

COVID-19: WHAT EMPLOYERS NEED TO KNOW

EMPLOYEES IN THE WORKPLACE

■ May an employer ask its employees to disclose whether they or their family member(s) are experiencing COVID-19-related symptoms?

Yes. These types of questions are ordinarily restricted under the Americans with Disabilities Act (“ADA”). In response to the COVID-19 pandemic, however, the Equal Employment Opportunity Commission (“EEOC”) has updated its pandemic guidance for employers. The EEOC now advises that the COVID-19 pandemic is a “direct threat” exception to the ADA. This means that employers may now make certain inquiries into whether an employee poses a direct threat to him/herself or to others. Any information obtained must be kept confidential consistent with employer obligations under the ADA.

Given the above, it is prudent that all employers implement a policy that requires employees who become ill (or employees with family members who become ill) with symptoms consistent with COVID-19 to notify the employer as soon as reasonably practicable. We recommend that each employer designate a point person within its organization to field the inevitable questions, comments, and updates. We likewise recommend that the policy set forth the best means of contact for that person.

■ May an employer send home an employee involuntarily who has or is exhibiting symptoms of COVID-19?

Yes. The EEOC and Centers for Disease Control and Prevention’s (“CDC”) have both stated that employees who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace. At this time, given the recommendations of the CDC and federal, state, and local governments, employers are urged to err on the side of caution when permitting symptomatic employees to remain in the workplace.

■ May an employer send home or require to work from home an asymptomatic employee who has been in close contact with someone with COVID-19 (e.g. a family member, close friend, etc.)?

Yes. The CDC has published Interim U.S. Guidance for Risk Assessment Management, which categorizes employees based on symptoms (symptomatic or asymptomatic) and risk (none, low, medium, high.) Under the CDC guidance,

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employees who are asymptomatic may be excluded from the workplace, if they (1) have close contact with, (2) sat on an aircraft within six feet (two airline seats) of, or (3) live in the same household as, or are an intimate partner of, or are caring for a family member at home, a symptomatic individual with confirmed COVID-19.

■ Can an employee refuse to come to work because of fear of infection?

It depends. Employees who are refusing employer directives may be protected from retaliation under the Occupational Safety and Health Administration (“OSHA”) in certain circumstances. Specifically, an employee may refuse a project that involves “risk of death or serious physical harm” if all of the following conditions apply: (1) the employee has “asked the employer to eliminate the danger and the employer failed to do so”; (2) the employee “refused to work in ‘good faith’ (a genuine belief that ‘an imminent danger exists’); (3) “[a] reasonable person would agree that there is real danger of death or serious injury”; and (4) “[t]here isn’t enough time, due to urgency of the hazard, to get it corrected the hazard through regular enforcement channels, such as requesting an OSHA inspection.”

Additionally, under the National Labor Relations Act (“NLRA”), nonsupervisory employees in unionized and non-unionized settings may have the right to refuse work in conditions they believe to be unsafe. To refuse to work, employees should have a “reasonable, good faith belief” that working under certain conditions would not be safe. If you have a unionized workforce, we recommend seeking further legal counsel on this issue.

Having said this, a generalized fear of contracting COVID-19 is unlikely to justify a work refusal in most cases.

■ What should an employer do if an employee tests positive for COVID-19?

Employers should engage in decisive action to ensure the infection does not spread. Per the CDC guidelines, this means that employers should send home the employee and all employees who worked closely with that employee for a 14-day period of time. If possible and practicable, employers may still encourage and require employees to telework during this quarantine.

The CDC has provided the following recommendations for most non-healthcare businesses that have suspected or confirmed COVID-19 cases:

- Close off areas used by the ill persons and wait as long as practical before beginning cleaning and disinfection to minimize potential for exposure to respiratory droplets.
- Open outside doors and windows to increase air circulation in the area.
- Cleaning staff should clean and disinfect all areas (e.g., offices, bathrooms, and common areas) used by the ill persons, focusing especially on frequently touched surfaces.
- To clean and disinfect:
 - o If surfaces are dirty, they should be cleaned using a detergent or soap and water prior to disinfection.
 - o For disinfection, diluted household bleach solutions, alcohol solutions with at least 70% alcohol, and most common EPA-registered household disinfectants should be effective.

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- o Cleaning staff should wear disposable gloves and gowns for all tasks in the cleaning process, including handling trash.
 - o Gloves and gowns should be compatible with the disinfectant products being used.
 - o Additional PPE might be required based on the cleaning/disinfectant products being used and whether there is a risk of splash. Follow the manufacturer's instructions regarding other protective measures recommended on the product labeling.
 - o Gloves and towns should be removed carefully to avoid contamination of the wearer and the surrounding area. Be sure to clean hands after removing gloves.
- Employers should develop policies for worker's protection and provide training to all cleaning staff prior to providing cleaning tasks. Training should include when to use PPE, what PPE is necessary, how to properly don (put on), use, and doff (take off) PPE, and how to properly dispose of PPE.

Can an employer take an employee's temperature at work to determine whether he/she might be infected?

Yes. Under normal operations, taking employee temperatures is a medical examination and therefore may only be conducted if it is "job related and consistent with business necessity." The EEOC has stated, however, that because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendance precautions, employers **may** measure employees' body temperature. As with all medical information, the fact that an employee had a fever or other symptoms would be subject to ADA confidentiality requirements.

As a practical matter, an employee may be infected with the COVID-19 virus without exhibiting a fever, so temperature checks may not be the most effective strategy for protecting your workforce.

Additionally, take care to provide proper precautions to those employees tasked with taking the temperature of other employees. It is safest to assume the testers are going to potentially be exposed to someone who is infected who may cough or sneeze during the interaction. Based on the anticipated exposure, mitigation efforts must be undertaken to protect the employee, including use of personal protective equipment.

If an employer learns that an employee has COVID-19, does the employer have a reporting responsibility?

Not at this time. The CDC guidance for employers does not include an obligation to report an employee's confirmed COVID-19 diagnosis to the CDC. The healthcare provider that receives the confirmation of a positive test is the mandatory reporter who will handle that responsibility.

What is the main workplace safety guidance that employers should follow?

OSHA recently published its Guidance on Preparing Workplaces for COVID-19. The guidance outlines actions employers can take to protect their workforce.

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OSHA divided workplaces and work operations into four risk zones, according to the likelihood of employee's occupational exposure during the COVID-19 pandemic. These risk zones are useful in determining the amount of risk for each worker, and subsequently, determining appropriate work practices and precautions. The four zones are as follows:

- **Very High Exposure Risk**

- o Healthcare workers (e.g. doctors, nurses, dentists, paramedics, emergency medical technicians) performing aerosol-generating procedures (e.g. intubation, cough induction procedures, bronchoscopies, some dental procedures and exams, or invasive specimen collection) on known or suspected COVID-19 patients
- o Healthcare or laboratory personnel collecting or handling specimens from known or suspected COVID-19 patients (e.g. manipulating cultures from known or suspected COVID-19 patients)
- o Morgue workers performing autopsies, which generally involve aerosol-generating procedures, on the bodies of people who are known to have or suspected to having, COVID-19 at the time of their death

- **High Exposure Risk**

- o Healthcare delivery and support staff (e.g. doctors, nurses, and other hospital staff who must enter patients' rooms) exposed to known or suspected COVID-19 patients
- o Medical transport workers (e.g. ambulance vehicle operators) moving known or suspected COVID-19 patients in enclosed vehicles
- o Mortuary workers involved in preparing (e.g. for burial or cremation) the bodies of people who are known to have, or suspected of having, COVID-19 at the time of their death

- **Medium Exposure Risk**

- o Jobs that require frequent and/or close contact with (i.e., within 6 feet of) people who may be infected with COVID-19, but who are not known or suspected patients. In areas without ongoing community transmission, workers in this risk group may have frequent contact with travelers who may return from international locations with widespread COVID-19 transmission. In areas where there is ongoing community transmission, workers in this category may have contact with the general public (e.g., in schools, high-population-density-work environments, and some high-volume retail settings).

- **Lower Exposure Risk**

- o Jobs that do not require contact with people known to be, or suspected of being, infected with COVID-19 nor frequent close contact with the general public. Workers in this category have minimal occupational contact with the public and other coworkers.

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■ Is COVID-19 a recordable illness for purposes of OSHA Logs?

Yes. Employers are required to record instances of workers contracting COVID-19 if the employee contracts the virus while on the job. This must be done in the employer's OSHA 300 log. The illness is not recordable if the employee was exposed to the virus while off the clock. Employers thus must record cases of COVID-19 if:

1. The case is a confirmed case of COVID-19;
2. The case is work-related;
3. The case involves one or more of the general recording criteria set forth in 29 C.F.R. 1904.7

■ During the COVID-19 pandemic, may an employer require its employees to wear personal protective equipment (e.g. face masks, gloves or gowns) designed to reduce the transmission of pandemic infection?

Yes, an employer may require employees to wear personal protective equipment during a pandemic. However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, or gowns designed for individuals who use wheelchairs), the employer should provide these, absent undue hardship.

■ Do these government shutdowns require my business to shut down?

It depends. Many states and localities are mandating that non-essential businesses close. If your state comes under one of these orders, the "fine print" is of utmost importance, as there are exceptions for certain industries and certain workers. Given the rapid pace of these developments, we recommend consultation with legal counsel or state or local authorities.

VACATION AND SICK LEAVE

■ Is COVID-19 an FMLA-covered serious health condition?

Maybe. Under FMLA, a health condition is a "serious health condition", if, for example, it meets the following criteria:

1. More than three calendar (not work) days of incapacity plus two treatments by a healthcare provider (the first of which must occur within seven days of the first day of incapacity and the second within 30 days of the first day of incapacity)
2. More than three calendar (not work) days of incapacity plus one treatment by a healthcare provider (which must occur within seven days of the first incapacity) plus continuing treatment (including prescription medication) under the supervision of a healthcare provider

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Some cases of COVID-19 will qualify, and others will not. Simply because an employee visits a physician does not automatically qualify the employee for FMLA leave.

■ What is Emergency FMLA and does it apply to me?

It depends on whether you are an employer who has over 499 employees.

If you are an employer with 500 or more employees, then employees requesting leave could conceivably be protected by the Family and Medical Leave Act (“FMLA”) to the extent they otherwise meet FMLA-eligibility requirements (see above). Employers with 500 or more employees are not subject to the recently passed Emergency Family and Medical Leave Act (“E-FMLA”) provisions.

If you are an employer with 499 or fewer employees, then employees may request E-FMLA Leave, starting April 2, 2020, for a qualifying need related to a public health emergency. A qualifying need means that an employee may request E-FMLA if the employee is unable to work (or telework) due to a need to care for his/her son or daughter under 18 if the school or place of care has been closed or the childcare provider is unavailable due to a public health emergency.

■ Does E-FMLA apply to small employers?

The Secretary of Labor has the authority to exclude or exempt employers with fewer than 50 employees, health care providers, and emergency responders. Guidance on this is forthcoming.

■ Does E-FMLA apply to healthcare providers?

E-FMLA provides that an employer of an employee who is a healthcare provider or emergency responder may elect to exclude such employee from emergency leave requirements. At this time, without DOL guidance, this applies on an employee-specific basis and is not a blanket provision that applies to a healthcare employer generally. The employer may choose to exclude such specific employee from receiving the benefits of the E-FMLA. Thus, if an employer makes such election, the affected employee does not get the additional 12 weeks of paid leave (following the 10 days of unpaid leave) allowable under the E-FMLA.

■ Is the E-FMLA leave paid or unpaid?

The initial ten days of E-FMLA is unpaid. An employee, may, however, elect to use any accrued vacation leave, personal leave, or medical or sick leave for unpaid leave for this initial ten-day leave period. This implies that employees may also use their allotted 80 hours of sick leave from the Emergency Sick Leave provision in Section B, if they do not have any accrued leave, and if they are entitled to such under the specific circumstances.

Leave after the initial ten-day period should be calculated at not less than two-thirds of an employee’s regular rate of pay at the hours the employee would normally be scheduled to work. The amount required for paid emergency FMLA leave is limited to \$200/day or \$10,000 in the aggregate.

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■ Are there any tax credits available to me?

Tax credits are available to employers who have made E-FMLA leave payments. IRS guidance is expected on this issue soon. Importantly, employers must pay this leave, even if they do not yet have the particulars of the credit information.

■ When does the E-FMLA go into effect? Is it retroactive?

The E-FMLA is effective on April 2, 2020. At this point, the E-FMLA is not retroactive. This may, but is unlikely to, change with the forthcoming Department of Labor guidance.

■ Is an employer required to offer sick leave to its employees?

Given the recent passage of the Emergency Paid Sick Leave Act, it depends on the number of employees the employer has.

If an employer has 500 or more employees, then employers are not required to offer additional paid sick leave responsive to COVID-19 in addition to whatever policies are already in effect.

If an employer has 499 or fewer employees, then under the newly-passed Emergency Paid Sick Leave Act, then an employer is required to offer additional paid sick leave to an eligible employee, if the employee is unable to work or work remotely for any of the following reasons:

1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2. The employee has been advised by a health care provider to quarantine due to concerns related to COVID-19;
3. The employee is experiencing symptoms of COVID-19 and seeking a diagnosis;
4. The employee is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
5. The employee is caring for a son or daughter if the school or place of care has closed or is unavailable due to COVID-19; or
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretaries of Treasury and Labor.

■ Do employers have to provide emergency paid sick leave to all employees? Even employees who just started with the company?

Yes. The paid sick time is available for all employees, regardless of how long the employee has been employed.

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How much sick time does an employer have to offer to a full-time employee? What about a part-time employee?

Full-time employees are entitled to 80 hours of paid sick leave. Part-time employees are entitled to a number of hours that equal the number of hours the employee works on average over a two-week period.

Paid sick time shall not exceed \$511/day or \$5,110 in the aggregate for needs (1), (2), or (3) above or \$200/day and \$2,000 in the aggregate for needs (4), (5), and (6).

Can employers require their employees to use PTO first?

No. An employer may not require an employee use other paid leave provided by the employer before the employee uses the paid sick time provided under the Act.

Do employers have to inform their employees that this paid leave exists?

The Act requires posting a notice, prepared or approved by the Secretary of Labor, in conspicuous places on the premises where notices are customarily placed. The Secretary of Labor is required to make a model notice available no later than seven days after enactment of the Act.

When does the Emergency Paid Sick Leave Act go into effect? Is it retroactive?

The Emergency Paid Sick Leave Act is effective on April 2, 2020. At this point, it is not retroactive. This may, but is unlikely to, change with the forthcoming Department of Labor guidance.

May an employer require an employee with COVID-19 or symptoms of such to use his/her vacation time and/or other paid time off for the absence?

It depends. If the employer has fewer than 500 employees, then employers should review its obligations under the Families First Coronavirus Response Act - Emergency Paid Leave Act. If the employer has 500 or more employees, then yes, the employer may require such use, subject to the provisions of the employer's current vacation time, paid time off, and other applicable policies.

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WAGE AND HOUR

May an employer encourage or require employees to telework as an infection control strategy?

Yes. An employer may encourage or require employees to telework as an infection-control or prevention strategy. Telework may also be a reasonable accommodation. Of course, employers must not single out employees either to telework or to continue reporting to the workplace on the basis prohibited by any of the anti-discrimination laws.

Do employers have to pay employees their same hourly rate or salary if they work from home?

If telework is being provided as a reasonable accommodation for a qualified individual with a disability, or if required by a union or employment contract, then employers must pay the same hourly rate or salary.

If this is not the case and employers do not have a union contract or other employment contracts, under the FLSA, employers generally have to pay employees only for the hours they actually work, whether at home or at the employer's office. However, the FLSA requires employers to pay non-exempt workers at least the minimum wage for all hours worked, and at least time and one half the regular rate of pay for hours worked in excess of 40 in a workweek. Salaried exempt employees generally must receive their full salary in a week in which they perform any work, subject to certain very limited exceptions.

Are employers required to cover any additional costs that employees may incur if they work from home (internet access, computer, additional phone line, increased use of electricity, etc.)?

Employers may not require employees who are covered by the FLSA to pay or reimburse the employer for such items that are business expenses of the employer if doing so reduces the employee's pay below the required minimum wage or overtime compensation. Additionally, employers may not require employees to pay or reimburse the employer for such items if telework is being provided to a qualified individual with a disability as a reasonable accommodation under the ADA.

How many hours is an employer obligated to pay an hourly-paid employee who works a partial week because the employer's business was closed?

The FLSA generally applies to hours actually worked. It does not require employers who were unable to provide work to non-exempt employees to pay them for hours the employees would have otherwise worked.

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■ If an employer directs salaried, exempt employees to take vacation or leave without pay during office closures during the COVID-19 pandemic, does this impact the employee's exempt status?

Exempt, salaried employees generally must receive their full salary in any week in which they perform any work, subject to certain, very limited exceptions.

■ May an employer count an employee's time away from work due to the employee's own COVID-19 illness against the employee in terms of the employer's attendance policy?

Yes, but proceed with caution. This question requires an analysis of whether the employee's illness under COVID-19 would be an FMLA-qualifying serious health condition. If a serious health condition, then employer may not count these absences against the employee.

Additionally, if an employee experiences long-term health effects as a result of COVID-19, then the ADA could likewise be triggered. If there are employee complications arising from COVID-19, or COVID-19's effect on preexisting medical conditions, then it could be considered a disability, in which case a reasonable accommodation may be required, such as modification to the employee's attendance requirements.

DISCRIMINATION

■ Can an employer enact a policy that prohibits high-risk individuals from working?

The Age Discrimination in Employment Act ("ADEA") and its state law counterparts prevent employers from discriminating against older employees in the absence of a "bona fide occupational qualification." A blanket policy that prohibits employees over a certain age from working would be unlawful. A policy that allows employees in particularly susceptible populations to voluntarily stay home or have priority to telecommute would not be unlawful.

Similarly, the ADA and comparable state laws require employers not to discriminate against people with disabilities. A blanket policy that prohibits employees with certain medical conditions from working would be unlawful unless the employer could prove that doing so would pose a direct threat of substantial harm to that employee or to others. Only in this circumstances may ADA-covered employers make disability-related inquiries or require medical examinations of asymptomatic employees to identify those at higher risk of influenza complication. However, a policy that allows employees in particularly susceptible populations to voluntarily stay home or have priority to telecommute would not be unlawful.

We recommend consultation with an attorney before enacting any policies that would be potentially discriminatory, albeit well-intentioned.

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If an employer learns that an employee has exposure or a diagnosis of COVID-19, can that employer alert fellow employees of the diagnosis? If so, what steps should the employer take?

The ADA and various state laws mandate privacy of employee medical information under most circumstances. The CDC advises that if an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain the confidentiality as required by the ADA.

In this circumstance, as a first, we recommend that an employer ask for the consent of an infected employee to let his or her coworkers know of the diagnosis in order to take appropriate steps to contain infection. In the absence of employee consent, the employer should inform other employees that a co-worker is believed to have contracted COVID-19, and for that reason, appropriate protective measures should be taken, including permitting temporary voluntary leave.

OTHER

What are an employer's obligations under the HIPAA privacy rules if contacted by officials asking for emergency personal health information about an employee?

The privacy restrictions mandated by HIPAA only apply to "covered entities" such as medical providers or employer-sponsored group health plans, and only in connection with individually identifiable health information. It is not applicable for most employers, even if they are within the health care industry, as long as they are not actually treating or paying for the costs of treating, providing medical care, or providing services to companies who do these things. Most employers will learn of a COVID-19 diagnosis from the employee in its role as an employer, and this is not a HIPAA-covered situation.

Keep confidentiality in mind, however. Disclosures should be made only to authorized personnel. We recommend seeking legal counsel if you receive any such requests.

Can we open childcare centers at our workplace for employees' children who are not allowed to go to school?

No, not unless you comply with the licensing requirements of your state. The Tennessee Department of Human Services recently issued a bulletin setting forth the requirements of an emergency child care center. We recommend you consult legal counsel if you wish to proceed with licensure.

May an employer waive deductibles or co-pays in its health plan for testing and medical treatment relating to COVID-19?

The Families First Coronavirus Response Act addresses this question and requires all group health plan to provide coverage for COVID-19 testing without any plan limitations or cost-sharing charges. Having said that, employers

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may also opt to waive out-of-pocket expenses for its employees for any medical treatment related to COVID-19. We recommend confirming all information with your insurer before enacting any policies.

REDUCTION IN FORCE/WARN

Will employment reductions as a result of COVID-19 qualify for a federal WARN Act exception and allow less than 60 days' notice?

Maybe. This requires a closer look at the specific circumstances and is extremely fact dependent. There are three general exceptions when notice is not required, but otherwise would be. These are: (1) faltering company, (2) unforeseeable business circumstances, and (3) natural disasters. Under the unforeseeable business circumstances exception, the inquiry is whether an event or business circumstance triggering the employment loss is "reasonably foreseeable" at the time notice should have been given. If the event/circumstance is caused by a sudden, dramatic, and unexpected action or condition outside the employer's control, then that may satisfy the "unforeseeable" standard. Even if unexpected, employers must still give as much notice as is practicable, including a brief statement of its basis for reducing the notification period.

Remember, however, that individual states also have their own WARN Acts with which employers must comply. Moreover, during the course of this pandemic, governors release new executive orders, some of which have affected the state WARN Acts. If you intend to engage in a mass layoff or termination, we recommend seeking legal counsel to evaluate the numerous factors.

The Department of Labor will be issuing guidance on or before April 2, 2020. We will provide an update upon the release and digestion of the guidance.

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