

Coronavirus and the Workplace: Issues Impacting Employers in the Restaurant Industry

As the novel coronavirus disease known as COVID-19 or “coronavirus” continues to spread in New York, restaurant industry employers are forced to consider a number of workplace issues related to the virus and their obligations to employees and customers. The Centers for Disease Control and Prevention (CDC) has issued guidance for businesses to plan for and respond to a coronavirus outbreak, but employers must go a step further and ensure they are also complying with multiple employment laws that may be implicated, including at the state and local level. While many of the workplace matters discussed herein are applicable to employers generally, those in the restaurant industry face unique circumstances as their doors are open to the public and their employees are preparing and serving food to that public.

STACEY A. USIAK is a partner and ANDREW P. YACYSHYN is an associate in the employment law practice of Tannenbaum Helpern Syracuse & Hirschtritt.



By
**Stacey A.
Usiak**



And
**Andrew P.
Yacyshyn**

Below we discuss several of the issues that employers are likely to encounter over the next several weeks. As an overall rule, it is imperative that employers consistently enforce and apply any policies or decisions made regarding coronavirus in the workplace to avoid unintentionally treating employees differently based upon their membership in a protected class, such as national origin.

Employees With Coronavirus Symptoms

Pursuant to the General Duty Clause of the Occupational Safety and Health Act (OSH Act), employers must provide employees with a workplace “free from recognized hazards that are causing or are likely to cause death or serious

physical harm” to employees, which means sending employees with symptoms of coronavirus home. CDC guidance suggests that employers should encourage employees who are sick with symptoms of respiratory illness, such as fever, cough, and shortness of breath, to stay home and not return to work until they are free of symptoms for at least 24 hours, while NYC Department of Health guidance now suggests 72 hours fever free.

Employers must allow employees to use accrued paid sick leave for absences occasioned by such symptoms. At the very least, employees who work in New York City accrue up to 40 hours of paid sick leave per year under the Earned Safe and Sick Time Act, which employees can use for their own sickness or to care for a sick family member. An employee caring for a family member with coronavirus may also be eligible for wage benefits under the New York Paid Family Leave Benefits law. Employees suffering from

coronavirus or caring for a family member who is suffering from coronavirus may also be entitled to unpaid job-protected leave under the federal Family and Medical Leave Act (FMLA).

A restaurant's obligation to pay employees who are quarantined, placed on a leave of absence or otherwise asked to stay home, or who are sick or caring for a sick family member with coronavirus, will depend on the employee's exempt or nonexempt status. Since nonexempt employees (i.e., employees eligible for overtime pay) are generally only required to be paid for time actually worked, other than accrued paid sick time, there is no requirement to pay nonexempt employees who do not report to work because of coronavirus, regardless of whether the employer directed them to stay home or they voluntarily made that decision. However, nonexempt employees who report to work exhibiting symptoms and are sent home will be entitled to call-in pay for reporting to work even if no work is performed. Exempt employees must be paid their full weekly salary if they perform any work in the workweek, with limited exceptions such as if the employee has exhausted their paid sick leave and is absent due to their own illness, in which case the employee need not be paid for full days not worked. If an exempt employee misses a full week of work as a result of having



contracted the coronavirus, there is no obligation for the employer to compensate the employee for the week beyond any accrued paid sick leave to which they are entitled. To the extent applicable, employers should also consider employees' rights to use any other paid time off provided by the employer, such as vacation.

As a practical matter, hospitality industry employers—such as restaurants, bars, clubs and hotels—need to consider the availability of employees to cover shifts for those who contract the virus or are in quarantine. There is no feasible way for food service employees to perform their job duties remotely, which means employers should have in place a plan to ensure shifts are properly staffed so that business operations run smoothly. This may involve contracting with a staffing company to supply temporary workers in the event of last minute absences.

Delivery Employees

An increase in delivery orders is anticipated as many customers seek to avoid gathering in places with other people and self-quarantine. Not only may this present a need to shift staffing levels, but delivery personnel must be protected as well. Restaurants may consider asking or adding to their on-line order forms “are you in quarantine or is there anything else we should know to ensure for our delivery person's health?” This would allow the restaurant to alter delivery procedures to protect their delivery personnel.

Travel Restrictions

A blanket ban on employees' personal travel could violate New York's protected off-duty conduct law (NY Labor Law §201-d), which prohibits discrimination against employees participating in legal recreational activities outside

work hours, off of the employer's premises and without use of the employer's property. However, employers should encourage employees to avoid personal travel to countries identified by the CDC as having an elevated risk for coronavirus contraction and require employees to notify them if they do so travel. Employees who return from a trip to a high-risk country should not be permitted to return to work for 14 days to ensure no coronavirus symptoms are present.

Privacy

Employers must remain aware of their obligation to maintain the privacy of employees who have or are showing symptoms of coronavirus as required under the Americans with Disabilities Act (ADA). That said, such obligation must be balanced against an employer's duty to notify employees of their potential exposure to the coronavirus in the workplace pursuant to the OSH Act. Accordingly, if an employee traveled to one of the countries identified by the CDC or is showing symptoms of coronavirus, the employer should warn other employees who had contact with such employee and consider requesting those employees to self-quarantine as well.

Customers

Just as hospitality employers have an obligation to protect their workforce from contagious

employees, such employers have a duty under the OSH Act to protect their employees from contagious customers. This may mean asking customers who are visibly exhibiting symptoms of a respiratory or other communicable illness, such as coronavirus, to leave and come back another time or suggesting delivery as an option. If a customer's symptoms are not wholly obvious, but the customer does appear possibly ill, a manager may consider discretely inquiring as to whether the customer recently traveled to one of the high-risk countries, was recently exposed to anyone with coronavirus and whether the customer is contagious.

Similarly, customers' health must be a concern. Many servers, bartenders, bussers, and others feel compelled to work even when sick for a variety of reasons. Given their roles in handling customers' food and beverages, restaurants must enforce strict policies prohibiting sick employees from working, especially given the public's fear of a coronavirus pandemic.

Customers may question whether any employees have coronavirus, have traveled to a high-risk country, or have been sent home or quarantined. Employers must preserve their employees' privacy and not reveal specific employees' identities, but in order to address customer concerns, the employer may notify the customer whether any employees

have contracted the coronavirus or traveled recently and inform the customer of the proactive steps taken by the employer to maintain a safe establishment and prevent the spread of the virus.

Conclusion

New information regarding the coronavirus is regularly being released and employers should keep abreast of such developments to ensure evolving best practices are followed. Employers should have a plan in place—beyond just requiring employees to wash their hands and use hand sanitizer—so that they are ready to manage a coronavirus outbreak should that occur. Importantly, employers must maintain safe workplaces and establishments for their employees and customers, but must not lose sight of the employment laws that will inevitably impact their decisions.