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PROTECTING YOUR NONPROFIT FROM COVID-19

As of this writing, several cases of the coronavirus COVID-19 have been confirmed in the New York City metropolitan area, and more will undoubtedly be reported in the coming weeks. While the situation is evolving rapidly, the main sources of reliable information are the Centers for Disease Control and Prevention (CDC), World Health Organization (WHO), National Institute of Occupational Health and Safety (NIOSH), and the New York State Department of Health. Nonprofit employers should prepare by:

- taking basic steps to prevent the spread of infection in the workplace
- developing an **Infectious Disease Outbreak Response Plan** as recommended by CDC
- understanding what responses to actual or perceived infection are legally permissible
- understanding what actions are not legally permissible
- understanding leave and wage payment obligations
- continually monitoring information as updated by reliable sources

What steps should we take now? Nonprofit employers should familiarize themselves with the following recommendations from the CDC to help minimize the risk of infection:

Separate sick employees:

- CDC recommends that employees who appear to have acute respiratory illness symptoms (i.e. cough, shortness of breath) upon arrival to work or become sick during the day should be separated from other employees and be sent home immediately. Sick employees should cover their noses and mouths with a tissue when coughing or sneezing (or an elbow or shoulder if no tissue is available).

Emphasize staying home when sick, respiratory etiquette and hand hygiene by all employees:

- Place posters that encourage [staying home when sick](#), [cough and sneeze etiquette](#), and [hand hygiene](#) at the entrance to your workplace and in other workplace areas where they are likely to be seen.
- Provide tissues and no-touch disposal receptacles for use by employees.
- Instruct employees to clean their hands often with an alcohol-based hand sanitizer that contains at least 60 percent alcohol, or wash their hands with soap and water for at least 20 seconds. Provide soap and water and alcohol-based hand rubs in the workplace. Maintain adequate supplies. Place hand rubs in multiple locations or in conference rooms to encourage hand hygiene.

Are nonprofits legally obligated to respond to COVID-19? Yes, with details depending on the circumstances. All employers have a general duty to provide a safe and healthful workplace under the Occupational Safety and Health Act (OSHA). In the absence of specific regulations addressing COVID-19, OSHA will rely on guidance from the Centers for Disease Control and Prevention (CDC), World Health Organization (WHO), National Institute of Occupational Health and Safety (NIOSH), and state and local public health authorities.

The CDC recommends that employers “should be ready to implement strategies to protect their workforce from COVID-19 while ensuring continuity of operations. During a COVID-19 outbreak, all sick employees should stay home and away from the workplace, respiratory etiquette and hand hygiene should be encouraged, and routine cleaning of commonly touched surfaces should be performed regularly.”

Employers are expected to develop an **Infectious Disease Outbreak Response Plan** that considers the following:

- Monitor information issued by CDC, WHO, OSHA and state and local public health departments and identify possible work-related exposure and health risks to employees.
- Develop plan to minimize exposure between and to employees, if public health officials call for social distancing/hazard prevention procedures.
- Establish a process to communicate information to employees on Infectious Disease Outbreak Response Plan and latest COVID-19 information.
- Explore the possibility of establishing policies and practices, such as flexible worksites (e.g., telecommuting) and flexible work hours (e.g., staggered shifts), to increase the physical distance among employees and between employees and others if state and local health authorities recommend the use of social distancing strategies.
- Prepare for possible increased numbers of employee absences due to illness in employees and their family members, dismissals of early childhood programs and K-12 schools due to high levels of absenteeism or illness.
- If there is evidence of a COVID-19 outbreak in the US, consider canceling non-essential business travel to additional countries per travel guidance on the CDC website.
- Develop a method for monitoring employees who contract the virus.
- In extreme cases, report incidents of on-the-job infection with COVID-19 to OSHA.
- More information from OSHA is available here: https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/guidance-business-response.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fguidance-business-response.html

Even while operating during a possible epidemic, employers will remain subject to existing laws concerning disability, sick leave, and payment of wages, in addition to safety and health laws. Nonprofit employers with union-represented employees should review relevant provisions of the collective bargaining agreement.

What are Employers Allowed to Do?

- An employer may send employees home if they display COVID-19-like symptoms. This action would be permitted under Americans with Disabilities Act (ADA) and required by OSHA, if the illness were serious enough to pose a direct threat.
- An employee who believes that his/her health is in “imminent danger” at the workplace due to *actual presence or reasonable probability* of disease at the workplace and refuses to work is engaging in “protected activity” should be allowed to stay home from work on paid or unpaid leave.
- Employees may be encouraged, but should not be required, to provide a medical certification of fitness to return to duty prior to returning to the workplace following an absence due to illness or quarantine. As a practical matter, health care providers may be unable to respond in a timely manner to a large number of such requests.

- Human Resources Department representative or, if none, a senior manager (but not a direct supervisor or manager) can make a general health inquiry of an employee who is displaying symptoms.
- If an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace, but the employee's name must not be disclosed.
- Employers may need to adjust attendance policies for employees who are quarantined and/or working from home but may continue to require call-in or email notifications of absences.
- Employers should notify all relevant insurance carriers if an employee tests positive for COVID-19.
- Employers must follow the usual procedure and dialogue for reasonable accommodation in response to an employee inquiry related to COVID-19.
- Employers may ask whether an employee has traveled to a country with known COVID-19 outbreak, and require the employee to self-quarantine before returning to work.
- Employers may need to develop a respiratory protection program as required by OSHA if allowing employees to wear respirator masks, e.g. the N95 mask, in the workplace.

What are Employers Not Allowed to Do?

- Employers may not **require** an employee to obtain medical care, even if they appear ill.
- Direct supervisors may not inquire about an asymptomatic employee's general health and well-being.
- Employers may not place on Family and Medical Leave Act leave an employee who is absent during an asymptomatic quarantine, because that is not a serious health condition.
- Employers may not take the temperatures of all employees as a blanket screening, unless ordered or allowed to do so by public health officials during a declared pandemic.
- Employers may not force an employee to come into the workplace if he or she has a **reasonable** belief that he or she is in imminent danger. Disciplining an employee under those circumstances would be unlawful retaliation under OSHA.
- An employer may not ask employees *who do not have symptoms* to disclose whether they have a medical condition that the CDC says could make them especially vulnerable to the coronavirus.

What are the rules around time off for quarantine or illness?

- **New York City Safe and Sick Time Law:** Employers must give employees five days off (paid, if the employer has at least five employees) in the event that the workplace is closed by official order for a public health emergency, or if an employee must stay home to care for a child whose school or child care facility is closed for a public health emergency. Employers must also provide time off for preventive care or medical treatment of employees and their family members.
- **Non-exempt employees:** The FLSA requires employers to pay non-exempt employees only for hours that the employees have actually worked. However, in a recent trend, some employers who can afford to do so are paying non-exempt employees who must stay at home to care for themselves or a family member.
- **Exempt employees:** For exempt employees, an employer will be required to pay the employee's full salary if the worksite is closed or unable to reopen due to inclement weather or other disasters for less than a full workweek. However, an employer may require exempt employees to use allowed leave for this time.
- **Call-in pay:** New York State requires that employers pay non-exempt employees who are required or allowed to report to work at least four hours' "call-in pay" even if they are sent

home due to lack of work, early office closure, or similar circumstances. If the employee's normal shift is less than four hours, then the employer need pay only for the number of hours scheduled for the shift.

- **Family and Medical Leave Act:** Employers with 50 or more employees must allow up to 12 weeks' protected leave for the serious health condition of eligible employees and their close relatives. It appears that this leave would not be available during the quarantine of an individual with no symptoms.
- **New York State Paid Family Leave:** All employers must allow eligible employees up to ten weeks' leave to care for a relative with a serious health condition.

COVID-19 has not yet been identified as a "pandemic" in the New York metropolitan area. Nonetheless, employers should consult the latest CDC and state or local public health assessments. Lawyer's Alliance is continuing to monitor this outbreak to assist New York City's nonprofit employers in their preparedness efforts. Updated or additional guidance will be published as the situation develops and is better understood.

Resources:

City of New York Health Department guidance and FAQs dedicated to COVID-19

<http://nyc.gov/health/coronavirus>

NYS Department of Health's dedicated novel coronavirus website at

<https://www.health.ny.gov/diseases/communicable/coronavirus/>

NYS Department of Health's directory of local health departments

https://www.health.ny.gov/contact/contact_information/

New York State Office of Children and Family Services has provided information for child care providers on its website at <https://ocfs.ny.gov/main/>

US Department of Labor OSHA guidance on how to protect workers from COVID-19

<https://www.osha.gov/SLTC/covid-19/>

Equal Employment Opportunity Commission's Guidance on Pandemic Preparedness and the Americans with Disabilities Act: https://www.seyfarth.com/dir_docs/publications/EEOC_Pandemic_Guidance.PDF

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