



March 9, 2020

Client Alert – Employment Law
COVID-19 (Coronavirus)

This Alert is intended to address specific inquiries regarding an employer's rights and obligations when responding to the potential impact of a COVID-19 outbreak.

Is there a law that tells me exactly what I must do?

1. Is there a COVID-19 specific law? No.

But OSHA requires an employer to provide a workplace that meets or exceeds the applicable safety and health regulations in the state where they are located and to furnish a place of employment that is free from recognized hazards likely to cause death or serious physical harm.

2. Are there state laws that regulate employers in this situation? Yes – in some states.

Employers in California must comply with the Cal/OSHA Aerosol Transmissible Diseases standard which addresses infectious diseases transmitted by inhaling air that contains viruses (which would likely include COVID-19). Note that the ATD standard is only mandatory for certain healthcare employers.

Discrimination

1. Can I treat certain employees/customers/vendors etc. differently if I know that they are more likely to be contagious because they look like they come from an area that has COVID-19? No.

You cannot discriminate on the basis of an employee's race, color, national origin, or other protected classifications. For example, in the context of COVID-19, an employer must not treat Asian employees (or employees assumed to be Asian based on their appearance) differently on the assumption that those employees have a greater chance of exposure based on their national origin. Employers must not exclude any person from work or work-related activities, or from any type of customer or client interaction, based purely on race or national origin, without evidence of illness or recent travel to a high-risk area.

2. Can employees request not to work with or around others based on the fact that they look like they probably come from an area that has had an outbreak (China, Japan, South Korea, Iran...)? No.

Employers must prevent discrimination and harassment against individuals based on national origin or who are disabled, or perceived as being disabled, due to COVID-19 symptoms and should promptly respond to and investigate harassment. An employees' medical information is confidential.

Employers must not retaliate against employees for raising concerns.

Payroll

1. If business slows, can I cut my workforce to reduce overhead? Yes

Non-exempt employees do not have to be paid for time not worked.

Exempt employees should generally continue to receive their full salary for each workweek in which they perform any work (including work at home such as checking emails).

2. Do I have to serve a WARN notice if I have a lay-off? No (in most circumstances).

A short-term layoff or furlough of less than six months should not implicate notice obligations under the WARN Act - but may require advance notice under some state statutes (e.g., the California WARN Act can be triggered by short-term furloughs).

Sick Employees

1. Can I isolate sick employees? Yes.

The CDC Guidance recommends that employees who appear to have acute respiratory illness symptoms (e.g., cough, shortness of breath) upon arrival to work or develop such symptoms during the day should be sent home.

2. Can I require sick employees to stay home? Yes (see previous question).
3. Does an employee who was sent home get paid? It depends on whether the employee works from home, whether they are exempt or non-exempt, and whether the employee has accrued benefits.

Employees may end up working from home for a variety of reasons – a sick family member, children home from school, under quarantine etc. An employee who works from home is paid just as if they were at work. Employers should ensure that all time spent working is captured and should have controls to manage overtime and productivity.

An employee who is home sick and not working is eligible to take sick leave, PTO or other employer-provided leave. In some cases, the employee may be entitled to short-term disability benefits.

An employer can, of course, choose to pay employees above and beyond their policy. This could include full wages, partial wages, benefit premiums etc.

4. Can I require a doctor's note if an employee calls in sick with COVID-19? Yes – maybe.

If the employer's policy requires a doctor's note when an employee calls in sick, then the employer can treat an employee calling in sick with COVID-19 the same as any other sick employee. Note that healthcare providers and medical facilities may be overwhelmed and unable to timely see the employee or provide documentation. An employer will be expected to act reasonably under the circumstances.

5. Can I require an employee to see a doctor before returning to work? Yes – maybe.

Employers may still require compliance with time and attendance policies including provisions that require a fitness for duty report from the employee’s healthcare provider. Again, healthcare providers and medical facilities may be overwhelmed and unable to timely see the employee or provide documentation and an employer will be expected to act reasonably under the circumstances.

6. Is COVID-19 a serious health condition under the FMLA? Yes (probably).

A request for FLMA must be considered on a case-by-case basis but someone diagnosed with COVID-19 or caring for a family member who has been diagnosed with COVID-19 would likely qualify for FMLA if all other qualifying conditions are satisfied. Note that a quarantine would likely not qualify, and neither would a request for leave due to fear of getting sick.

7. Can I ask employees if they or a family member have travelled to a high-risk area? Yes – if non-discriminatory.

Employers may request that employees advise them if they have traveled to high-risk areas, in order to determine if the exposure has resulted in the employee posing a direct threat to the health and safety of others. Employer’s may make the same request of any family members with whom the employee has close contact.

8. Can I take an employee’s temperature? No – at least not at this time.

The ADA prohibits an employer from requiring an employee to submit to a temperature check. However, in 2009 the EEOC issued a statement in connection with the H1N1 influenza virus pandemic suggesting that taking an employee’s temperature might be permissible under certain circumstances. If COVID-19 becomes widespread in the community, or when symptoms become more severe than those experienced during the seasonal flu and local health authorities or the CDC issue guidance or a directive that mandates or recommends employees temperature checks, then it may be permissible (if it is deemed to be a “direct threat”).

Employers can of course recommend that employees check their own temperature as part of an effort to ensure they are asymptomatic before arriving at work.

Travel

1. Can I prevent or prohibit employees from travelling? Work travel – yes. Personal travel – no.

An employer can restrict or prohibit business-related travel. With regard to personal travel, an employer cannot prohibit “all” travel but can take steps to influence an employee’s decision to travel. Initially, there should be a distinction between travel to an area where the CDC has issued a Warning Level 3 or a Warning Level 2 and a place with a Level 1 or no warning. Currently, the Level 3 areas are: China, South Korea, Iran and Italy. Japan is listed as a Level 2 and Hong Kong is listed as a Level 1. Depending on the employer’s policies, it might be possible to deny an employee’s request to take time off to visit a Level 2

or Level 3 area. An employer can also require that any employee who has acquired COVID-19 or has been exposed to it not return to work for 14 days (or may send the employee home) upon their return.

2. Can I quarantine employees when they return if they do travel? Yes, if there is non-discriminatory.

An employer can institute a policy that all employees who travel internationally must self-quarantine. Or, broader, that any employee that travels by airplane must self-quarantine. Or, narrower, that any employee that travels to a Level 2 or Level 3 area must self-quarantine. An employer cannot require employees that are Asian or of Asian descent must self-quarantine regardless of where or how they travelled.

Respirators and masks

1. Is an employee required to wear a mask? No.

OSHA and the CDC have issued rules specific to healthcare workers – but non-healthcare workers are not required to wear a mask. Note this this is a fluid situation and these rules can and likely will change and you should seek confirmation before taking any action.

2. Can I require that employees wear a mask? Generally, yes – but this is a minefield.

An employer that requires the use of a mask must generally provide the mask, ensure that the mask provided is appropriate, and provide training on use of the mask. Some employees may have facial hair or medical conditions that create issues in using a mask. An employer is free to make masks available along with information regarding their use without requiring that employees wear them.

3. Can I prohibit an employee from wearing a mask if they want to (and bring their own)? Yes.

Employers have a legitimate business interest in not causing client or customer alarm. OSHA rules state that: “A respirator shall be provided to each employee *when such equipment is necessary to protect the health of such employee...* The CDC is NOT recommending use of surgical masks or respirators by the general public, except as recommended by a healthcare professional or by persons infected with COVID-19 or caring for someone who is infected or suspected to be infected. Therefore, PPE has not been deemed necessary to protect health and safety and employers have discretion as to whether to allow their usage.

4. Must I provide a mask if an employee requests it? No.

An employer may provide respirators at the request of employees or permit employees to use their own respirators, if the employer determines that such respirator use will not in itself create a hazard.”

5. Can the employee demand to be allowed to wear a mask as an accommodation? No. But points for creativity.

The CDC does not recommend that people who are not sick wear a mask. Although the CDC does recommend that someone who has COVID-19 wear a mask, the CDC also recommends that such a person be separated from others. So, if an employee is not sick, they have no right to an accommodation and, if they have COVID-19, then they should be sent home (where they are encouraged to wear a mask).

Unemployment benefits

1. Can I reduce my workforce, and, if I do, does an employee who is quarantined/laid-off/furloughed get unemployment? Generally, yes.

Generally, short-term layoffs or furloughs are permitted as long as selections are not based on protected categories such as race, gender, national origin, etc.

The rules vary by state but, in general, an employee who is furloughed when a business temporarily shuts down is entitled to unemployment (assuming that all other unemployment qualification requirements are satisfied).

Worker's compensation

1. If an employee has COVID-19 can they get worker's comp? A very fact-specific maybe.

Again, this will vary by state. But, in general, an illness arising out of or in the course of employment is compensable. Most states' workers' compensation laws require that the workplace present an "increased risk" or "risks peculiar" to the workplace. A healthcare employee who contracts COVID-19 would be more likely to have a compensable claim than an office or factory worker (assuming that the employee is working in an area in which an outbreak is occurring). A contagious disease contracted at work or while traveling for work would likely qualify. The problem of course is determining where the employee contracted it – is it more likely than not that the illness arose out of or in the course of employment. If the employee traveled from a place with little or no contagion to a place with some or a lot of contagion and COVID-19 is diagnosed within the incubation period, then the illness may well be deemed to be covered.

Confidentiality

1. Can I tell other employees if a coworker gets COVID-19? Yes – but without specifics.

If an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace. Employers should not disclose the identity of the quarantined employee.¹

2. Can I ask an employee if he's sick? Maybe.

Employers may ask employees if they are experiencing COVID-19 symptoms such as fever, tiredness, cough, and shortness of breath. However, an affirmative response would trigger an employer duty to handle the employee's response as a confidential medical record.

¹ Note that several states have declared a State of Emergency. The rules vary by state but declaring a state of emergency changes many of the existing rules. For example, medical professionals licensed in one state may be able to practice in another state and allied health professionals (e.g., nurses and physician assistants) who usually must practice under a physician's supervision may be allowed to work with reduced supervision. A state of emergency also enables local authorities to enact curfews, prohibit gatherings, and to quarantine individuals. A state of emergency can also impact the confidentiality rules and allow local health authorities to bypass the usual HIPAA confidentiality rules to identify and contact other potentially infected people.

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