

Protecting Your Workforce: What You Need to Know About Ebola

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The Ebola virus disease (“Ebola”) has become a worldwide threat, which, among many other effects, has forced employers to think about how to protect their employees. Employers also must consider how Ebola might impact employment policies and procedures, including, but not limited to, those addressing attendance, leaves of absence, discipline, and medical testing.

Employers are generally tasked with maintaining safe and productive workplaces for their employees, and the Ebola scare has brought many challenges in this regard. In particular, employers’ desire to maintain safe workplaces for their employees potentially may be at odds with the legal rights of those same employees to be free from employment discrimination. Employers that wish to maintain a safe workplace at all costs should be aware of the precise legal risks that they may face and the ramifications of their actions.

With this construct in mind, we have provided below a legal framework of best practices and legal risks pertaining to Ebola. Employers should be mindful of applicable laws, and should also stay abreast of any guidance provided by agencies charged with guiding the public, such as the U.S. Centers for Disease Control and Prevention (“CDC”).

Ebola in the United States

Since August 2, 2014, there have been nine patients diagnosed with the Ebola within the United States, eight of whom were U.S. citizens, and only two of whom contracted the disease while within the United States. The first person diagnosed with Ebola, Eric Duncan, died from the disease after 11 days in the hospital.

As a result of these travel-associated cases, and in order to help prevent infection in the United States, the White House has ordered, as a protective measure, [screening](#) for the disease at five airports (New York’s John F. Kennedy, Newark’s Liberty, Washington’s Dulles, Chicago’s O’Hare, and Atlanta’s Hartsfield-Jackson). The government also recently required that all incoming flights from the areas affected by Ebola arrive in the United States at one of these airports.

On October 11, the CDC confirmed the first human-to-human transmission of the Ebola within the United States, when a health care worker who treated Mr. Duncan in Dallas, Texas, contracted the disease. On October 15, another hospital employee who treated Mr. Duncan was diagnosed with Ebola.

On October 23, a fourth person was diagnosed with Ebola—a New York City physician, Dr. Craig Spencer, who had returned from Guinea, where he served with Doctors Without Borders treating Ebola patients. He is currently being treated at Bellevue Hospital Center, which has been designated as an Ebola treatment center within New York City.

The current Ebola epidemic is mainly affecting Western Africa and is the largest known outbreak in the history of the disease. Although there has been growing concern in the United States, the CDC has [stated](#) that there is “no substantial risk to the U.S. general population.”

What Is the Ebola Virus Disease?

According to the CDC, Ebola is a rare virus that initially presents symptoms similar to those of the flu and can appear anywhere from two to 21 days after exposure. Some common symptoms are headaches, diarrhea, body aches, vomiting, unexplained bleeding, stomach pain, and a sore throat. In the majority of cases, hemorrhagic fevers cause internal bleeding, and complications from the disease can cause organ failure. While the virus can be transmitted through direct contact with body fluids of an infected individual, it is not an airborne virus, such as the flu. Before an individual shows symptoms, the individual is not contagious to others.

While the risk of transmission to the general population has been described as being extremely low, direct contact transmission creates higher levels of concern in the health care industry. Currently, there is no vaccine and no known cure for Ebola. Because of the recent epidemic, there has been an increased effort in the United States to develop a vaccine. The Department of Human Health and Human Services is [providing funds](#) to accelerate the development of an Ebola vaccine.

Which Workplaces Face the Highest Risks?

Because Ebola is transmitted only through direct contact with bodily fluid, the CDC has stated that health care facilities face the highest risks related to the epidemic. In West Africa, the majority of new cases have been occurring where individuals are helping to care for people who are already ill. Of the infected individuals within the United States, three are doctors who contracted the disease in Liberia. The only individuals to contract Ebola in the United States have been health care workers.

The CDC has established and released prevention and control recommendations for [health care](#) workers, [laboratory](#) workers, [airline](#) workers, and [humanitarian](#) workers, as they are at the highest risk level for coming in contact with Ebola. If your workplace is within one of these categories, you should closely review the CDC’s website and comply with all recommended procedures. Again, while certain industries should be

more concerned with Ebola prevention procedures, there is still a low overall risk of contracting Ebola in the United States.

Can Employers Ask Their Employees to Disclose Health Information Relating to Ebola?

Employers should take an individualized approach to requesting health information about employees with respect to Ebola. Most individuals who demonstrate symptoms of Ebola and are contagious will be too ill to go to work. If an employer has a reason to suspect that an employee may have been exposed to Ebola, however, the employer must maintain compliance with federal, state, and city laws pertaining to inquiries about medical conditions.

Under the Americans with Disabilities Act (“ADA” or the “Act”), as amended by the ADA Amendments Act, an employee with Ebola would likely fall within the definition of a “qualified individual with a disability” and would be protected by the Act. Further, even individuals exposed to Ebola, or thought to be exposed, such as those who have travelled to the areas where the current outbreak is centered, might be able to present ADA claims under the theory that the employee was “regarded as” having the illness.

It is important to note that under the ADA, an employer cannot make medical inquiries of employees unless the inquiry is *voluntary* or *job-related and consistent with business necessity*. Further, if an employer does make such inquiries, the employer must follow the ADA guidelines pertaining to medical records. Specifically, the ADA (i) requires confidential maintenance of medical information, which should be kept separate and apart from the employee’s personnel file, and (ii) limits the distribution of such information to individuals with a legitimate need to know.

While the ADA provides these protections for individual workers, if an employee poses a *direct threat* to the health or safety of himself/herself or others, then an employer can require the employee to disclose health information. A positive test for Ebola would almost certainly fall within this category. Similarly, an employer will likely be permitted to require an employee to undergo medical testing if the employer *reasonably believes*, based on an individualized assessment, that an employee demonstrates symptoms of Ebola.

Be mindful, however, that an employer’s unwarranted fear of such a threat will likely not constitute a sufficient basis to ask medical questions and/or require medical testing. The following examples from the CDC’s guidance regarding monitoring risks of Ebola demonstrate the difference between situations in which a direct threat will likely be deemed to exist and those in which no such threat exists:

- If an employee has merely traveled to Liberia, an affected country, but had no exposure to any persons infected with Ebola, then the employee generally will not be considered a direct threat to the workplace.
- On the other hand, if an employee traveled to Liberia as a humanitarian worker to care for Ebola victims, there is a strong likelihood of exposure, and the employee could be deemed a potential direct threat.

- If an employee has contact, such as a handshake, with a person whose fiancé just returned from treating Ebola patients, it is unlikely that person would be a direct threat to the workplace because the risk is so attenuated.
- However, if an employee's fiancé, with whom the employee shared a glass of water, has started showing symptoms of Ebola following his work with Ebola patients, that employee is at a high risk and could be considered a potential direct threat.

Significantly, Title III of the ADA requires places of public accommodation to afford the full range of their services and activities to individuals with disabilities. As such, if your place of employment is also a place of public accommodation (e.g., retail establishments, hotels, restaurants, etc.), you should carefully consider any policies that would result in guests or customers from West Africa, or others believed to be exposed to Ebola, being subject to certain restrictions or limitations.

What Types of Restrictions Are Permissible on an Employee's Movement?

The most important thing that employers can do is to educate employees as to the CDC's guidelines regarding Ebola and its symptoms, particularly to individuals who have recently traveled to affected areas.

Following the most recent case of Ebola, concerns arose over Dr. Spencer's movements following his potential exposure to Ebola, and New York and New Jersey reacted by imposing mandatory quarantines on individuals, regardless of whether they were symptomatic. In response, the CDC issued [new guidance](#) regarding the types of restrictions to which individuals who are potentially exposed to Ebola should be subject:

- Where an individual is symptomatic (whether there has been high, some, or low risk), he or she should undergo medical evaluation with the appropriate infection control precautions, such as those listed below. If the individual is released with *some other diagnosis than Ebola*, then the individual should follow the protocol based on the level of exposure for asymptomatic individuals.
- Where there has been a high exposure level (direct contact with body fluids of person infected with Ebola), if there are any Ebola symptoms, the individual will be placed in rapid isolation (i.e., quarantine) by public health authorities. If the individual is asymptomatic, the individual will be under direct active monitoring, where:
 - public health authorities physically monitor the individual for 21 days,
 - the individual cannot travel on public conveyances (e.g., a plane or bus) for 21 days,
 - the individual cannot go in public places (e.g., a shopping center) for 21 days, and

- the individual cannot go to a workplace while under the public health order.
- Where there has been some risk of exposure (household or other close contact with a person infected with Ebola), if the individual has any Ebola symptoms, the individual will be placed in rapid isolation (i.e., quarantine) by public health authorities. If the individual is asymptomatic, the individual will be on direct active monitoring, as described above. Additionally, other activities will be assessed by the public health authorities.
- Where there has been low (but not zero) risk of exposure (having been in an affected country or having brief direct contact while not wearing appropriate protective personal equipment with a person in the early stage of Ebola), if the individual has a fever or other specific symptoms, the individual will be placed in rapid isolation (i.e., quarantine) by public health authorities. If there are no symptoms, the individual will be on active monitoring, where:
 - public health authorities will check for symptoms of Ebola, including taking the temperature of the individual daily, and
 - there are no travel, work, or public place restrictions.
- However, direct active monitoring (as described above) will be required for asymptomatic individuals in the low (but not zero) risk category if:
 - the individual is a U.S.-based health care worker caring for symptomatic Ebola patients, or
 - the individual was a traveler on an aircraft sitting within three feet of a person with Ebola.
- Where there has been no known exposure (merely traveled to country where an outbreak occurred, contact with an asymptomatic person who had contact with a person with Ebola, or contact with a person with Ebola *before* the person developed symptoms), if the individual has any symptoms, the individual should undergo a routine medical examination. If there are no symptoms, no action is needed.

What Can an Employer Share with Others About an Employee's Risk of or Infection with Ebola?

If an employee has been diagnosed with Ebola, the federal, state, and/or local public health agencies will take responsibility for informing anyone who may be at risk. With respect to the employer's obligations in this regard, generally, information about an employee's health should be kept confidential, as required by the ADA. This includes a general prohibition against sharing an employee's health condition with managers, supervisors, and other employees. If an employee is on an Ebola-related leave of absence, however, employers may inform managers, supervisors, and others that an employee is on a leave of absence for non-disciplinary purposes.

If other employees may have had contact with an employee with Ebola, it may be necessary to share this information with such employees. Employers should not inform the potentially affected employees of the name of the Ebola-stricken employee, but may inform the potentially affected employees that an employee of the company has tested positive for Ebola, and that the company believes that the potentially affected employees may have come into contact with the stricken employee. The company may suggest to such potentially affected employees that they may wish to seek medical attention or otherwise monitor their possible development of symptoms.

Additionally, an employer may always ask an employee whom it knows to be infected with Ebola if the employer may disclose that fact to others, so long as the employee's acquiescence is purely voluntary. Further, if the department of health in the city/state where the employer is located requires notification of any cases of Ebola, employers do not need to maintain confidentiality with respect to informing these governmental agencies of the identity of the stricken employee.

Employers that are health care providers (and subject to the Health Insurance Portability and Accountability Act ("HIPAA") Privacy Rule) may face additional challenges, particularly if they are the treating provider of an employee with or suspected to have Ebola. As such, a health care provider employer will need to balance HIPAA concerns with the public health reporting requirements, public safety needs, and protection of its workforce and patients. Health care employers may also wish to review [guidance](#) from the portal provided by The Joint Commission, an accrediting body for health care organizations, which addresses various safety actions for health care providers to consider, such as ensuring that all staff and clinicians who may come into contact with Ebola patients are educated and trained on Ebola guidance, re-evaluating infection control plans to ensure proper guidelines and requirements, and reviewing emergency operations plans.

Other Concerns and Practices for Employer Consideration

Travel

While some travel cannot be avoided, employers should make sure that only essential business travel to affected areas occurs. If an employer does plan to send an employee to a high-risk area, it should be sure to inform the traveling employee of the risk. With respect to personal travel, however, if an employer wishes to restrict employees' travel to affected areas, it should first look at local labor laws regarding off-duty conduct. Some states (e.g., California and New York) have statutes limiting the actions that an employer can take against an employee based on off-duty conduct. Also, the Family and Medical Leave Act may restrict the actions that an employer can take if an employee wants to take a leave of absence to care for a sick relative. Further, an employer may be subject to a claim of national origin discrimination if it prohibits an employee from traveling to a location that is his or her home country.

The State and City of New York [announced](#) on October 30 that they are establishing a program to encourage health care workers to travel to the affected countries to treat Ebola patients. The program would provide employment protections, such as

continuation of compensation, benefits, and reinstatement, to these individuals. Returning employees under this program would be reimbursed for costs and losses resulting from quarantines needed based on public health concerns. We will provide additional information when and if this program is established.

Occupational Safety and Health Laws

Employers also should comply with Occupational Safety and Health Administration (“OSHA”) regulations in fashioning their responses to this epidemic and the risks that it may pose for their workplaces. All employers are required to provide a safe and healthy workplace, but certain industries, such as health care, require precautions where exposure to an infectious disease is reasonably likely. OSHA has provided a helpful [fact sheet](#) for employers whose employees may come into contact with Ebola.

Consistent Messages by the Employer

To ensure consistent messaging both inside and outside your organization, a single person or department should be appointed as the “point person” on all Ebola-related questions and concerns. Ideally, this point person would be a human resources professional, someone in the legal department, or a workplace health professional. This point person should be involved in all personnel decisions related to Ebola—e.g., whether medical testing is appropriate, whether an individual should be barred from the office, what happens if an employee refuses to come into the workplace or to go on a business trip, and what types of business travel may be prohibited. Having a single person or department, rather than various managers, make these types of decisions, and make them consistently, will likely reduce the organization’s risk. Further, this person should be the contact person when members of the public inquire about Ebola and the company’s preparedness or response.

The point person should remain up-to-date on the guidance issued by the CDC, OSHA, and local health departments, because such guidance continues to evolve. Further, the company’s point person should review the document “[Frequently Asked Questions About the Ebola Virus Disease for Employers](#),” which we have drafted in connection with this Advisory, and which addresses an employer’s obligations and permissible actions.

Finally, the point person should coordinate with all employees of the company who have a role in the company’s response to any Ebola-related issues. This could include security personnel, health personnel, human resources personnel, legal personnel, public relations or marketing personnel, and others. The point person and his or her “team” should plan responses to certain questions or events.

What Employers Should Do Now

- Appoint a single individual or department as the point of contact within your organization for questions about Ebola and to ensure a coordinated and consistent response to all inquiries.

- Make information available to managers and employees about the symptoms of Ebola and the geographical locations where employees are most likely to contract Ebola.
- Educate supervisors on the company's planned preventative stops.
- Review business-related travel itineraries for employees, and consider whether any travel to high-risk Ebola areas is necessary.
- Determine if additional obligations are imposed on your workplace by OSHA or HIPAA's Privacy Rule.
- If employees are represented by a union, consider whether there are any issues that need to be addressed with the employees' bargaining representative and whether there are any provisions in the company's collective bargaining agreements that may be affected.
- If any employees will not be allowed in the office due to exposure or symptoms, determine if telework is viable. If an employee will not be allowed in the office or to telework, communicate whether he or she will be paid or, rather, whether he or she can use sick, vacation, or any other type of paid leave.

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