Managing Coronavirus Risks: What Should the Community Action Network Think About?

CAPLAW
March 5, 2020

Background

Over the past few weeks, a new coronavirus (COVID-19), first identified in late 2019, has begun spreading across the world and is now in the United States. In light of the increasing numbers of confirmed cases, there is heightened concern about a broader outbreak and the impacts on normal business operations. Below is guidance for the Community Action network that integrates the most relevant information currently available from various legal and funding sources. CAPLAW is closely monitoring the situation and will send updates as necessary.

Considerations for CAAs and State Associations as Employers

1. Plan for business interruptions. Develop or review disaster/emergency plans to prepare for interruptions in your organization's operations. Ensure your plan addresses scenarios where employees are unable to come to work due to travel restrictions, transportation shutdowns, and/or school and daycare closures. Determine how your organization will communicate with employees and operate on a reduced or remote workforce. Review and remind employees about your policy on working remotely, including time tracking for non-exempt employees to ensure that they are paid for all hours worked.

2. Ask sick employees to stay at home. If an employee appears sick, or exhibits coronavirus or flu-like symptoms, you can ask the employee to stay at home or leave work and seek medical attention.

3. Paid leave. Generally speaking, if an exempt employee works during any part of a workweek, he/she must be paid for that entire week. For both exempt and non-exempt employees, you can require the employee to use accrued leave (vacation or sick) to cover absences from work. Under the Uniform Guidance, you can charge the cost of leave to federal grants so long as: (i) the leave is provided under established written leave policies; (ii) the costs are equitably allocated to all related activities; and (iii) the organization uses a consistent accounting basis for costing each type of leave. 2 C.F.R. § 200.431(b). You may also be required to pay an employee during a quarantine period based on a contract or collective bargaining agreement.

4. Unpaid leave. If a non-exempt employee exhausts his/her leave bank, you do not have to compensate the employee for time not worked. If an exempt employee exhausts his/her leave bank, you can only deduct the employee's wages for full-day absences due to sickness or disability if your organization has a bona fide leave plan. See 29 C.F.R. § 541.602(b)(2); DOL Opinion Letter FLSA2005-07; and DOL Opinion Letter FLSA 2006-32.

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5. **FMLA.** If your organization is covered by the federal Family and Medical Leave Act (FMLA), coronavirus likely qualifies as a "serious health condition" under FMLA. This would allow an employee to take job-protected FMLA leave if either the employee or an immediate family member contracts the coronavirus. See 29 C.F.R. Part 825. State laws may offer additional leave benefits.

6. **Maintain flexible policies.** Consider maintaining flexible policies that allow employees to stay at home to care for a sick family member. However, you must administer your policies consistently and ensure that employees are treated equally.

7. **Medical examinations and inquiries.** Under your organization's sick leave policy, you can generally require employees to get a doctor's note verifying that a medical provider saw the employee and stating any period of incapacity or job-related restriction. If medical providers in your area are overwhelmed with demands for care, you may consider more lenient measures with respect to requiring medical provider notes to substantiate sick leave or return to work, such as giving employees more time to get a doctor's note, or allowing employees to return to work without a note if they adhere to self-quarantine policies. Ensure that you apply any adjustment you may make to your policy in light of the coronavirus consistently.

   If you require a doctor's note to return to work, ensure that you do not request any more information than described above, as this could trigger Americans with Disabilities Act (ADA) compliance. Under the ADA, employers can only make medical inquiries or require a medical examination when it is job-related and consistent with business necessity. 29 C.F.R. § 1630.14(b). This standard is met when the employer has a reasonable belief (based on objective evidence) that an employee poses a "direct threat" because of a medical condition. The U.S. Equal Employment Opportunity Commission (EEOC) has applied guidance previously issued on an influenza pandemic to the coronavirus outbreak, noting that the ADA does not interfere with or prevent employers from following the CDC's guidelines for employers.

8. **Upcoming employee travel.** Check the CDC's Traveler's Health Notices for the latest guidance and recommendations for travel. Plan to regularly evaluate travel policies, including whether to temporarily cease non-essential business travel. Consider developing self-quarantining policies for employees returning from travel so that you apply the standard fairly and in a nondiscriminatory manner.

9. **Employee refusal to come to work.** Under the Occupational Safety and Health Act (OSHA) § 13(a), employees can refuse to work if they believe they are in "imminent danger", which includes the "threat of death or serious physical harm" or "a reasonable expectation that toxic substances or other health hazards are present, and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency." While requiring employees to travel to areas with current outbreaks of the coronavirus could rise to the level of "imminent danger", at this point in time, most work conditions in the United States likely do not meet the standard required for an employee to refuse to work. However, you should continue to monitor your workplace circumstances and regularly communicate with your employees to discuss their concerns.

10. **Develop a single point of contact.** Employees that have concerns about the coronavirus and your organization's policies should be able to contact this person with questions.

11. **Educate employees.** Provide information about the coronavirus, its symptoms, how it spreads, and prevention and treatment steps. Refer to the CDC's resources and fact sheets.

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12. **Train supervisors.** Ensure that managers are aware of potential workplace discrimination and apply your organization's policies consistently and fairly. The CDC specifically warned against prejudice and disparate treatment towards individuals of Asian descent due to fear of the coronavirus. You may not bar an employee from the workplace based on the employee's national origin, though you may consistently apply a policy that evaluates an employee's travel history or symptoms to determine whether the employee is allowed to come to work.

13. **Maintain employee confidentiality.** Generally, state laws govern an employer's obligation to maintain the confidentiality of an employee's personally identifiable information. The ADA requires employers to maintain all information about employee illness gathered from a medical examination or inquiry as a confidential medical record. Further, the Office for Civil Rights of the U.S. Department of Health and Human Services reminded employers subject to the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule that they must continue to comply with HIPAA restrictions during the coronavirus outbreak. Note that medical information in your organization's employment records is not generally subject to HIPAA restrictions, but you should still treat this information as confidential. The ADA permits employers to share employee medical information with providers and government officials under certain circumstances.

14. **Check your insurance policies.** Review your commercial property and general liability insurance policies. Note, however, that property policies often specifically exclude losses arising out of contamination and pandemics. If you have business interruption coverage as part of your commercial property insurance, check whether the policy requires "direct physical loss" to the property. Claims for coronavirus-related business interruptions may not satisfy this requirement, particularly if your premises are uncontaminated and remain habitable, even if your organization is closed as part of a mandatory or voluntary quarantine. See this National Law Review article about business interruption insurance. Some commercial property insurance policies will also cover losses sustained when a "civil authority" prohibits or impairs access to the policyholder's premises.

15. **Consult your state and local departments of public health.** These departments may make guidance available in multiple languages to disseminate to employees and clients. For example, see information available via the Massachusetts Department of Public Health webpage.

Considerations for CAAs as Service Providers

1. **Consult procedures for sick clients.** Review your organization's policies with respect to clients who come to your programs showing symptoms of illness. Head Start programs, for example, may need to comply with their state's child care licensing regulations governing child health and safety. Be sure to check with your funding source before denying services to clients due to the coronavirus.

2. **Review program-specific guidance.** The following are resources issued by federal agencies that may be relevant to specific CAA programs. We expect that if the coronavirus outbreak worsens, federal funding sources will issue further guidance.

   - Preventing and Managing the Spread of Infectious Disease for People Experiencing Homelessness (HUD)
   - Preventing and Managing the Spread of Infectious Disease within Shelters (HUD)
   - Preventing and Managing the Spread of Infectious Disease within Encampments (HUD)

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- Guidance for Childcare Programs (CDC)
- Guidance for Mass Gatherings or Large Community Events (CDC)
- Planning Recommendations for Mass Gatherings (WHO)

Considerations for CAAs and State Associations Planning Upcoming Events

1. **Check your contracts.** Review agreements with outside vendors such as hotels, event planners, and speakers for termination rights. Some contracts contain a "force majeure" clause that releases the parties from their contractual obligations when certain unforeseeable circumstances make performance of the contract impossible, impracticable, or illegal. Read the provisions carefully to determine whether a coronavirus outbreak will trigger the clause in the contract, as well as any other conditions that may apply. For example, a force majeure event could include a government-ordered temporary quarantine or shutdown of the local transportation network.

2. **Assess the financial impact of a cancellation and/or significantly lower attendance.** Review the penalties associated with terminating or breaching a contract, including any room, food, and beverage commitments. Also consider lost revenue from cancelling an event or having lower-than-expected turnout, as well as expenses associated with reimbursing speakers for planned travel and refunding attendees.

3. **Check insurance policies and consider whether to purchase additional coverage.** Determine whether you have event cancellation policies that apply to the specific event, and the applicable coverage amounts. Covered losses in a typical event cancellation policy may include accident or illness and unavoidable travel delay. However, if you cancel an event because attendees and/or organizers are afraid of traveling and catching or spreading the coronavirus, the claim may not be covered if no government-imposed travel restrictions are in place and the event could otherwise proceed. Many policies also require you to mitigate losses by making a reasonable effort to postpone or reschedule the event.

   Business interruption insurance policies, which may be a part of your existing property insurance, typically would not apply to cancelled events. If you don't currently have event cancellation coverage, consider whether to purchase additional insurance, taking into account the cost of coverage and the expense of having to cancel or reduce the size of your event. See this National Law Review article about event cancellation and contingency nonappearance insurance.

4. **Explore alternatives to the planned event.** Consider whether there are alternative means to perform contractual obligations, such as working with a hotel venue and speakers to reschedule the event to a later date in the year. If you cancel the event, ask vendors to mitigate losses, such as requesting that the hotel credit you for rooms later sold out of your organization's room block to the general public. You may also explore conducting sessions virtually, rather than in person.

5. **Communicate with attendees and speakers.** Ensure that event participants are kept up to date by designating a contact person at your organization to address concerns about travel and attendance. Clearly state your cancellation policies with respect to event registration and hotel reservations. Communicate expectations such as asking speakers to wait to make travel plans to minimize the costs of later cancelling the event.

6. **Follow health guidance for events.** If you proceed with the event, review the CDC's guidance and WHO's Planning Recommendations for Mass Gatherings.