



COVID-19: Questions & Answers for Concerned Employers

COVID-19: QUESTIONS & ANSWERS FOR CONCERNED EMPLOYERS

By: McGrath North Labor & Employment Group

The spread of the Coronavirus (COVID-19), which has been declared a pandemic by the World Health Organization, has triggered numerous concerns in the workplace, including issues relating to health and safety, leaves of absence, privacy, discrimination, and travel. The U.S. Centers for Disease Control (CDC) has published a steady stream of information to help employers and businesses navigate through these issues including the "Interim Guidance for Businesses and Employers" at www.cdc.gov/coronavirus/2019-NCOV/community/guidance-business-response.html. While there is a wealth of information being circulated, it is not always easy to translate this information into an appropriate policy or practice in the workplace.

WORKPLACE COMMUNICATIONS AND BEST PRACTICES

1. What are the symptoms of COVID-19 and how is it transmitted?

Symptoms of COVID-19 manifest as a mild to severe respiratory illness with fever, cough and difficulty breathing. Currently, the CDC is reporting that symptoms can appear in as few as 2 days or may appear 14 days after exposure. The disease spreads from person to person through small droplets from the nose or mouth which are spread when a person with COVID-19 coughs, sneezes or exhales. The droplets can land on objects and surfaces around the person. Therefore, people can catch the virus by simply touching objects or surfaces and then touching their eyes, nose or mouth.

The CDC has published important information for non-healthcare employers to help prevent workplace exposure to COVID-19. Consistent with these recommendations, employers should immediately take steps to protect employees, customers and other individuals in the workplace.

2. What should an employer communicate to its workforce and what actions should be taken to encourage good health practices?

Many employers have already taken proactive steps to communicate with their employees regarding COVID-19 and good health practices in the workplace. Here are the recommended measures that should be undertaken:

- First and foremost, an employer needs to assure its employees that it is actively monitoring the fast-moving developments of COVID-19 and will do whatever is necessary to protect its employees. Providing hyperlinks to information published by the CDC will give employees the most up-to-date information regarding the spread of the virus, risk factors and other information that addresses public health concerns. Updates are available on the CDC's web page at www.cdc.gov/coronavirus.
- Employees need to be instructed to stay home if they are sick. The CDC recommends that employees with symptoms, including symptoms of acute respiratory illness, should stay home and not come to work until symptoms have resolved for at least 24 hours, including fever ([100.4° F or above](#)) without the use of fever-reducing medication. Managers need to back up this message to ensure that employees are sent home when symptoms are observed.
- Employees should be advised regarding proper hygiene in the workplace to avoid the spread of disease including proper hand-washing techniques. Employees should be instructed to wash their hands regularly and before eating. Counting for 20 seconds while washing hands is a good practice to follow. Employees should be encouraged to carry with them and utilize a hand cleaner. Employees should be advised to keep their hands away from their mouth, nose and eyes because this is a way people contract the virus.
- Reaffirm this message by placing signs throughout the workplace encouraging employees to stay home from work when sick, instructing regarding proper coughing and sneezing etiquette, good hygiene and other health practices. The CDC has published various handouts and posters for employers addressing these topics at www.cdc.gov/coronavirus/2019-NCOV/communication/factsheets.html.

WORKPLACE COMMUNICATIONS AND BEST PRACTICES (CONT.)

- Provide adequate soap, water and hand-sanitizer (with at least 60% alcohol) stations and supplies in easily accessible areas throughout the workplace, including public areas, break areas, near elevators, entrances and exits, in conference rooms, and other areas where people gather.
- Perform routine cleaning including all surfaces frequently touched by workers such as workstations, countertops and doorknobs. Have disposable wipes so that commonly used surfaces (e.g., doorknobs, keyboards, devices, and desks) can be wiped down by employees throughout the workday.
- When in public areas, including public transportation areas, common sense dictates that you should keep a reasonable distance from others. As a general rule, the CDC recommends that you should keep approximately 6 feet of space between yourself and others in public areas to avoid transmission. While traveling, individuals should wash and clean their hands on a frequent basis and carry disinfectant wipes or hand cleaners.
- Disclose that visitor access may be limited until further notice. Visitors should not be allowed to come to the premises if they display symptoms.
- Advise employees that non-essential travel will be limited.
- Consider using masks, including cloth face coverings – especially if the work environment prevents employees from maintaining proper social distancing (i.e., 6 feet or more). The CDC has recommended to use facial coverings to limit the transmission of the virus.

3. What should an employee be required to report?

In addition to the above instructions regarding good health practices in the workplace, an employer should take the following steps:

- Advise employees to bring any and all concerns to a designated contact person who will serve as a central resource on matters relating to COVID-19. Multiple persons may need to be identified depending on the size of your business. These individuals need to be available and prepared to answer questions and receive information from employees.
- Instruct employees to contact the central resource:
 - If they are diagnosed with COVID-19 or if they have been exposed to someone with COVID-19, including any persons living in their home;
 - If they are experiencing flu symptoms, specifically respiratory illness, fever (100.4° F or above) without the use of fever-reducing or other symptom-altering medicines (e.g., cough suppressants); and
 - If they have recently returned from a “high risk” area or plan to travel to such areas.
- Advise that employees who are exposed to COVID-19 will not be allowed at work and will be subject to quarantine according to CDC guidelines. They will also undergo questioning and a risk assessment before returning to work. Employees should be told that they will be expected to respond to questions regarding potential exposure, symptoms and their business or personal travel plans.
- Inform employees that older adults and individuals who have severe underlying chronic medical conditions (like heart or lung disease or diabetes) may have a higher risk of developing serious complications from COVID-19. The employer encourages employees to report any concerns so that additional preventative measures can be considered.
- Advise employees that they need to make sure the employer has current contact information on file (addresses and phone numbers) in the event developments require the employer to make changes to office hours or operations.

HANDLING EMPLOYEE ABSENCES AND ILLNESS

1. What can an employer do if an employee is showing signs and symptoms of illness?

As stated above, an employer should instruct a visibly ill employee to stay away from the workplace, to prevent the spread of illness. Alternatively, employers may instruct employees to work remotely from home. Employers who generally do not allow employees to work from home should consider adopting a temporary “work from home” policy with parameters.

CDC guidance regarding risk assessment for individuals determined to have at least some risk for COVID-19 can be found on CDC’s website at <https://www.cdc.gov/coronavirus/2019-NCOV/php/risk-assessment.html>.

2. How should an employee’s absences or leave be treated under an employer’s existing policies, including paid leave?

The Families First Coronavirus Response Act (FFCRA) became effective April 1, 2020 and requires employers with fewer than 500 employees and certain public-sector employers to provide Emergency Family Medical Leave and Emergency Paid Sick Leave to employees. For information regarding the FFCRA, see <https://www.mcgrathnorth.com/publication/congress-enacts-a-sweeping-leave-bill-in-response-to-covid-19/>.

In addition to providing leave benefits under the FFCRA, employers should generally follow their existing medical and sick leave policies and provide paid leave according to past policy and practice. Employers should follow normal practices regarding medical certifications under the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA). Employers covered by the FMLA should provide FMLA paperwork to eligible employees who have contracted COVID-19 or if they are absent from work due to illness for an extended period.

3. Can I require an employee to have their temperature taken?

According to the Equal Employment Opportunity Commission (EEOC), requiring an employee to have their temperature taken is considered a medical test that could violate the ADA and employee privacy rights unless the employer can establish that the request is job-related and supported by business necessity. Therefore, the request must be based on objective evidence and not simply based on assumptions and fears relating to the virus. In 2009, the Equal Employment Opportunity Commission (EEOC) issued guidance in connection with the H1N1 Influenza Virus Pandemic and advised that it may be permissible under the ADA to conduct a medical examination (including a temperature reading) where a disease is widespread within a community and when an individual’s symptoms have become severe. Because COVID-19 has now been declared a pandemic, a temperature reading should be justified by business necessity within the workplace although there is scant legal authority addressing this topic. Here are some recommendations:

- The best practice is to send an employee home if they are showing visible symptoms. In other words, there is no need to take the employee’s temperature.
- There may be circumstances where an employer may want to take a temperature reading, for example, one or more employees have contracted COVID-19 and may have exposed coworkers. A temperature reading may also be appropriate if an employee is requesting to return to work after suffering from illness and experiencing flu symptoms. In every case, the employer should conduct an individualized assessment of the employee’s circumstances. If the employee has been subject to a self-imposed quarantine (for at least 14 days according to the CDC standard below) and has not experienced any illness or signs of illness, a temperature reading should not be necessary upon return.
- There is always a risk that an employee may claim that the employer is violating the ADA by requiring a temperature reading, however, we have now reached a point with the pandemic where such testing should be supported by business necessity. An employer should use a non-invasive means to measure the employee’s temperature to help minimize the risk of an ADA claim (e.g., an ear thermometer may be appropriate).

HANDLING EMPLOYEE ABSENCES AND ILLNESS (CONT.)

4. What should be done if an employee is reluctant or refuses to come to work based on concerns relating to COVID-19?

It is certainly understandable that employees may fear for their own health and seek to avoid the workplace. In order to combat misplaced employee fears, you should make sure that information is available to employees and the above measures are taken to reaffirm good health practices in the workplace. The Occupational Safety and Health Act (OSHA) requires employers to provide employees with a safe working environment, including protections against "recognized hazards" that could lead to death or serious injury. If an employee has a legitimate reason to refuse to come to work due to COVID-19 outbreaks, OSHA may be implicated and could protect an employee who has legitimate concerns about reporting to work.

These issues are difficult to evaluate and should be handled on a case-by-case basis. For example, the employee or a close family member at home may have a compromised immune system and therefore, has a legitimate concern regarding transmission.

If the employee is not ill, the employer can treat the time off as a personal day and require the employee to use paid-time off benefits. Again, an individualized assessment should be made as to the employee's individual circumstances.

EMPLOYEE TRAVEL

It is without question that employment-related travel will raise concerns regarding COVID-19 transmission. The CDC will continue to issue new warnings covering areas that are experiencing "widespread sustained transmission of respiratory illness" caused by COVID-19. Even if there is no prohibition from traveling to certain areas, the CDC has advised against travel within areas experiencing community spread of the disease.

1. What are the current travel restrictions concerning high-risk countries and regions?

Travel bans have been issued and will continue to expand to new areas and regions. Employers should consult the CDC's website for updated information regarding high-risk areas at www.cdc.gov/coronavirus/2019-NCOV/travelers/index.html.

2. What if an employee plans to travel to an area that is subject to a CDC warning or other designated areas?

In these situations, an employer should advise the employee about the risks of such travel, including a possible quarantine upon return. In addition, an employer may deny time off for an employee's personal travel, as long as the denial is based on the destination, the business costs of a resulting quarantine, or other legitimate business-driven reasons, and is not based on the national origin of the employee. If the employer has a reasonable belief that an employee has traveled to a high-risk area that has been designated as experiencing "a widespread sustained transmission of respiratory illness" caused by COVID-19, the employee should be excluded from work for 14 days (per the CDC recommendation above).

EMPLOYEE PRIVACY ISSUES

1. What questions can I ask an employee regarding potential exposure?

Consistent with the employer's obligation to provide a safe work environment, an employer can ask certain questions to help evaluate whether an individual may have been exposed to the virus.

- Employers can ask whether they have had exposure to individuals who have contracted COVID-19, including members of their household.
- Employers may ask employees if they have contracted COVID-19 symptoms such as fever, tiredness or cough, and shortness of breath. Such information must be handled in a confidential manner and any records regarding this information should be kept in a separate confidential medical file with limited access.
- Employers may require employees to respond to questions about areas where they have traveled or plan to travel. It is permissible to question employees whether they have traveled to high-risk areas or whether they have had close contact with others who have traveled to high-risk areas who may have been exposed to the virus.
- A quarantine (according to CDC guidance below) should be imposed for employees who have been exposed to anyone with COVID-19 or if they have returned from a high-risk area.

2. What can an employer advise coworkers if an employee is subject to a mandatory or voluntary quarantine due to potential exposure to COVID-19?

As a general rule, employers should not identify or explain to other employees the reason why someone may not be at work. Communications with employees about medical conditions should be kept confidential. Individuals who are subject to quarantine are generally required to stay home for 14 days from the time they may have been exposed. CDC guidance advises that the following measures be taken:

- Taking your temperature 2 times a day to monitor for fever and watching for symptoms including coughing or trouble breathing.
- Staying at home and avoiding contact with others during the 14-day period. The individual is expected to advise their employer of their circumstances before returning to work.
- Not using public transportation, taxis or ride-shares.
- Avoiding crowded places (such as shopping centers or theaters) and limiting public activities.
- Keeping a proper distance from others (at least 6 feet according to CDC guidance).
- Seeking medical care if there is a fever of 100.4° F or higher with a cough and trouble breathing.

Employers should consider allowing employees to work from home in the event of a quarantine, whether mandatory or self-imposed.

3. What can I advise coworkers if an employee has COVID-19?

Employers will need to inform coworkers of their possible exposure to COVID-19 if there is a confirmed case that an employee has contracted the virus. Employers should not, however, disclose the identity of the individual based on confidentiality requirements imposed by federal law and the ADA.

WAGE & HOUR AND WORKERS COMPENSATION

1. Are employees entitled to be compensated for time off work due to COVID-19 related illness or quarantine?

See benefits available under the FFCRA, <https://www.mcgrathnorth.com/publication/congress-enacts-a-sweeping-leave-bill-in-response-to-covid-19/>. In addition to benefits under the FFCRA, employers must consider benefits available under its own policies as well as benefits provided under federal and state law.

If the employer has a bona fide sick leave plan and the employee is ill, benefits should be available under that program until benefits are exhausted. Once exhausted, an employer may deduct an exempt employee's salary in full-day increments. Hourly employees who have utilized all sick leave benefits are not entitled to be compensated for any hours absent from work.

If an employee is ill and the employer does not have a bona fide sick leave policy, an exempt employee should not be subject to a payroll deduction unless they miss the entire workweek. Furthermore, employers should not deduct from an exempt employee's compensation if the employer mandates the individual to be off work. In this instance, the employer may require an exempt employee to utilize their sick leave and personal time off but once these benefits are exhausted, the employer should not charge the employee for any absence, unless the employee does not perform any work during the entire workweek.

If an individual misses work due to reasons that are not associated with the employee's own illness, the employer may require the employee to use paid-time benefits per existing policy. If these benefits are exhausted or are not available, the employer is not required to pay an exempt employee for full-day absences if the employee has decided not to come to work. Again, non-exempt employees do not have to be paid for any hours absent from work. At this stage, we are recommending that employers should allow employees to choose whether they want to utilize paid-leave benefits or take unpaid leave under the circumstances.

Employers can certainly decide to provide paid-leave benefits during this difficult time and government relief may be on the way to offset these expenses.

2. What are an employer's workers compensation obligations if employees contract COVID-19?

Generally speaking, an injury or illness must arise out of or during the course of employment in order for it to be covered by workers compensation laws. If a contagious disease is contracted at work or while traveling for work, it may be considered a compensable injury in certain states - for example, the employee contracts the virus after conducting business in a high-risk country. However, in most jurisdictions, a disease must be "work-related" in order for coverage to apply. In other words, merely contracting the virus from someone at work or while performing duties for the employer is not enough as it has to be tied to an occupational-related hazard. If there is strong evidence that an employee contracted the illness at work, you should consult legal counsel to evaluate potential workers compensation liability. Obviously, as the virus spreads throughout the U.S., it will become more difficult to evaluate the point of origin and establish that the disease was transmitted in the workplace.

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