

Practical Employer Guidance on COVID -19

Employers everywhere are currently scrambling to manage the myriad employee and workplace issues that arise due to the current COVID-19 pandemic. O'Hagan Meyer employment attorneys Jacqueline Ferrell, Joan McKenna, and Woody Lay have crafted the following practical guidance for employers in a Q & A format to address many of those issues. If you don't find guidance here, please call us at O'Hagan Meyer and one of our Labor and Employment attorneys will walk you through this thorny area. These issues are evolving quickly. O'Hagan Meyer will continue to issue periodic updates to address questions important to employers.

Travel:

- **Can we restrict travel?**

Employers may restrict *business* travel. Employers should stay up-to-date on the Center for Disease Control's (CDC) travel guidelines and consider restricting non-essential travel per those guidelines. The CDC's Traveler's Health Notices <https://wwwnc.cdc.gov/travel/notices> contains updated travel notices concerning risk. The CDC recommends avoiding all non-essential travel to destinations designated a Risk Assessment Level 3.¹ Be aware that other countries may have travel restrictions that could limit the ability of employees to return home. Additionally, employers should consider canceling or rescheduling upcoming non-essential meetings and events. Many states and cities have implemented measures to limit the size of public gatherings.

- **If an employee is planning to travel for a personal trip, what can we do?**

Employers may require employees to inform the employer of their travel plans. Some employers limit the request to travel plans to a location with a known outbreak, but that limitation is not required. Employers should also notify employees that, if they travel to an affected area, they may be prohibited from coming to work for a period of time. Employers generally should avoid restricting personal travel, unless there is a business reason to do so. For example, an employer may limit personal travel by senior executives to limit the possibility of exposure to COVID-19.

- **Can we ask an employee about a family member's recent travel?**

Employers may request that employees inform them of any family or household members with whom they have close contact or who have traveled to high-risk areas to determine whether the exposure has resulted in the employee posing a direct threat to the health and safety of others. Employers should limit questions about family members to recent travel and ask employees about their potential exposure to COVID-19, rather than specifically asking about the family members' health conditions.

¹ Note that entry of foreign nationals from many of the Level 3 destinations has been suspended.

Potential Exposure:

- **Can we require employees to tell us if they may have been exposed?**

Asking employees about their medical conditions raises potential issues under the Americans with Disabilities Act (ADA); however, the Pandemic Preparedness in the Workplace and The Americans With Disabilities Act guidance issued by the Equal Employment Opportunity Commission (EEOC) https://www.eeoc.gov/facts/pandemic_flu.html states that, during a pandemic, exceptions to the ADA's restrictions on questions about employees' health allow employers to ask about employees' travel and potential exposure to the virus. Furthermore, the EEOC's guidance indicates that if the pandemic becomes "severe," the ADA's "direct threat" rule will justify inquiries to employees who report COVID-19-like symptoms or who may have been exposed to the virus. Employers also should be mindful that the Occupational Health and Safety Act (OSHA) requires employers to protect the safety of employees, and it is implicated by COVID-19.

- **If an employee notifies us that he or she may have been exposed, what do we do?**

If an employee believes the employee may have been exposed to COVID-19, either because the employee has traveled to an area with an outbreak, or because the employee has been in close contact with someone with COVID-19, the employee should be required to work from home (or not report to work) for the incubation period; the CDC currently recommends individuals stay home for 14 days. During this time, the employee should self-monitor for symptoms such as fever, coughing and difficulty breathing. If the employee experiences any of these symptoms, the employee should seek medical attention, notify the employee's supervisor, and stay home pending further instructions from the employee's healthcare provider. Remind all employees that they should stay home if they are sick and remind them of any rights they may have to paid time off.

- **If an employee notifies us that she has tested positive for COVID-19, what should we tell others?**

Employers must maintain the confidentiality of any employee with a suspected or confirmed case of COVID-19.² However, employers should inform other employees of their possible exposure to COVID-19 because they have a right to know if there is a health risk in their workplace. Additionally, employers should immediately contact the local health department and establish a plan before communicating any information to their employees. An employer may let employees know that someone in the company is infected with the virus so that employees may monitor themselves for symptoms and quarantine themselves, if appropriate. The employer also may choose to send home any individuals who were in close contact with the affected employee. The employer may not disclose the identity of the individual who tested positive or provide any information that allows employees to identify the individual.

² Whether there is a legal requirement to maintain the confidentiality of this information will most likely depend on whether the employee has a disability covered by the ADA (i.e., the employer is making a disability-related inquiry) or is making a request for leave under the Family Medical Leave Act (FMLA). There may be other protections that could apply as well under the Genetic Information Nondisclosure Act (GINA) and state law leave or privacy laws. Note: The Health Insurance Portability and Accountability Act (HIPAA) generally does not apply to employers.

- **If an employee is coughing or showing other symptoms of COVID-19, can we send her home?**

Yes. If an employee comes to work showing signs of respiratory illness, you should immediately separate her from other employees and send her home.

- **Can we take employees' temperatures?**

Typically, requiring employees to submit to temperature checks would be considered a medical examination in violation of the ADA. However, under the EEOC's Pandemic Preparedness in the Workplace guidelines, doing so might be permissible where COVID-19 becomes widespread in the community, as assessed by state or local health authorities or the CDC. We do not recommend taking this step without direct consultation with an attorney.

- **Can we ask an employee for a medical release to speak directly to her physician to obtain more information on her condition?**

In cases where the employee is exhibiting flu-like symptoms or has been exposed to someone with COVID-19, the employer may wish to speak directly to the employee's physician regarding whether the employee has posed a risk to other workers or could do so in the future. In either instance, such a request is permissible under federal law. Under the current circumstances, determining whether an employee may have infected other employees or could do so is permissible under the ADA standard that such inquiries may be made if (1) job related, and (2) consistent with business necessity, on grounds that at the current time, the employee may pose a direct threat in the workplace. State laws may differ on an employer's ability to request such a release so consult directly with an attorney in your state for guidance in this area.

Working from Home or Being Sent Home

- **Can we fire employees who refuse to come to work because of concerns about COVID-19?**

OSHA prohibits employers from terminating employees who refuse, in good faith, to expose themselves to dangerous job conditions and who have no reasonable alternative but to avoid the workplace. The condition causing the employees' fears, however, must be objectively reasonable. Additionally, Section 7 of the National Labor Relations Act protects concerted protests against unsafe working conditions. Therefore, terminating an employee for refusing to come to work over COVID-19 concerns poses risks and should not be done without consultation with an attorney.

- **If employees ask to work from home, do we have to allow them to do so?**

Typically there is no requirement that an employer permit all employees to telecommute. Given the unique challenges presented by COVID-19, however, employers should consider allowing employees to work from home where possible. If an employer allows some employees and not others to work remotely, it must be prepared to offer a legitimate, nondiscriminatory reason as to why some may not, and make sure it applies any policies consistently.

Additionally, employers should remember that under the ADA and some state laws, employers have an obligation to provide reasonable accommodations to employees with disabilities, unless doing so would present an undue hardship. Allowing temporary telework arrangements in response to COVID-19 could undermine an employer's ability to decline future temporary telework arrangements as reasonable accommodations to people with disabilities. Therefore, employers should carefully document and make clear in their communications that the ability to work from home is being granted due to the extraordinary circumstances presented by COVID-19.

- **Are there circumstances under which we should require employees to work from home (or not report to work)?**

Employers should consider (and communicate to their employees) circumstances under which the employees must stay home. For example, employers should consider requiring employees to work from home (or, if not feasible to work from home, to remain home) in the following situations:

- The employee or a household member traveled to or through a country with a CDC Risk Level 3 in the past 14 days;
- The employee or a household member traveled on a cruise ship within the last 14 days;
- The employee believes he or she may have been exposed to someone with COVID-19; or
- The employee's work location has been exposed to someone with COVID-19.

Employers should consider requiring employees in those circumstances to stay home for a 14-day period and self-monitor for symptoms such as coughing, fever, and difficulty breathing. If they experience any of those symptoms, employees should seek medical attention, notify their supervisors, and stay home pending further instructions from their healthcare providers.

- **If we send employees home because they are being quarantined, self-monitoring, or are ill with COVID-19 or are caring for a family member with COVID-19, are we required to pay them?**

It depends on the employers' policies, applicable federal, state and local laws, and the circumstances specific to the employees. Employers, however, should seek to avoid creating a work environment where employees are hesitant to come forward and indicate they may be sick. Where possible, employers should consider continuing pay, even where not legally required to do so.

Employers would be required to pay employees who are absent from work for these reasons if they have accrued paid time off pursuant to any paid sick leave law. After employees exhaust any paid sick leave benefits, whether to pay them depends on a number of factors.

- For non-exempt employees, employers generally must pay them only for hours they work. An employer typically would need to grant employees an unpaid leave of absence if they have exhausted any paid leave entitlement.

- For exempt employees, they must be paid their full weekly salary if they perform any work during a given week. Employers must also pay exempt employees for the full workweek if they are requiring them to be absent from work (for instance, to self-monitor at home).

If employees are diagnosed with COVID-19 and unable to work due to their medical condition, employers should extend any state- or employer-provided disability benefits to eligible employees.

- **Local schools are closed, and employees want to stay home to take care of their children. What do we do?**

The employer's normal leave policies would apply. Nevertheless, these are unique times. Employers may need to provide additional flexibility to allow employees to continue working while schools, day care, and other child care options are closed.

- **Can we require employees who stayed home to be medically cleared before returning to work?**

If employees traveled to one of the CDC-designated countries, you may request documentation of the employees' travel to confirm the dates of self-monitoring at home. If employees did not have fever, cough or shortness of breath during the 14 days of self-monitoring, there is no reason to prevent them from returning to the workplace.

If employees were home sick with an illness, employers may be able to request documentation. The ADA allows employers to ask employees who have been out on medical leave to require documentation of fitness for duty before returning to work. Some state and local leave laws permit employers to request doctors' notes after employees have been absent for more than three consecutive workdays (others do not require employees to be out for three days or have other requirements). Some states have restrictions on requesting such notes. This is an area where an employer again should consult with an attorney.

- **If a vaccine becomes available, can we require employees to get it?**

No, employers may not require employees to receive vaccinations. Employers may, however, educate their employees about the benefits of any vaccine if it becomes available, and offer vaccinations to employees at no cost during working hours.

Obligations Under Various Laws:

- **If an employee who is not sick wants to wear a mask, do we have to permit it?**

Employees are understandably concerned about transmission of COVID-19. On the other hand, employers have an interest in not causing fear or alarm. Furthermore, the CDC does not recommend that the general public wear masks, except as recommended by a healthcare professional or unless the individual is infected with COVID-19 or caring for someone who is infected with COVID-19. Employers thus have discretion as to whether to allow employees to wear masks, but employers should understand the circumstances behind any such request.

- **An employee has asked for leave to care for a family member with COVID-19. Do we have to grant the leave?**

Yes, if the employee is eligible for leave under the FMLA. Some state and local laws also provide leave to care for a sick family member. The definition of “family member” under these laws varies. Review the request and the applicable leave law closely to determine if the “family member” is included.

- **Do we have an obligation to give notice of a temporary shutdown of our workplace?**

Temporary workplace shutdowns may implicate obligations under federal or state Worker Adjustment Retraining Notification (WARN) Acts. Under the federal WARN Act, employers with 100 or more employees are required to give 60 days’ notice of a temporary shutdown if it will affect 50 or more employees at a single site and result in at least a 50% reduction of hours of work during the month of the shutdown. However, COVID-19 may qualify as a “natural disaster” or “unforeseeable business circumstances” that does not require the 60 days’ notice. Even if 60 days’ notice is not required, employers still must give as much advance notice as is practicable. Also note that many states have “mini-WARN” laws that cover smaller employers or require notice for less significant shutdowns.

How Do We Prepare, and How Do We Keep Employees Informed?

- Create a plan
- Anticipate increased employee absences, as employees and their family members may become ill and their children’s schools or care providers may close.
- Determine which function(s) are critical to your operations and plan for operating with reduced staff.
- Anticipate employees working from home.
- Prohibit business travel to areas with significant outbreaks and prohibit all nonessential business travel to other locations.
- Allow greater flexibility for employees to work remotely and consider how to provide flexibility for employees to deal with school closings, public transportation disruptions, and other developments.
- Consider, if possible, paid leave for employees who must self-monitor but cannot work remotely.
- Cancel all large gatherings where the risk of exposure is greater.
- Require employees who may have traveled to affected areas to work remotely until the incubation period has passed.
- Encourage good hygiene practices, including washing hands, sanitizing work areas, covering mouths and noses when they sneeze or cough, and avoiding close contact.