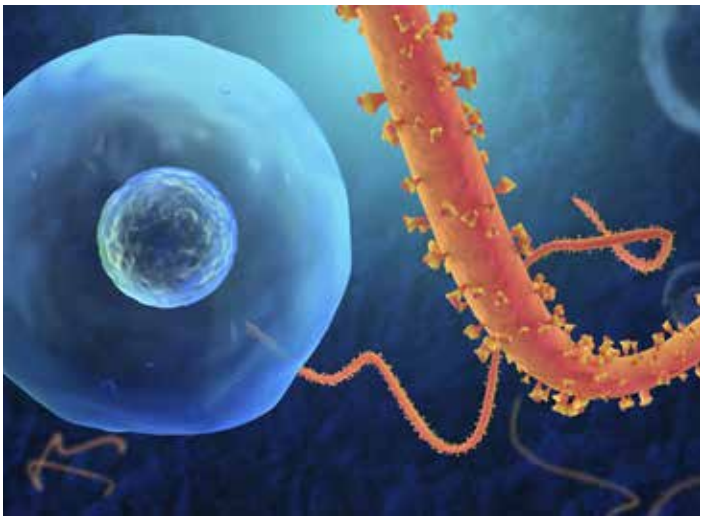
If an employer terminates an employee who traveled to a West African country to care for a family member who has Ebola, the employee may bring a disability discrimination claim alleging that the employer terminated him for his association with a person who has a disability.

In addition, such a policy could violate the FMLA to the extent an FMLA-covered employer denies an eligible employee FMLA leave to travel to West Africa to care for a spouse, child or parent afflicted with Ebola. If that same employer terminated that employee upon his return to work at the end of his FMLA leave, the employer would also be looking at an FMLA retaliation claim.



2. May an employer ask an employee if he is experiencing symptoms of Ebola or require an employee to get tested for the Ebola virus?

The ADA prohibits employers from making disability-related inquiries or requiring medical examinations of current employees unless they are job-related or consistent with business necessity.

Generally, a disability-related inquiry or medical examination of an employee is job-related and consistent with business necessity when (1) an employee's ability to perform essential job functions will be impaired by a medical condition or (2) an employer has a reasonable belief, based on objective evidence, that an employee poses a direct threat to the employer or others.

Depending on the particular circumstances presented, questions about where an employee has traveled and whether an employee has potentially been exposed to the Ebola virus during his travels are generally not disability-related inquiries.

However, an employer should ensure that questions regarding employees' travel plans are asked consistently and without discrimination. For example, an employer should not direct questions about travel plans only to employees of African descent.

Absent a determination that an employee poses a direct threat, an employer risks running afoul of the ADA if it takes an employee's temperature or requires an employee to undergo diagnostic testing for Ebola.

If an employee reports that he is going to be absent from work, the EEOC's 2009 "Pandemic Influenza" Guidance provides that an employer is permitted to ask the reason for the absence. According to the EEOC, asking an employee why he is absent from work is not a disability-related inquiry, and an employer is always entitled to know why an employee is absent from work. Unless an employer determines that an employee is a direct threat or will be absent for FMLA-qualifying reasons, the employer should not press further for details if an employee's absence is for medical reasons.

In the event the CDC or state or local public health agencies escalate the restrictions for those exposed to Ebola, an ADA-covered employer may have sufficient objective information to conclude that an employee who traveled to an area where there is a large Ebola outbreak or who was exposed to Ebola will pose a direct threat to himself or others. In this circumstance, ADA-covered employers may make disability-related inquiries, including asking such an employee if he is experiencing Ebola-like symptoms.

Where an employer believes that an employee poses a direct threat because of his medical condition, the employer may require that the employee undergo medical testing (*e.g.*, taking his body temperature) and direct the employee to be examined by a health care professional of its choice who has expertise in the employee's specific condition.

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3. May an employer prohibit an employee from returning to work until 21 days has passed since he was exposed to the virus, provided he remains symptom free?

In its 2009 "Pandemic Influenza" Guidance, the EEOC notes that if an individual with a disability poses a direct threat despite a reasonable accommodation, the employee is not protected by the nondiscrimination provisions of the ADA.

The EEOC cautions that an "Assessment of whether an employee poses a direct threat in the workplace must be based on objective, factual information, not on subjective perceptions … [or] irrational fears about a specific disability or disabilities." (Internal quotations omitted.)

The EEOC also recognizes that "during a pandemic, employers should rely on the latest CDC and state or local public health assessments, [and even though the] public health recommendations may change during a crisis and vary between states, [the EEOC instructs employers] to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location, and to make reasonable assessments of conditions in their workplace based on this information."

As explained above, the CDC's most current guidance provides that asymptomatic individuals can continue to work even if they have been exposed to the Ebola virus. Therefore, an employer would likely come under fire for "regarding" an employee as disabled in violation of the ADA if it prohibited an asymptomatic employee from returning to work for 21 days following a trip to a West African country affected by the Ebola outbreak or exposure to the Ebola virus.

Also, an employer can be found in violation of the ADA if it discriminates against an employee for his association with a person who has a disability. Therefore, excluding an asymptomatic employee from the workplace following his exposure to Ebola through his contact with an Ebola patient may give rise to an ADA-associated claim.

Conversely, if an employee develops symptoms consistent with the Ebola virus, an employer would be justified in instructing the employee to work from home or otherwise not come to work for up to 21 days absent negative test results from a qualified medical provider, based on the employer's determination that the employee poses a direct threat. Any employer's conduct in this regard is consistent with the current CDC guidance.

Irrespective of the legal parameters, it is understood that an employer may have compelling business reasons, such as addressing concerns of its personnel, clients or patients, as a result of which it prefers that an employee take time off or work remotely following the employee's travel to an area with an Ebola outbreak or exposure to the virus. Concerns such as these are particularly common for employers in the health care industry when employees have direct patient contact.

An employer must be careful in how it approaches this discussion with the employee to avoid being seen as violating the ADA by "regarding" an employee as disabled. This becomes especially sensitive when an employee does not want to work from home or has a job where all or many of the essential duties cannot be performed from home.

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4. Is an employer required to pay an employee who has not been diagnosed with Ebola and who is not coming to work for up to 21 days (either by agreement or because it has been determined that he poses a direct threat) and who cannot perform all or most of his job duties remotely because of the nature of his work?

Under the Fair Labor Standards Act (FLSA), an employee who is paid on an hourly basis or is otherwise not exempt from the FLSA's minimum wage or overtime-pay requirements (*i.e.*, is entitled to minimum wage and overtime) is not entitled to compensation when he is not performing compensable work. An employer, however, should consult its own paid-time-off policies.

If an employee is exempt from the FLSA's minimum wage or overtime-pay requirements (*i.e.*, the employee is not entitled to minimum wage or overtime), the employer jeopardizes the exempt status if it deducts wages for a reason not permitted by the Department of Labor. If an employee loses his exempt status, the employee may be entitled to minimum wage or overtime.

Three permissible deductions an employer could take from an exempt employee's wages without jeopardizing the employee's exempt status are (1) if the employee is absent from work for one or more full days for personal reasons other than sickness or disability, (2) for absences of one or more full days due to sickness or disability if the deduction is made in accordance with a *bona fide* plan, policy or practice or providing compensation for salary lost due to illness, and (3) if the employee is absent for a full workweek.

Legal requirements aside, paying an employee his regular wages (at least until and unless he tests positive for the Ebola virus) may provide other benefits to an employer, such as limiting the risk that Ebola will spread in its workplace, reducing rumors in the workplace, and improving morale and public relations. While an employer may think an employee has "agreed" not to come to work for a period of time, the employee may be harboring negative feelings associated with this arrangement. If that situation arises, having continued to pay an employee his salary may reduce the chance he will bring a claim, or at the very least reduce the damages to which he may be entitled if he does bring one.

5. Does an employer have to pay an employee who is absent from work after testing positive for Ebola?

The employer should generally treat such employees the same as it does others who are absent for medical reasons. An employee diagnosed with Ebola may qualify for short-term disability benefits. Assuming the employee has used all accrued paid-time-off benefits, an employer should be mindful of the implications of an otherwise well-intended practice, such as paying an employee for work missed following an Ebola diagnosis. For example, an employer that does not pay female employees for pregnancy-related disabilities opens itself up to liability under the Pregnancy Discrimination Act (PDA) if it provides paid leave for employees with other temporary disabilities such as Ebola.

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6. What job protection exists for an employee who is diagnosed with Ebola or has a family member with Ebola?

If an employer is covered under the FMLA and the employee is eligible for FMLA benefits, then the employee may be afforded up to 12 weeks of unpaid, job-protected leave for his own serious health condition. The FMLA would also provide the same benefit to an employee who needs to miss work to care for a spouse, parent or child with a serious health condition such as Ebola.

If an employee has not recovered well enough from his own Ebola diagnosis to return to work full-time at the end of the 12-week FMLA leave, his employer should consider whether he is entitled to a reasonable accommodation (*i.e.*, additional unpaid leave, a work from home arrangement or reduced schedule) under the ADA or if doing so would impose an undue burden on the employer.

Also, an employer should ensure that it treats such an employee consistently with the way it treats similarly situated, non-disabled employees who are permitted to work from home or take unpaid leaves from work.

As mentioned above, an employer may be subject to liability under the ADA for discriminating against an employee who has an association with a person who has a disability. Therefore, if an employee is unable to return to work full-time at the end of his 12-week FMLA caretaker leave, an employer needs to consider if providing that employee additional time off or permitting him to work from home is consistent with how it treats other employees to avoid an ADA-associated claim.

7. May an employer require an employee who has been away from work for the 21-day incubation period or to recover from an Ebola diagnosis to obtain medical authorization before returning to work?

In its 2009 "Pandemic Influenza" Guidance, the EEOC advised that an ADA-covered employer is permitted to require an employee returning to work during a pandemic to provide a doctor's note certifying his fitness to return to work because such inquiry would not be disability-related, or would be justified under the ADA if the pandemic influenza were truly severe.

In the case of an employee returning to work following an Ebola diagnosis or 21-day incubation period following Ebola exposure, an employer would likely be justified under the direct-threat defense to require an employee to obtain a medical authorization to return to work. Any such inquiries, however, must be limited to what information is needed to make an assessment of an employee's ability to return to work.

When an employee is returning to work at the expiration of his 12-week FMLA leave upon recovery from the virus, the FMLA permits employers to obtain a fitness-for-duty certification as a condition of returning to work. The employee should be advised of this requirement at the outset of his FMLA leave.

8. What rights exist for employees who express concern about exposure to Ebola in the workplace?

Notwithstanding an employer's leave of absence policy or paid-time-off benefits accrued by an employee, employees who are afraid to come to work out of concern that they will contract Ebola are not entitled to FMLA leave or any sort of accommodation (*e.g.*, work from home) under the ADA.

Union and non-union employees who refuse to work because of safety concerns in the workplace could be deemed to be engaging in concerted activity protected under the National Labor Relations Act (NLRA) so long as they have a "good faith" belief that their health and safety were at risk – even if they are mistaken. The NLRA prohibits employers from retaliating against employees who engage in protected concerted activity.

Under the Occupational Safety and Health Act of 1970 (OSHA), employees can refuse to perform work if (1) where possible, they asked the employer to eliminate the danger and the employer failed to do so; (2) they refused to work in "good faith," meaning that they

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genuinely believed that an imminent danger existed; (3) a reasonable person would agree that there is a real danger of death or serious injury; and (4) there is not enough time due to the urgency of the hazard to get it corrected through regular enforcement channels, such as requesting an OSHA inspection. An employer cannot retaliate against an employee for expressing a safety concern. However, the employer may not need to pay such employees, and further, it is unclear at this time whether fear of Ebola exposure would actually be reasonable in light of the current CDC guidance.

9. What liability may an employer face if an employee or third party becomes infected with the Ebola virus at its workplace?

An employer's concern that it not open itself up to liability for violating the ADA by asking an employee disability-related questions, or requiring medical testing in the absence of a direct threat, or prohibiting an asymptomatic employee from coming to work based on fear following his exposure to the Ebola virus must be balanced with the risks associated with the spread of the Ebola virus in its workplace.

If the Ebola virus is spread in the workplace, employees who claim to have become infected in the course of their employment may file workers' compensation claims.

Under OSHA, an employer has a legal obligation to provide safe and healthy working conditions, which include protecting employees against "recognized hazards" to safety or health that may cause injury or death.

OSHA has issued *Interim General Guidance for Workers*, which sets forth its requirements and recommendations for protecting workers whose activities are conducted in an environment that is known to be or is reasonably susceptible to becoming contaminated with Ebola. These include health care workers; airline and travel industry personnel; mortuary and death care workers; laboratory workers; border, customs and quarantine workers; emergency responders; and workers in critical care sectors.

OSHA's "Interim Guidance" refers employers to its regulations governing the Blood-borne Pathogens Standard for any occupational exposure to blood or other potentially infectious material, and its regulations governing the Personal Protective Equipment Standard, the Respiratory Protection Standard and the General Duty Clause of OSHA for other occupational exposures.

An employer may also face civil claims such as professional liability or premises liability claims alleging that an employer was reckless or negligent in failing to prevent the spread of Ebola to patients or business invitees in its workplace.

10. What may an employer disclose about issues surrounding an employee's health condition?

Once an employer receives medical information about an employee, it must ensure that it keeps that information confidential. An employer may acquire confidential medical information about an employee (1) in response to the employer's disability-related questions or directed medical examination based on the reasonable belief that the employee poses a direct threat, (2) during the course of the interactive process when an employee has requested a reasonable

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accommodation, (3) when an employee has exercised his rights under the FMLA or (4) when an employee voluntarily discloses such information.

The ADA permits an employer to disclose confidential medical information about an employee only to supervisors and managers if it relates to (1) necessary restrictions on the work or duties of the employee and necessary accommodations, (2) first aid and safety personnel if an employee's disability might require emergency treatment and (3) government officials investigating compliance with the ADA, if requested.

The EEOC has instructed in its guidance that the general personnel files of employees should not contain any "medical-related material." The EEOC differentiates between notice that an employee has taken sick leave or had a doctor's appointment, which is not considered to be covered medical information, and information regarding an employee's diagnosis or symptoms, which is considered covered medical information.

The EEOC's "Technical Assistance Manual on the Employment Provisions of the ADA" (issued in January 1992) provides that an employer "should take steps to guarantee the security of [an employee's] medical information," including keeping the information "in a medical file in a separate, locked cabinet, apart from the location of the personnel files" and access should be restricted to specific persons.

An employer's obligations to maintain an employee's medical information do not end when an individual is no longer an employee.

The regulations interpreting the FMLA also require that records and documents relating to medical certifications of employees or their family members for purposes of the FMLA shall be maintained as confidential medical records kept separate from personnel files.

Infectious diseases will continue to pose challenges to employers seeking to ensure a safe and productive workplace, whether it is Ebola or the next virulent "bug." Wilson Elser's national Employment & Labor attorneys are available to help employers navigate the various developing issues and laws implicated when an employee has been exposed to the Ebola virus or other communicable medical conditions.

Members of Wilson Elser's Employment & Labor practice, located throughout the country, provide one convenient point of contact for our clients. Please contact any of the following partners to access the experience and capabilities of this formidable team.

Contacts:

National Practice Chair
Ricki Roer
ricki.roer@wilsonelser.com
212.915.5375
Northeast

By Region:

Midatlantic
Robert Wallace
robert.wallace@wilsonelser.com

Southeast
Anthony P. Strasius
anthony.strasius@wilsonelser.com

Rodney Janis
rodney.janis@wilsonelser.com

Midwest
David Holmes
david.holmes@wilsonelser.com

Southwest
Linda Wills
linda.wills@wilsonelser.com

West
Dean Rocco
dean.rocco@wilsonelser.com

Steve Joffe
steve.joffe@wilsonelser.com