



## Ep. 29: Coronavirus and the Workplace

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### Jose Garriga:

Jose Garriga: Hello, and welcome to *OnAir with Akin Gump*. I'm your host, Jose Garriga.

In almost every country around the world, one topic dominates conversation and debate: the coronavirus or COVID-19. The personal, the political, the economic—there is no realm left untouched by the outbreak.

One of the areas that have felt the greatest impact is the workplace, as quarantines, illnesses, shutdowns, either actual or impending, have forced employers and company leaders to consider workforce disruptions on an unprecedented scale.

In this episode, Akin Gump labor and employment partner Richard Rabin and associate Grace O'Donnell will be discussing coronavirus' impact on the U.S. workplace and what employers and senior leadership should bear in mind as they prepare to handle the impact of, and fallout from, this virus.

Welcome to the podcast.

Rich, Grace, thank you both for appearing on the show today. I'm sure this topic is top of mind for business leaders coast to coast, so let's dive in.

Let's start with a big-picture question. Rich, if you would, please, what steps should company leaders be taking in connection with COVID?

### Richard Rabin:

Thanks, Jose. I think, first and foremost, the situation is extremely fluid. That's often the case with matters that we handle from day to day, but this is really in a league of its own. The facts and information coming out change daily, sometimes hourly.

Grace and I put out an article, a Hedge Up client alert that is available on our website a week ago, or nine days ago, and at least the factual information in that article has been overrun by development since that time. So, keeping tabs on the CDC website, the World Health Organization website, and actually, Akin Gump has a blog that is available [*COVID-19 Resource Center - [agcovid19.com](https://www.agcovid19.com)*]. Keeping tabs on development is important because the advice that we would give at any one time may change over time.

The second thing firms should consider and prioritize is cleanliness in the workplace. Making sure employees know to wash their hands regularly with soap and water or with a hand sanitizer that's alcohol-based. Extra cleaning in the office, wiping down surfaces that are frequently touched by employees, is advisable as well.

And the third thing firms can do is clearly communicate with employees regarding policies and practices. One, as I mentioned, personal hygiene in terms of washing hands and throwing out used tissues and perhaps not shaking hands with colleagues and maintaining some distance to the extent practicable is good advice.

Employees need to know that, if they feel sick or they're coming down with something, they should alert the employer and stay out of the workplace. And, similarly, if a family member becomes sick, they should alert the employer so that the employer can make an assessment as to whether the employee should stay out of the workplace due to potential exposure. Similarly, when employees travel, that presents risks. Employers may want to have policies regarding travel. They certainly will want to know about any travel that employees are taking.

The next item, I'd say, is to lead by example. If an employer management member, a member of the management team, is sick and coughing, he or she should leave the workplace, set an example for other employees about what they should do in similar circumstances.

And last, I would say, keep in touch with your counsel because the situation is so dynamic. Reach out to your counsel when you start confronting issues that you aren't already equipped to handle or already haven't run by counsel so that you know you're doing the right thing. We're a little bit off the grid here.

**Jose Garriga:**

Thank you, Rich. Let's dive in a little bit to that question of policies. You mentioned travel, I think that's an important one. How should employers handle employee travel, for example, company authorization of business travel? Grace, if you would, please.

**Grace O'Donnell:**

Issues around business travel are probably some of the questions we are hearing the most. I think right now our recommendation is a ban on all nonessential business travel. As Rich mentioned, this has really been developing quickly. When we initially looked at this issue, we thought we would recommend a ban on nonessential business travel to those regions affected by the coronavirus or that the CDC had issued health travel alerts for. However, as the coronavirus has continued to spread, and we're seeing more and more cases in the United States, it seems like a ban on all nonessential business travel, whether international or domestic, probably makes the most sense for our clients to prevent risk. I think that getting authorization in the circumstance where an employee needs to travel would also be key. You want to make sure that the company is aware of travel that is going on or is required if necessary.

Some employees might not want to travel in light of the risk and everything we're hearing on the news. While employers technically may have the right to say an employee has to travel, in some circumstances, we're in a brave new world here where there's a lot of risk and uncertainty. So our perspective is, we recommend that employers not require employees to travel, especially if not necessary. They should consider videoconferences, postponing meetings to a future date when we have more certainty, or other measures such as that. Personal travel can also be an issue that employers may want to address. Personal travel can be tricky because that's an employee's personal time. We're of the position that employers can discourage personal travel.

There are some state laws, for instance, New York has a law that says employers can't discriminate based on recreational activities that employees take on their off-time outside of work. That might apply to personal travel. But in light of the coronavirus and how rapidly things are developing, our opinion is that employers can discourage personal travel.

And in the event that an employee does travel, especially to someplace that is affected by the coronavirus, self-quarantine can be appropriate upon an employee's return. So, we would recommend having an employee stay out of the office for 14 days, which is the incubation period for the virus from what we know. Have that employee stay out of the office and not come in, to reduce the risk.

**Jose Garriga:** Thank you. So, returning to the concept of the topic of policies, remote work. Grace was just talking about people quarantining themselves for 14 days and presumably working remotely, if possible, during that time. Rich, should employers require employees to work remotely, and under what circumstances should that be the case?

**Richard Rabin:** Yeah, it's a good question. This is another area where the situation may be developing; the answers we give now could change. Right now, the answer I would give is: There are individualized circumstances in which an employer should consider directing an employee to work from home. Grace just hit on one, where an employee takes international travel or domestic travel, particularly if it's to an area deemed especially risky by the CDC or World Health Organization. The employee should be asked to work from home for a period of 14 days after returning to the country. The 14 days really is CDC's guidance; we're just parroting it. But that's, apparently, the period in which it takes the virus to manifest itself. And, so, until that period has passed, it's safer to have them out of the office.

And I think that goes the same for any other heightened risk of an exposure the employee would present. So, if an employee has an ill family member, and the family member is showing signs that are consistent with the coronavirus, direct the employee to stay home in that circumstance and work remotely as well for the 14 days. If the employee, him or herself, has signs of illness, it's probably safest to have the employee stay home in that circumstance as well. Or if the employee believes that he or she has come into contact with someone that has the coronavirus—either at an event or in any walk of life, they've come to learn that someone they're in contact with has the coronavirus—it probably makes sense and is prudent to have that person self-quarantine and work remotely for that period.

**Jose Garriga:** Well, let's look at a corollary to that. And that's one where the employee requests the option to work remotely. Is that one that employers should be allowing? And similarly, under what circumstances should that be the case?

**Richard Rabin:** Yeah. With the same caveat that I gave to the last question, that circumstances are quite fluid. So, the answers on this and other questions could change, but right now, again, I would say the situation is individualized.

There are some circumstances in which employers should allow employees to work from home. And they include, one, if the employee presents risk to others in the workplace for any of the reasons we just talked about, either because of travel or contact with someone who has the virus, for that purpose.

Two, if the employee has a medical issue or other condition that makes him or her particularly susceptible to the disease, or if the repercussions of the disease are more likely to be deeper for the employee, the employee might well be entitled to a what's called a "reasonable accommodation," which can be required by the federal Americans with Disabilities Act and by state and local analogs, and, so, employers should allow leave in that circumstance. There are also a number of other laws that could come into play and mandate allowing leave such as the illness of a family member, which may require leave under the Family and Medical Leave Act or by state and local analogs.

And those are the main circumstances. Where there's a medical issue affecting the employee or affecting a loved one of the employee, a family member of the employee, there are laws in which leave might need to be allowed by an employer.

**Jose Garriga:**

Thank you. A reminder, listeners, we're here today with Akin Gump labor and employment partner Richard Rabin and associate Grace O'Donnell discussing what company management should be thinking about regarding the coronavirus' impact on the workplace.

So, let's expand a bit on that idea of illness and, basically, sick leave. Grace, what are companies' obligations to provide leave for illness?

**Grace O'Donnell:**

Companies might have obligations to provide leave for illness under a number of different laws at the federal, state and local level, in addition to obligations under their own policies and contractual obligations. Under the federal law, we would probably be in the land of the Family and Medical Leave Act. That allows some employees to take leave for a serious medical condition or to care for a family member with a serious medical condition. As Rich mentioned, leave might be required as well if an employee has disability and needs to work remotely.

Under state law, some states have paid family leave laws. For instance, New York has a paid family leave law, and that law allows paid leave to care for a family member with a medical condition.

Some localities also have paid sick leave laws. Taking New York, this time New York City, again, as an example, New York City has a paid sick leave law, so, an employee would be able to take some paid sick leave to care for their own medical condition if they have symptoms; or if a family member has symptoms, and they need to care for them; or if it's a public health emergency, and the workplace is closed, or a school is closed, sick leave, paid sick leave, might be available in those circumstances.

Some of this leave is unpaid, and some is paid. I think that employers will have to consider how to treat leave that their employees are taking even outside the context of what's required by law. So, employers might want to consider whether they're going to require employees to use up their paid time off if they're out because of the coronavirus. I think that that raises issues of, if the employer is able to do that financially, but also it will help people take the time off that they need to take off and not come into the office if they have symptoms, if they're able to not use up their paid time off or be paid when they're out of the office.

Another thing that needs to be considered is making sure that policies are enforced consistently. Employers don't want to be making exceptions for some people, especially based on a protected characteristic. You want to be consistent across the board.

**Jose Garriga:** Thank you, Grace. Following up, there's a topic that might be one of certain sensitivity in the workplace, and that's COVID testing. How should employers handle testing for coronavirus, and how and to what extent should employees be accommodated under disability laws? Grace, if you could follow up on that, please.

**Grace O'Donnell:** Sure. I think that testing is an issue. Employers, of course, want to know if an employee who is in their workforce tested positive for the coronavirus. Right now, I think we're all aware that there is a shortage of testing kits, and testing isn't always available. Even notwithstanding that, laws do place certain restrictions on the ability to request medical testing in the context of the workplace. So, an employer is only allowed to request a medical test if there is a direct threat to the health and safety of others or the employee. In this case, an employer would need to consider if there is a direct threat posed by the coronavirus.

If an employee is exhibiting symptoms, whether there is a direct threat might be dependent on what those symptoms are. Are there other symptoms that indicate that this might be just the flu or a cold, and not the coronavirus? Has the employee been traveling, especially to regions that we know to be affected? Has the employee been caring for somebody who has been diagnosed with the coronavirus? Looking at factors like that can help the employer consider, is this a direct threat that COVID-19 might be present in the workplace? Then a medical test might be required.

As to your question about accommodating disabilities, as Rich mentioned earlier, one way that an accommodation might be made is allowing employees to work remotely. If an employer has that capability, that's probably the easiest solution to accommodating somebody who, say, has an underlying medical condition that makes them especially wary of coming into the workplace in light of the risk of the coronavirus. In that case, an employer does want to be aware that allowing employees to work remotely might make it so they, in the future, have an obligation to allow other employees with other disabilities or for other reasons to also work remotely. So, that's just something to keep in mind and you might want to consult with counsel if that situation arises.

**Jose Garriga:** Thank you. So, just to wrap up, as you've both mentioned, the situation is very fluid, it's changing day-to-day. Rich, what short-term takeaways, then, can you offer listeners?

**Richard Rabin:** I would say, first and foremost, stay on top of the latest guidance issued by the leading health organizations. As I mentioned earlier, their websites are linked in the articles we've put out so far, the bulletins Grace and I and others put out last week, which are available on our site. Our firm's blog, COVID-19 Resource Center blog, also is remaining as current as possible with all kinds of information that will help firms navigate the waters.

First and foremost, obviously, COVID is a health issue, but, secondarily, it is a business issue. So, when keeping abreast of facts and situation, we'd encourage firms to consider things like, what are potential developments on Capitol Hill? How might those developments impact your particular business? What are the implications for trade and supply lines? What does the international trade landscape look like? What are experts predicting? Again, staying on top with our blog will help you keep abreast of some of those types of considerations, same with regulatory and other developments.

And the bottom line is: The world is changing in lots of different ways, first and foremost health, but other ways as well. And it's important to stay on top of it, not just for your welfare, which is the most important thing, but also for your business. Similarly, we'd

suggest engaging in contingency planning—most of our clients are engaging in some level of planning, for example, ensuring that new employees are capable and equipped for working remotely if the office were to be shut down, making sure they have the equipment, make sure they've tested the equipment and have worked through any snafus, ensuring they have appropriate cybersecurity so that when they do so they don't expose themselves in other ways.

And the last thing I would say, is, when in doubt or when you come to a situation that you haven't thought of before or is causing you anxiety, contact your counsel, whether it's internal or external, to walk through these issues. With so many developments happening so quickly and a situation that is unique, at least in my 26 years of experience, it's important to get the best thinking on issues that are confronting the business, and that will help you mitigate risk.

**Jose Garriga:**

Rich, thank you. Listeners, you've been listening to Akin Gump labor and employment partner Richard Rabin and associate Grace O'Donnell. Thank you both for shedding light on a situation that's surely on the mind of every senior leader and company manager in the U.S.

And thank you, listeners, as always, for your time and attention. Please make sure to subscribe to *OnAir with Akin Gump* at your favorite podcast provider to ensure you do not miss an episode. We're on, among others, iTunes, SoundCloud and Spotify.

To learn more about Akin Gump and the firm's analysis and insights into the latest legal, regulatory and technical developments related to the ongoing outbreak, visit Akin Gump's COVID-19 Resource Center at [agcovid19.com](http://agcovid19.com). That's one word, [agcovid19.com](http://agcovid19.com).

Until next time.

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