Lessons Learned From Walmart: Best Practices For Employers Regarding COVID-19 Preparation and Communication

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The first COVID-19-related wrongful death lawsuit against an employer has been filed, specifically in Illinois state court, against Walmart. The Complaint alleges that the victim -- an employee -- likely contracted his fatal case of COVID-19 because of the gross negligence of his employer, Walmart. At the time of the incident, Walmart purportedly did not have any procedures in place to prevent the spread of the virus, such as policies enacting social distancing, sterilization of common areas, communicating with employees who came into contact with the victim, and others.

Although most of the workforce currently is shuttered or working remotely, "essential" businesses -- such as grocery stores, manufacturers, and health care facilities -- need their full workforce in the workplace now more than ever. Unfortunately, some of these employees will contract COVID-19. However, employers should learn from the unfortunate Walmart incident by taking precautionary measures to best protect their employees and clients, while simultaneously limiting the spread of the virus if COVID-19 reaches the workplace.

Policies and Procedures for Precaution

1. What are some basic steps that every employer, big or small, should be taking right now?

According to the Centers for Disease Control and Prevention ("CDC"), every employer should be taking the following steps as soon as practicable:

- enact written infectious disease response plan;
- implement basic infection prevention measures; and
- develop procedures for prompt identification and isolation of infected individuals.

It is critical for employers to draft written policies that will protect employers, customers, and management alike while not violating employees' rights under federal and state laws, such as the Americans with Disabilities Act ("ADA"). Employers (and their managers/supervisors) should not be reacting on the fly if, or when, an employee reports experiencing symptoms of COVID-19 in the workplace.

2. What policies and procedures should an employer institute? Are certain policies and procedures mandated pursuant to the law?

At a minimum, all employers should institute policies and procedures that address the following:

- The testing of employees, if desired, and how and where these tests will be conducted;
- The provision of cleaning supplies, masks, and gloves to be provided to employees;
- The reporting mechanism for an employee experiencing symptoms, or who has been exposed to COVID-19 (employees need to be required to report same to a supervisor before reporting to work);
- The manner and timing of communication to other employees of their possible exposure;
- The extent to which the workplace will be closed, in whole or in part, once an employee is diagnosed with COVID-19; and
- The extent to which enhanced cleaning of common surfaces will be conducted and maintained.

This list is not exhaustive, and the policies may need to be altered and updated rapidly due to the constant changing of both federal and state laws. Governor Murphy recently enacted Executive Order #122 (issued on April 7, 2020) which now requires all "essential" retail business to adopt and enforce policies that include, but are not limited to:

1. providing sanitation materials to employees and customers;
2. requiring all persons to wear cloth face coverings unless doing so would "inhibit the individual's health"; and
3. providing employees with masks and gloves at the employers' expense.

Many federal and state institutions are providing guidance to employers on these rapidly evolving laws. For example, the Equal Employment Opportunity Commission ("EEOC") has provided an updated list (updated as of April 17, 2020) detailing what actions an employer can take without violating the ADA, which includes, but is not limited to:

- Asking employees about symptoms;
- Monitoring employees' temperatures via forehead thermometer;
- Screening applicants after job offer for symptoms, delay start date, or withdraw job offer if need to fill job immediately; and
- Disclosing the name of COVID-19 positive employee to a public health agency.

Be consistent in applying these policies to all employees -- from management on down. By enacting concise and clear written policies now, employers will be prepared whatever should come to pass.

Reacting To An Infection in the Workplace

Below are some of the most common scenarios faced by employers and the questions that are triggered by these scenarios when an employee begins experiencing COVID-19 symptoms in the workplace:

1. An employee comes to work, and the employer suspects the employee may be experiencing symptoms of COVID-19. However, after taking the employee's temperature, the employee does not have a fever. Can the employer still demand that the employee head home?

- Yes, pursuant to guidance from the EEOC, an employer can command an employee to go home -- without violating the ADA -- if the employer reasonably suspects the employee has symptoms of COVID-19. It is important to remember that, although a fever is a common symptom of COVID-19, individuals still can be infected without having a fever. The

employer should be consistent in applying the same level of scrutiny to every employee and memorialize the company's reasoning to avoid potential discrimination litigation.

2. An employee notifies his employer that he has been tested and diagnosed with COVID-19. What are the first steps the employer should take with respect to the infected employee?

- Ask the employee to identify all coworkers and customers or clients with whom the employee interacted in the past 14 days;
- Ask the employee to identify any location in the workplace where the employee was present within the past 14 days; and
- Inform the employee that the employer will not reveal the employee's identity without the employee's consent.

3. Should the employer place documentation related to the infected employee in her or her personnel file?

- No. Any documentation generated as a result of an employee being sent home due to symptoms or testing positive should be kept in a separate medical file. This includes the documentation that is sent to any public health agencies.

4. What steps should the employer take with respect to any employees who potentially came into contact with the infected employee?

- The employer should advise these employees that an individual in the workplace is either suspected to have or has tested positive for COVID-19. The employer should state that the infected employee recalled potentially coming into contact with the employee, and, out of an abundance of caution, the employee should self-quarantine for at least 14 days. The employer should NOT reveal the infected employee's identity -- or even provide a vague description of the employee (e.g. he worked in billing for the past 10 years) -- unless the employer has obtained a waiver from the infected.

5. What if an employee guesses the identity of the infected?

- The employer should provide a non-response that the company can neither confirm nor deny the identity of the infected individual due to federal and state laws.

6. How broad does the communication need to be in terms of which employees are notified?

- In most instances, e-mail is a sufficient form of communication. However, if an employer does not have an employee's e-mail address and must rely on verbal communication, the employer should memorialize the conversation with the employee. Employers should err on the side of being over-inclusive as to how many employees are notified. The more employees who are aware of the situation, the better protected both the employer and employees will be.

7. Are notifications required to be sent within a certain timeframe, or contain certain information?

- There is no state or federal law regarding notifications related to an employee afflicted with COVID-19 that explicitly provides: (1) how many employees must be notified; (2) the details of the notification; or (3) when the employees need to be notified. These determinations should be made based on the particular circumstances of the company's operations. The notification should be concise, clear, and sent quickly. Employers need to keep in mind the privacy concerns of the infected employee (e.g. ADA, HIPAA, etc.) while striving to remain calm and honest with all their employees regarding the situation.

8. Is there an obligation to tell non-employees that may have interacted with the infected, such as clients or outside vendors?

- There is no explicit requirement that an employer must communicate with clients and outside vendors in the event of COVID-19 reaching the workplace. However, if an employer definitively knows that a client or outside vendor came into contact with an employee afflicted with COVID-19, the employer should notify them as soon as practicable.

9. Beyond what is required, what are the best practices?

- Establish clear and concise protocols. For example:
    - Employees shall be provided with a supply of gloves and masks prior to entering the workplace each day;
    - Masks and gloves must be worn at all times; and
    - Prior to the start of the workday, the employee shall report to the HR Office where the employee will have his/her temperature taken via forehead thermometer and recorded.
- Document as much as possible.
- Establish lines of communication for employees, and encourage them to report their symptoms or any hardships they may be experiencing as a result of COVID-19.
- If someone is suspected of having symptoms or tests positive, inform anyone who came into contact with the employee that they should self-quarantine.
- Notify the entire staff -- in a calm, reassuring manner -- that an employee may have contracted COVID-19, anyone who came into contact with the employee is being asked to stay home in an abundance of caution, and the premises shall be cleaned in accordance with CDC guidelines.
- Let your employees know with whom they should communicate if they are experiencing symptoms or hardships as a result of COVID-19. If an employee requests assistance understanding the new federal and state laws on COVID-19 related leave, assist them. Do <u>not</u> ignore the situation, and be open -- to the extent allowed under the law -- with your employees.

10. What, if any, liability could an employer face for failing to notify employees who may have been exposed to a COVID-19 positive employee?

- At this stage, it is unclear the extent of liability an employer may face as a result of its failure to notify employees or take any of the steps suggest above. However, the Walmart Complaint provides some insight into what Plaintiff's lawyers may allege. The Complaint alleges that Walmart:
    - Failed to implement and enforce social distancing;
    - Failed to provide personal protective equipment;
    - Failed to warn employees that other employees were experiencing symptoms;
    - Failed to adequately address and ignored employees who communicated they were experiencing symptoms; and
    - Failed to institute the policies and procedures established by the CDC.
- In short, employers should avoid the “failures” alleged against Walmart.

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The government recognizes that the prudence which it is advocating can have a negative impact on companies' productivity. However, having to contend with employees who allege they are sick, or the survivors who allege that the decedent became sick, all because of their employer's failure to keep them safe will provide for a much more powerful negative impact. Stay safe.