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Q&A - Coronavirus FMLA, ADA and Attendance Implications

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We received multiple questions about the implications of the FMLA and ADA and the Coronavirus. The following Q&A may help with issues you may be facing in the workplace.

Question: *Is Coronavirus an FMLA-covered serious health condition?*

Answer: Determine whether the Coronavirus absence is FMLA-covered like you would any other illness. The Coronavirus absence will be FMLA-covered if there is:

1. More than three calendar days of incapacity plus two treatments by a healthcare provider (with the first treatment occurring occur within seven days of the first day of incapacity and the second treatment within 30 days of the first day of incapacity); or
2. More than three calendar days of incapacity plus one treatment by a healthcare provider (within seven days of the first incapacity) plus continuing treatment (including prescription medication) under a healthcare provider's supervision;

If Coronavirus does not satisfy the regulatory definition of a "serious health condition," employers should not count the absence against the employee's 12 weeks of FMLA leave.

Question: *Is Coronavirus a "disability"?*

Answer: Typically, no. Under normal circumstances, a Coronavirus illness will not last long enough to qualify as an ADA disability. However, Coronavirus complications (e.g., pneumonia) may extend for a longer period of time and qualify as an ADA disability. As a result, a reasonable accommodation (such as leave) may be required.

Question: *Could forcing an employee to stay home during the incubation period result in a "regarded as disabled" claim?*

Answer: Unlikely; "regarded as" claims are not valid for conditions that are "transitory and minor." However, Coronavirus complications that are not transitory and minor could give rise to a "regarded as disabled" claim.

Question: *Can a Coronavirus absence be counted for purposes of attendance? What if discipline would result?*

Answer: Yes; if the illness is not covered by the FMLA. However, complications arising from Coronavirus (or

Coronavirus' effect on a preexisting medical condition) could be considered a disability. If so, a reasonable accommodation under the ADA may be required, such as extended leave or modifying attendance requirements. Employers may wish to consider forgoing discipline or temporarily modifying attendance policies to prevent adversely impacting a large number of employees, disrupting business operations and negatively effecting employee relations.

Question: *Doesn't making an exception for Coronavirus set a precedent that opens the door for employees with other serious illnesses?*

Answer: Not if the exception is expressly limited in time or to the Coronavirus. We recommend setting the exception forth in writing to prevent future disputes.

Employers should apply the guidance set forth in this Q&A uniformly and in a manner that does not discriminate based on any protected characteristic (e.g., national origin, gender, race, etc.). A myriad of situations may arise regarding the Coronavirus. Please contact any member of **Bodman's Workplace Law Group** if you need assistance.

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