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LEGAL BRIEFING: EBOLA VIRUS DISEASE
Employment Issues on the Horizon

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October 30, 2014

The 2014 Ebola Virus Disease ("EVD") epidemic has been declared the largest EVD outbreak in history. The Department of Homeland Security recently designated New York's John F. Kennedy International Airport as one of six (6) airports in the nation that travelers from West African nations affected by EVD must come through in order to enter the United States. Highlighting the reality of the situation, on October 23rd, 2014 a doctor in New York City who had served as a member of Doctor's Without Borders tested positive for EVD. The potential impact of EVD locally was expanded when the University of Rochester Medical Center was designated as a treatment location for EVD in upstate New York. For all of these issues, it is critical that employers have a plan to respond to EVD related issues in the workplace. This article is intended to address some of the many employment issues on the horizon that have been raised as a result of this serious health concern.

**Implications under the Americans with Disabilities Act
and Title VII of the Civil Rights Act**

A top concern of employers is what to do with employees who have recently traveled to high risk areas in West Africa where the EVD outbreak has been the most severe. While it may seem intuitive to immediately impose restrictions and/or require medical screening, employment laws must be considered before action is taken. The Americans with Disabilities Act ("ADA") requires a direct threat to the health of the employee or others before an employer can make a disability related inquiry of an employee that is not job related or consistent with business necessity.

Employers may, however, ask employees where they have traveled and ask about potential EVD exposure. In situations where employees have traveled to high risk areas, employers may educate workers about EVD, recommend following the Centers for Disease Control and Prevention's guidance on how to monitor possible symptoms for the disease and choose to pay an employee to stay home during the 21 day incubation period in which symptoms could develop.

If a business determines an employee's exposure poses a threat, then the employer has grounds to impose restrictions and/or require medical screening. The threat assessment should be viewed on a continuum: if an employee has traveled to a country neighboring the EVD outbreak, the legal risk is higher to designate the employee as a threat. The strongest case for a designation of a threat is where an employee has been exposed to a patient with EVD. The gray area for employers is where an employee has recently been to a high risk area but does not report direct exposure to a patient with EVD.

Employers should also take care not to impose restrictions, inquiries, or otherwise treat employees of West African descent differently than other workers or applicants based on national

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ATTORNEYS & COUNSELORS AT LAW

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origin. This could expose the employer to significant liability under Title VII of the Civil Rights and state anti-discrimination laws.

Implications under the Occupational Safety and Health Act and Other Considerations

The Occupational Safety and Health Act (“OSHA”) imposes a duty to provide a safe and healthy workplace. In industries where there is likely to be an infectious disease, a business that fails to comply with OSHA regulations – particularly where bloodborne pathogens are concerned – could be cited for violations and face fines in the range of \$7,000 - \$70,000 depending on whether the violations is deemed a mistake or willful.

Even if the potential exposure to EVD is just perceived and not real, employers may be faced with the dilemma of employees threatening not to come to work. Employers should be aware that those employees cannot be fired if the employees reasonably believe that they would be in imminent danger due to the anti-retaliation provisions of OSHA. However, the employer would not necessarily have to pay those employees while they stay home.

Many employers that send employees to high-risk areas for business have ceased such business travel to minimize the risk associated with the EVD outbreak. Employers may not, however, forbid travel to such areas if an employee is traveling for vacation or on leave. New York has a “Lawful Activities” statute that proscribes employers from forbidding employees from engaging in lawful activities during their personal time, which would include travel to West Africa and/or other high risk areas. Furthermore, if an employee has to travel to a high risk area to care for a sick relative, such leave may be protected by the Family and Medical Leave Act and therefore must be granted.

While travel destinations cannot be forbidden, employers can require that employees report where they have been upon return. Once the information is reported, employers can evaluate the level of risk and determine whether restricting a return to work or requiring medical clearance is justifiable.

As things continue to develop we will keep you informed of relevant legal impacts this may have on you, your family, and your organization.

This Legal Briefing is intended for general informational and educational purposes only and should not be considered legal advice or counsel. The substance of this Legal Briefing is not intended to cover all legal issues or developments regarding the matter. Please consult with an attorney to ascertain how these new developments may relate to you or your business.

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