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Q&A: Government Coronavirus Directives Shield Employers From Bias, Safety Claims: MoFo Partners

REUTERS/JEENAH MOON

Empty street is seen near Lincoln tunnel in Manhattan borough following the outbreak of coronavirus disease (COVID-19), in New York City, U.S., March 15, 2020.

By **DANIEL WIESSNER** (REUTERS)

(Reuters) — The coronavirus pandemic is forcing employers to make tough decisions that could lead to legal liability, but most companies should be in the clear if they follow the advice of government authorities, according to Morrison & Foerster partners Janie Schulman and Christine Lyon.

As companies move to prevent the virus from spreading by requiring employees to work remotely or inquiring about the reasons for medical absences, they risk violating numerous medical privacy, disability discrimination, and workplace safety laws. But most reasonable steps employers are taking do not violate those laws, Schulman and Lyon said, because they track guidance from federal and state agencies.

On Monday, Reuters spoke with Schulman, who is based in Los Angeles and advises employers on a range of issues including discrimination, retaliation and whistleblower claims, and Palo Alto-based Lyon, who advises tech firms and other companies on data security and privacy.

Questions and answers have been edited for clarity and brevity.

REUTERS: When should a company disclose to its workforce that an employee has been exposed to coronavirus, and can they violate medical privacy laws by doing so?

SCHULMAN: At least for now, there is a good chance that the health department will know about the confirmed case before the employer does, and will come knocking at the company's door to identify who was in close contact with the affected employee. The employees may be able to deduce who has the disease, but the employer is spared the breach of confidentiality. Employers

can appropriately disclose that someone in the workplace has been exposed to coronavirus, but should avoid disclosing the identity of that employee to meet their obligations under laws like the Americans with Disabilities Act (ADA).

REUTERS: Does mandatory testing, such as requiring employees to have their temperatures taken at work, violate the ADA?

LYON: The ADA generally prohibits mandatory medical examinations of current employees, including taking their temperatures, unless the employer can show this is necessary to respond to a "direct threat." The (Equal Employment Opportunity Commission) issued guidelines in 2009 about pandemic preparedness, in which the EEOC cautioned employers that even a pandemic does not necessarily justify medical examinations. However, with the (Centers for Disease Control and Prevention) now recommending that employers in certain geographical areas start checking employees' temperatures, (and the WHO declaring a pandemic), employers in those places likely now would be able to justify it.

REUTERS: Would that also be true about sending ill employees home?

SCHULMAN: According to the EEOC guidance, if the employee's symptoms are not worse than those of the seasonal flu, the employee is not "disabled" under the ADA, so the ADA would not apply. Alternatively, if the employee has very serious symptoms, the employer may be able to send the employee home and not violate the ADA under the exception for employees who pose a "direct threat."

REUTERS: What kind of liability could employers face when employees are infected at work?

SCHULMAN: In nearly all states, worker's compensation insurance is the exclusive remedy for work-related illnesses and injuries, assuming an employee could prove that he or she contracted the illness at work. There are very limited exceptions to worker's compensation exclusivity. For example, in California, if the employer engages in conduct that exceeds the inherent risk in the employment relationship or violates public policy, the employee may be able to sue the employer in a civil lawsuit. The behavior would likely have to be egregious to meet this standard.

REUTERS: How does the Occupational and Safety Health Act's "general duty clause" apply to this situation? (The law requires employers to furnish "a place of employment free from recognized hazards that are causing or likely to cause death or serious physical harm.")

SCHULMAN: In its guidance (on coronavirus released this month), OSHA advises employers that existing OSHA standards apply to protecting workers from exposure and infection. The guidance also includes a number of steps employers should take to reduce employees' risk of exposure to COVID-19, such as developing an infectious disease preparedness plan and policies and procedures for prompt identification and isolation of sick people. Presumably, OSHA would view failure to follow that guidance as a violation of the general duty clause.

REUTERS: Tests for the virus are in short supply. How can employers ensure they are meeting all of their responsibilities, and that employees and customers are not exposed to the virus, if testing is difficult or impossible?

SCHULMAN: Employers cannot be expected to be omniscient, but they can be expected to continue to do what CDC, OSHA, WHO, and state and local governments advise in terms of hygiene and sanitation, sending sick employees home, and being flexible with policies. If employers take the steps recommended by the various authorities, it would be difficult to argue that they have fallen short of their responsibilities.

REUTERS: What steps has Morrison & Foerster taken to prevent the spread of the virus?

SCHULMAN: We have decided to move to a remote work environment for all our U.S. and European offices at least through the end of March, but offices will remain open throughout this period. (The firm is also) suspending non-essential travel, enhancing our office protocols globally to ensure we provide the healthiest work environment possible, and limiting or canceling major events.