



CLIENT ALERT--CORONAVIRUS

COVID-19, commonly referred to as Coronavirus, presents a number of challenges for employers. All employers are encouraged to review guidelines recently published by the Centers for Disease Control and Prevention (CDC), available at <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/guidance-business-response.html>.

To help you prepare, below are some *Frequently Asked Questions* regarding the impact of this virus on employers and employees. Keep in mind that this situation is changing rapidly, and the government's response is ongoing, so it is likely some of these answers will change.

Q: What should I be doing right now?

A: In general, it is recommended that you:

- Follow guidelines posted by the CDC and check the CDC regularly for updates
- Encourage employees to follow basic hygiene procedures such as:
 - Washing hands frequently and for at least 20 seconds (sing “Happy Birthday” twice)
 - Implementing a “No Handshake” policy at work and place a sign alerting customers (where applicable)
 - Avoiding touching eyes, nose and mouth
 - Limiting close contact with people
 - Covering your mouth with tissues when you sneeze or cough, then discarding the tissue, or if tissue is not available, cough or sneeze into your elbow
 - Using hand sanitizer if handwashing is not available. Makes sure it is at least 60% alcohol
- Tell employees to stay home if they are feeling sick
- Advise employees to seek medical attention if they are experiencing flu-like symptoms, such as fever and cough
- Consider sending out and/or posting the CDC's handwashing guidelines to employees
- Review and share your disaster preparedness plan, including checking that you have current employee contact information
- Be cautious about providing medical advice to sick employees
- Utilize virtual meetings and telework where possible
- Limit or eliminate business travel
- Disinfect workspaces and frequently touched surfaces such as copiers, elevator buttons, door handles, phones, etc.
- Provide hand sanitizer for employees and customers
- Stagger work schedules and start/end times so that employees are not clustered together
- If your health plan offers it, inform workers about tele-health options



Q: How does the Coronavirus interact with other workplace laws?

A: The provisions of the Americans with Disabilities Act (ADA), Family and Medical Leave Act (FMLA) and Title VII of the Civil Rights Act (Title VII) apply, even when employers are dealing with a communicable disease. An infected person could qualify as disabled under the ADA. Care must be taken not to discriminate on that basis.

Additionally, the Occupational Safety and Health Act (OSHA) imposes a general duty of care on employers, which requires employers to provide a safe and healthy workplace for all employees. This means that employers must ensure that the workplace meets or exceeds the applicable safety and health regulations in the state where they are located. Highly communicable diseases, like Coronavirus, are “known hazards” under OSHA, and employers have an obligation to protect their workers from these hazards.

Review OSHA’s COVID-19 website (<https://www.osha.gov/SLTC/covid-19/>), including COVID-19 standards, for more information.

Q: Can I ask an employee if they recently traveled to a high-risk country, or traveled by cruise ship or commercial airlines, or if they have been exposed to someone with the virus?

A: Yes. You can ask if an employee recently traveled to a place with a coronavirus outbreak (a current list is available on the World Health Organization’s website) or if they have been exposed to someone with the virus.

For employees who have traveled to high-risk areas or been exposed, you can require them to wait the maximum incubation period of the virus before returning to work. At this time, it is believed that the maximum incubation period of the virus is 14 days. However, Title VII’s protections against discrimination based on race or national origin still apply, so you could not, for example, require all Asian employees to self-quarantine or only ask Asian employees these questions.

Q: What if an employee shows up to work showing symptoms associated with Coronavirus (e.g., shortness of breath)?

A: CDC’s Interim Guidance recommends that employees who appear to have acute respiratory symptoms upon arrival to work or develop such symptoms during the day should be asked to go home. If the employee is unable to work from home, they should be permitted to use their available sick time or PTO in accordance with your policies. You can require employees who exhibit Coronavirus symptoms to stay home until they are symptom free.

Q: Can I tell my other employees if an employee informs me that they are positive for Coronavirus?

A: Yes, you can inform fellow employees of their possible exposure in the workplace, but you must maintain confidentiality as required by the ADA, so do not identify the infected employee by name. For example, you might want to say that an employee “on the fourth floor” tested positive. Employees exposed to a coworker with Coronavirus should be referred to the CDC guidance for how to conduct a risk assessment of their potential exposure and encouraged to contact their own health care provider. You should also quarantine and disinfect materials in the area around the exposed employee’s workspace.



Q: Can eligible employees use FMLA leave to care for a family member who contracts Coronavirus?

A: Almost certainly. It is likely that Coronavirus constitutes a “serious health condition” under the FMLA, so you would need to go through your regular FMLA process for affected employees, including providing reinstatement at the end of the FMLA period.

Q: Does FMLA apply to self-quarantine of employees who are not exhibiting symptoms, were not advised by a healthcare provider to stay away from work, or are not caring for an infected family member?

A: At this time, no, but the CDC is encouraging employers to be flexible with leave policies during this outbreak. Also, on March 14 the House passed the Families First Coronavirus Response Act. If passed, FMLA rights will be expanded to aid and assist families with a family member who has Coronavirus. We will be monitoring this topic and provide updates on our Firm’s website; in the meantime, see our FAQ on this proposed bill.

Q: Can I require an employee to use PTO if the business shuts down temporarily?

A: In general, yes, if your policy provides for it and it is done consistently and without discrimination. In some states, there are laws about the use of PTO and restrictions about the amount of notice required, so it is important to check with an attorney to ensure compliance.

Q: Can I require a doctor’s note before allowing an employee who was exposed to Coronavirus back to work?

A: Yes, you can, but in practicality, due to the limited availability of healthcare workers and access to testing, the CDC recommends that you do not require this at this time. Instead, you should insist employees follow the CDC guidelines on self-quarantine before returning to work.

Q: Can I require employees to work from home if they don’t want to?

A: Yes. As long as you institute a non-discriminatory policy, you can require this even if your employees would rather come to the office. You could require this of all employees, of all employees with symptoms of Coronavirus, or just those who recently traveled to high-risk countries, for example. However, you would not want to require only those over 70 to stay home, even though they are higher risk, as age is a protected class.

Q: Do I have to let employees work from home if I don’t want them to?

A: At this time, no, employers are generally not required to allow telecommuting, but the situation is changing rapidly, and the CDC encourages employers to be flexible and allow telecommuting when possible. The ADA may also require it to be considered as a reasonable accommodation in certain situations, such as if someone has a chronic illness that qualifies as a disability and coming into the office would increase their risk. Should the government declare a quarantine situation, this answer will likely change.



Q: Can I terminate an employee who refuses to come to work because of fear of infection?

A: At this time, yes in most cases, but that situation is likely becoming more complex. Under OSHA, an employee may refuse to work if they would be in “imminent danger” from working. Most working conditions would not generally rise to that level, but requiring someone to travel to Italy could. The National Labor Relations Act (NLRA) also protects employees who join together to protest unsafe working conditions. As the outbreak worsens, it is possible these and other laws could be implicated, including new legislation in the works. We encourage you to reach out to counsel before making such a decision.

Q: Can I require employees to undergo a medical examination or test to determine if they have Coronavirus?

A: Possibly. Keep in mind that something as simple as taking someone’s temperature qualifies as a medical examination under the ADA. Generally, the ADA prohibits employers from requiring employees to undergo medical examinations unless they can show that the examination is job-related and consistent with business necessity. However, since Coronavirus has been declared a pandemic by the World Health Organization (WHO), EEOC guidance suggests that some medical examinations, such as a temperature screening, may be allowed (for more information, see https://www.eeoc.gov/facts/pandemic_flu.html), such as when the CDC or a state or local health department deems the outbreak widespread within a community. However, you should be aware that not all those who are infected with the Coronavirus have a temperature. If you think you might want to institute such procedures, we encourage you to reach out to us first.

Q: If an employee has symptoms similar to those of Coronavirus that are confirmed not to be Coronavirus (e.g., a cold or allergies), can I require the employee to work away from customers who may understandably have concerns?

A: Yes, you can generally reassign employees based on business needs. The ADA protects individuals who are “regarded as having a disability” from discrimination or adverse employment consequences. While the transitory nature of Coronavirus makes it less likely to be considered a disability under the ADA, it is possible that it would meet the definition in some cases. You would also want to keep in mind the anti-discrimination rules to make sure this policy applied to all employees and not just, for example, to your Asian employees. Where possible, you should try to ensure that the reassignment to the “back office” is temporary, affords the employee similar job duties, and does not result in a reduction in compensation or benefits.

Q: Does the WARN Act apply if we must suspend operations or close a plant?

A: Yes. If you have 100 or more employees and undergo a “mass layoff” or “plant closing,” you would typically need to give employees 60 days’ notice. However, there is an exception in the WARN Act for unforeseeable business circumstances. It is possible the Coronavirus outbreak could fall into that category. If you think this might affect you, we encourage you to reach out to counsel to help navigate the issues and requirements.



Q: Do I have to pay employees during the time they are not at work due to the pandemic?

A: Laws vary by state, but generally, you should continue to pay the salaries of exempt employees during short-term furloughs for each work week in which they perform any work, including work at home, such as checking emails. Hourly works generally do not have to be paid for time not worked. However, some companies—such as Walmart—have voluntarily chosen to offer two weeks of paid leave to employees who are infected with Coronavirus or quarantined under the order of a government agency or health care provider. The federal government is currently working on a plan that, if passed, would require many employers to provide two weeks, at least, of pay to employees who miss work due to Coronavirus.

Q: Does workers' compensation cover Coronavirus claims?

A: Typically, no, but that could change, at least for certain employees. While most workers' compensation statutes do cover exposure to a disease at work, it generally must be as a natural consequence of the employee's job and often, must be on a list of compensable diseases in the statute. However, some states, such as Washington, have made changes to their laws in light of Coronavirus to ensure that health care workers and first responders are eligible for benefits if they develop Coronavirus due to exposure on the job. The Department of Labor recently announced that federal employees who contract Coronavirus while in performance of their job would have full coverage of the Federal Employees' Compensation Act for related medical treatment and for wage loss or disability related to that condition.

Q: What happens to group health plan coverage if employees are not working and unable to pay their share of premiums?

A: Usually, group health plan coverage will cease when an employee's share of premiums is not timely paid. However, it may be possible that the employer's healthcare insurance carrier would voluntarily continue the coverage, employers should check with their carrier. Employers may also elect to pay the employees' share of premiums to keep coverage in place (at least temporarily). Each situation will be different, depending upon the insurance carrier and the relationship between the employer and the insurance carrier. Therefore, each factual situation will need to be individually assessed.

Q: What additional steps should I take immediately?

A: Review your sick leave and attendance policies to make sure they are consistent with public health guidance, temporarily modify them if appropriate, and communicate these policies and modifications to employees. Explore whether you can establish flexible worksites, flexible work hours, and increase physical distance between employees to the minimum social distancing recommended by the CDC and local health authorities. Establish a procedure for communicating information to employees and business partners. Determine how you will operate if absenteeism spikes due to school closures or sickness. Take time to learn about the plans in place in your local community. Each state and local health department has methods for dissemination of local outbreak information.

See our FAQ regarding the Families First Coronavirus Response Act (next FAQ) and call us if you have questions (contact information at the end of these FAQs, along with relevant website links).



Q: How would the Families First Coronavirus Response Act, the proposed new bill that passed the House of Representatives on March 14th, change things if passed into law?

A: It is clear that the government will provide some type of relief. A new law is in the works that employers should watch carefully - H.R. 6201, the Families First Coronavirus Response Act passed the House of Representatives. While it waits for Senate approval, the President indicated he would sign it. However, as of this time, *this bill is not law*.

The new bill that passed the House of Representatives would change the way FMLA applies to Coronavirus and require some employers to provide paid leave under certain conditions. If it is eventually enacted in current form, it would allow employees who have been on the employer's payroll for 30 days to use emergency FMLA leave for the following reasons:

- To adhere to a requirement or recommendation to quarantine due to exposure to or symptoms of Coronavirus;
- To care for an at-risk family member who is adhering to a requirement or recommendation to quarantine due to exposure to or symptoms of Coronavirus; and
- To care for a child of an employee if the child's school or place of care has been closed, or the childcare provider is unavailable, due to Coronavirus.

The first two weeks of leave may be unpaid. Employees can substitute paid leave (vacation, sick or other paid leave) if they wish to, but an employer **cannot** require them to use paid leave. After the two weeks of unpaid leave, employers must continue *paid FMLA leave at a rate of no less than two-thirds of the employee's usual rate of pay*, provided the leave is used for one of the above purposes.

Under the bill, the Secretary of Labor can issue regulations to (a) exclude certain health care providers and emergency responders from the list of those employees eligible for leave; and (b) to exempt small businesses with fewer than 50 employees where the imposition of these requirements would jeopardize the viability of the business as a going concern.

This leave is job-protected, just like regular FMLA leave, meaning an employer must return the employee to the same or equivalent position upon their return to work. There is an exception to this requirement for employers with fewer than 25 employees if the employee's position does not exist after FMLA leave due to an economic downturn or other operating conditions that affect employment caused by a public health emergency during the period of leave. In that situation, the employer would be required to make reasonable attempts to return the employee to an equivalent position, and take steps to contact a displaced employee for up to a year after they are displaced.

The bill provides for a refundable tax credit equal to 100% of qualified paid sick or family leave wages paid by an employer for each calendar quarter. The tax credit is allowed against the employer portion of Social Security taxes. The credit applies to amounts paid to employees who are sick or quarantined; a lesser credit applies to amounts paid to employees caring for a family member or for a child whose school or place of care has been closed. Caps and limits apply. There is also relief for self-employed individuals.

We are watching this bill closely to see what the final version includes and will update accordingly.



Q: What should I do if I have other questions about legal issues related to Coronavirus in the workplace?

A: We recognize that this is a dynamic situation and expect that there will be new laws and changes to current laws to deal with the impact. For further guidance on the legal issues facing employers regarding this virus, contact:

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Links to Resources:

U.S. Government Coronavirus information website:

<https://www.usa.gov/coronavirus>

World Health Organization Coronavirus website: <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>

CDC Coronavirus website:

<https://www.cdc.gov/coronavirus/2019-ncov/index.html>

Texas State Department of Health:

<https://www.dshs.texas.gov/>

Dallas County Health Department:

<https://www.dallascounty.org/departments/dchhs/>

Department of Labor Coronavirus Resources:

<https://www.dol.gov/coronavirus>

OSHA Covid-19 resources website:

<https://www.osha.gov/SLTC/covid-19/>

OSHA Guidance on Preparing Workplaces for Coronavirus:

<https://www.dol.gov/newsroom/releases/osha/osha20200309>

EEOC Coronavirus information:

https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm