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Frequently Asked Employment Law Questions About COVID-19

Please be advised that this material is for informational purposes only. You should contact an attorney for any specific legal problems or guidance. If you have any further questions about employer and employee rights regarding COVID-19, please feel free to contact Dworkin, Chambers, Williams, York, Benson & Evans at (303) 584-0990.

1. What preventive measures should we take?

The CDC has published an Interim Guidance for Businesses and Employers and advises employers to take the following actions:

- Actively encourage sick employees to stay home until they are symptom-free for 24 hours
- Separate sick employees, especially those with symptoms of an acute respiratory illness
- Perform routine environmental cleaning and provide disposable wipes

Employers should repeatedly and strongly advise employees to take the same steps they would take to avoid the flu. This includes:

- Wash hands frequently with soap and water for at least 20 seconds (or use hand sanitizer);
- Cover your cough or sneeze with a tissue, then throw the tissue in the trash;
- Refrain from shaking hands with others for the time being;
- Avoid close contact with others, especially those exhibiting any symptoms;
- Refrain from touching your eyes, mouth, or nose with unwashed hands; and
- Clean and disinfect frequently touched surfaces and objects.

Employers are encouraged to develop and implement flexible plans designed not only to minimize business disruptions but also to reduce transmission of COVID-19 and to protect people who are at a higher risk of infection. The World Health Organization endorses social distancing as an effective preventive measure. Employers should consider modifying leave policies to permit employees to take the necessary precautions and help prevent the spread of COVID-19. For additional resources, employers can consult OSHA's Guidance on Preparing Workplaces for COVID-19.

2. An employee appears sick or may have been exposed to COVID-19. Can I . . .

. . . ask the employee leave work?

Yes. The CDC advises employers to separate sick employees and encourage sick employees to stay home until they are symptom-free for 24 hours. The ADA does not prohibit an employer from encouraging or requesting an employee who exhibits symptoms to leave the workplace.

. . . ask the employee to get tested?

Yes. Employers are permitted to ask employees to seek medical attention and get tested for COVID-19.

. . . take the employee's temperature?

It is important to note that an employee may be infected with COVID-19 without exhibiting symptoms, including a fever. An employee can also have a fever without being infected with COVID-19. As such, temperature checks may not be an effective means of preventing exposure and could potentially spread disease if an employer doesn't have proper sterilization safeguards.

Taking an employee's temperature is considered a "medical examination" under the Americans with Disabilities Act (ADA). Employers cannot require medical examinations or make disability-related inquiries unless: (1) the employer can show the medical examination or inquiry is job-related and consistent with business necessity; or (2) the employer has a reasonable belief that the employee poses a "direct threat" to the health and safety of the individual or others that cannot otherwise be eliminated or reduced by reasonable accommodation.

Whether taking an employee's temperature is job-related and consistent with business necessity is a fact-dependent inquiry with different results for different employers and employees. Employers should rely on the most recent CDC and state or local public health assessments to determine if a pandemic is objectively considered a "direct threat." If such an assessment concludes that COVID-19 is a direct threat, then an employer can take the temperature of its employee.

If COVID-19 is deemed a direct threat, inquiries into an employee's symptoms will likely be considered justified by the EEOC. Any and all information an employer obtains from its employees about illness must be maintained as a confidential medical record.

3. What should I do if an employee . . .

. . . tests positive for COVID-19?

Any employee who tests positive for COVID-19 cannot report to work until he or she is symptom-free for 24 hours. In addition, employers should ask employees who test positive to identify all individuals they worked in close proximity with (3 to 6 feet) over the previous 14 days. Employees who worked in close proximity with someone who has tested positive should also be sent home.

Employers should not identify by name employees who are sent home due to potential violation of confidentiality laws.

If an employee tests positive for COVID-19, the employer should consider additional cleaning measures for the potentially affected workspaces. For employers operating in a shared office space, the building management company should also be informed so that it may take necessary precautions. There is no need for an employer to notify the CDC because the healthcare provider that receives the positive test result is responsible for such reporting.

. . . has a suspected but unconfirmed case of COVID-19?

Employers may reasonably suspect that an employee has contracted COVID-19 by the relevant facts particular to the employee (recent travel to a restricted area, exposure to someone with a confirmed case, etc.). If you suspect that an employee has contracted COVID-19, take the same precautions discussed above and act as if the suspected case has been confirmed. Employees who've worked closely with the subject employee should be sent home, but communicate that the subject employee is exhibiting symptoms but not tested positive. Employers should not identify by name employees who are sent home due to potential violation of confidentiality laws.

. . . had contact with someone else with a presumptive positive case of COVID-19?

If an employee has had contact with someone with a presumptive case of COVID-19, take the same precautions discussed above. Employees who've worked closely with the subject employee should be sent home, but communicate that the subject employee is asymptomatic and you are responding proactively out of an abundance of caution. Employers should not identify by name employees who are sent home due to potential violation of confidentiality laws.

. . . has been exposed to COVID-19 *after* interacting with clients or customers?

Take the same precautions discussed above to limit further exposure to your employees. Notify any clients or customers that came into close contact with the subject employee of the relevant facts (positive test, suspected but unconfirmed case, contact with someone with a presumptive case). There is no need for an employer to notify the CDC because the healthcare provider that receives the positive test result is responsible for such reporting.

4. Can my employees . . .

. . . refuse to come to work due to fear of infection?

In general, employees are only entitled to refuse to come to work when they believe they are in imminent danger. It is unlikely that potential exposure to COVID-19 qualifies as imminent danger, which OSHA defines to include "any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the

enforcement procedures otherwise provided by this Act." This standard is unlikely to be met in most work locations in the United States but it may be met under specific circumstances, such as assignments that require travel to high-risk countries.

However, employees may have the right under the National Labor Relations Act (NLRA) to refuse to work in conditions they believe are unsafe or expose them to a dangerous condition. The NLRA protects employees so long as they act in good faith. Whether or not an employee may refuse to work based on the NLRA is a fact-dependent inquiry that may require additional consideration.

. . . request telework/remote access as a reasonable accommodation?

Reasonable accommodations are available under the ADA for employees with a disability and employees who are regarded as disabled. In general, the duration of COVID-19 will not be long enough to qualify as a disability or to be regarded as a disability, unless there is a complication. Since COVID-19 is neither a disability nor regarded as a disability, employers are not required to provide a reasonable accommodation.

However, the CDC, OSHA, and the World Health Organization all encourage employers to explore the feasibility of teleworking arrangements and to implement such arrangements when reasonably practical. Telecommuting minimizes face-to-face interactions and the potential for unnecessary exposure to COVID-19.

. . . demand to wear a face mask at work?

The World Health Organization has determined that people only need to wear a face mask if they are treating others infected with COVID-19. The consensus is that thoroughly washing hands and social distancing are the best preventive measures against COVID-19, while wearing a face mask could create a false sense of security.

OSHA standards govern when respiratory protection is and is not required. Employers are required to provide safety masks only "when such equipment is necessary to protect the health" of employees. Employees only have the right to refuse to work without wearing a face mask if they can show:

- They have asked the employer to eliminate the danger and the employer failed to do so;
- They genuinely believe an imminent danger exists and refuse to work in good faith;
- A reasonable person would agree that the danger of death or serious injury is real; and
- The hazard is so urgent that it can't be timely corrected through regular enforcement channels.

Based on the guidance of the World Health Organization, discussed above, most employees will not be able to show that a face mask is necessary to protect their health or satisfy the above requirements. Regardless, OSHA standards provide that "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." The use of the word "may" indicates that employers have the discretion to permit or prohibit employees' use of face masks in most circumstances.