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Legal Update

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THE CORONAVIRUS AND THE LAW

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The coronavirus, which, in less than two months, has reportedly infected more than 81,000 people (the vast majority in mainland China) and caused more than 2,700 deaths worldwide, continues to dramatically impact global markets and economies. The threat of a pandemic has been serious enough for the U.S. State Department and U.S. Center for Disease Control and Prevention ("CDC") to issue serious advisories and warnings against travelling to China and other affected areas. The CDC has also stated that the spread of the coronavirus in the U.S. is inevitable. In response to the "public health emergency," the White House has even imposed mandatory quarantines on citizens returning to the United States from infected areas. Unsurprisingly, the effects of the coronavirus are being felt in a number of legal contexts as well. Some examples are discussed below, however, further issues are sure to arise as the crisis continues to unfold.

What is the coronavirus?

The coronavirus (officially named COVID-19 by the World Health Organization known as WHO) is a previously unidentified virus that usually manifests in respiratory illness (fever, cough, difficulty breathing) but can be deadly in severe cases, resulting in pneumonia, kidney failure and other potentially fatal conditions. The CDC has confirmed that the coronavirus, believed to have an incubation period of between 2 and 14 days, can be spread from person to person contact.

Employment law implications.

The coronavirus outbreak has significant workplace implications, considering the need for employers to balance their obligation to ensure a safe and healthy working environment with the many privacy and antidiscrimination obligations they owe their employees under applicable state and federal laws.

Section 5 of the federal Occupational Safety and Health Act ("OSHA"), known as the "General Duty Clause," obligates employers to assure their employees a workplace free from recognized hazards likely to cause serious physical harm or death. OSHA also requires employers to protect employees of *other* businesses who visit the employer's worksite against exposure to danger. The nature of each particular workplace generally determines the level of response that an employer should undertake to reasonably protect its employees against threats.

Given the geographic concentration of documented infections, and consistent with the guidance offered by the State Department and the CDC, employers that ordinarily require employees to travel internationally—especially to and from areas where authorities have confirmed COVID-19 infections—are advised to review and/or establish policies and procedures to address the current environment. For example, employees who have recently travelled to China or who demonstrate symptoms of respiratory illness might be instructed to work from home for up to 14 days. If assigning such employees to work remotely is not possible or practical, employers may consider providing the employees with paid leave during the period of incubation.

Employers must still be careful, however, to avoid adopting policies and procedures that might violate the Americans with Disabilities Act ("ADA"). While the coronavirus might not be considered a "disability" under the ADA, due to its temporary nature, an employer can still violate the ADA by treating an employee with no disability as though he/she is "disabled." Accordingly, employers should refrain from "overreacting" to the threat by, for example, subjecting the entire workforce to unnecessary quarantine. Instead, assessing risk to employees on a case by case basis is recommended.

Along similar lines, employers should think twice before requiring their employees to undergo medical examinations—even if the employees in question recently returned from China or another area with known infections. The ADA prohibits employers from requiring medical examinations unless they are job-related and "necessary" to the employer's business. Because of the precautions already being undertaken at the government level to restrict travel to and from China, requiring employees (especially those who are asymptomatic) to undertake medical exams to screen for the coronavirus could be deemed "unnecessary" and potentially discriminatory. Employers should consult with legal advisors when considering implementing workplace policies in response to the coronavirus.

Contractual performance implications.

As a result of the emergency travel restrictions imposed by numerous governments, international trade and commerce has slowed considerably. In many cases, products and materials have no commercially reasonable way of reaching their intended destination. Accordingly, businesses may experience difficulty performing certain contractual obligations such as delivering products and materials to a particular place at a particular time. While such failures might usually result in liability for breach of contract, the governmental restrictions on travel could give rise to special contract defenses.

Commercial contracts frequently contain provisions, called "*force majeure"* clauses, which allow a party to avoid performance as a result of certain extreme circumstances beyond their control. These clauses generally list the circumstances that qualify and commonly include floods, earthquakes and other "acts of God," as well as "man-made" obstacles such as war, terrorism, and governmental or regulatory action. Because global health emergencies are not commonly listed as circumstances allowing a party to avoid performance, businesses should be careful before using these clauses to justify non-performance, as doing so could backfire and might result in liability. During the current crisis, businesses may want to consider adding appropriate language to their contracts to cover a health crisis such as the coronavirus.

If contracts do not have a clause covering a health crisis or the related unavailability of parts and materials, other defenses may be available depending on the applicable state law. For example, some states recognize the doctrines of commercial frustration or legal impossibility to excuse contractual performance. These defenses may come into play when unforeseen circumstances undermine the very purpose of the agreement. However, these doctrines are reserved for the most exceptional of circumstances.

Conclusion

The coronavirus threat to public health does not seem likely to dissipate in the immediate future and may be on the brink of being declared a global pandemic. Businesses must be prepared to adapt their strategies and practices in a manner consistent with the emerging threat. Your regular FVLD contact can discuss with you the latest developments that may be affecting your business.

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