



Frequently Asked Employment Questions Regarding the Coronavirus (Covid-19)

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During this pandemic, it is important that employers consider how they will handle situations regarding the Coronavirus (COVID-19) as well as any other infectious diseases. If an employer creates a policy, it should not include every situation outlined below nor specific details of how the employer will deal with every example. Rather, the policy should outline a general statement and links to the CDC site. The most important piece is that of treating each situation on a case-by-case basis while steering clear of any possible discrimination or retaliation.

Please note that Information contained in this publication is intended for informational purposes only and does not constitute legal advice or opinion, nor is it a substitute for the professional judgment of an attorney.

Can I force a sick employee to stay home? Go home?

Yes. Employers are responsible for the health and safety of all their employees. Employees with obvious symptoms of illness and disease, including all forms of the flu, should be encouraged to stay home or if they are at work when symptoms develop, to go home. Frequently, employees who wish to demonstrate their diligence and strong work ethic will try to "tough it out." Allowing employees to do this only subjects the remaining workforce to added levels of exposure. Employers should speak with sick employees in private. Employees who insist on coming to work should be told that their effort is appreciated; however, the best interests of their co-workers and the business will be achieved if they recuperate away from the workplace. If, after such a dialogue, the employee continues to insist on being at work, employers do have the right to mandate sick employees to not come to work. Among other things, all employers have an obligation under the General Duty clause of the Occupational Health and Safety Act ("OSHA") to maintain a healthy and safe workplace. As with all good HR practices, insistence on an employee staying home should be approached in a consistent manner. The same rules for sending one sick employee home should apply to another ill employee unless there is some significant circumstance that dictates disparate treatment.

Note: Some states have mini-OSHA laws that you may seek additional information from regarding the Coronavirus; California's Cal-OSHA has released interim guidance here: <https://www.dir.ca.gov/dosh/Coronavirus-info.html>. Although there may be some individual safety and health activities which may be protected solely under the OSH Act, many employee safety activities involve concerted activity protected under the NLRA and therefore may be protected under both Acts. Please reach out to your HR contact for assistance in making such determinations.

Is an employee entitled to compensation for reporting to work and being sent home?

It depends. There are at least nine states that have some requirements regarding reporting time pay for some or all employees (CA, CT, D.C., MA, NH, NJ, NY, OR, RI). To ensure that you are following state law, please consult with you HR contact. In California, for example, if an employee reports for their regularly scheduled shift but is required to work fewer hours or is sent home, the employee must be compensated for at least two hours, or no more than four hours, of reporting time pay. If a worker who reports to work for an eight-hour shift and only works for one hour must receive four hours of pay, one for the hour worked and three as reporting time pay so that the worker receives pay for at least half of the expected eight-hour shift. Additional information on reporting time pay is posted online.

If I force an employee to go home or stay home, do I have to pay them for the time away from work?

Employees who are off work voluntarily or involuntarily due to the flu should be treated the same as any other employee who is off work due to a non-work-related illness or injury. A determination of whether that time

off is paid or unpaid depends on a number of factors, such as their status under the Fair Labor Standards Act ("FLSA") (exempt or non-exempt), a union contract, the length of the time off, the employer's sick pay policies, the employee's previous use of sick pay, and benefit plans, such as short-term disability. If an employer is not legally obligated to pay for such sick days, consideration can nevertheless be given to paying sick employees as an added incentive for them to stay home until they are no longer contagious. Also, keep in mind any applicable federal and state paid sick leave laws as well as job-protected leaves for which the employee may be eligible. The CDC advises employers to "ensure that your sick leave policies are flexible and consistent with public health guidance and that employees are aware of these policies."

If the employer is covered by the FMLA, or if there are similar state or local laws, an employee suffering from Coronavirus could be eligible for FMLA if they meet the requirements. With that said, the Coronavirus is being accepted as a serious health condition and thus, meets the requirements afforded under the act: A period of incapacity lasting more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also includes: (i) treatment two or more times by or under the supervision of a health care provider (i.e., in-person visits, the first within 7 days and both within 30 days of the first day of incapacity); or, (ii) one treatment by a health care provider (i.e., an in-person visit within seven days of the first day of incapacity) with a continuing regimen of treatment (e.g., prescription medication, physical therapy). See Department of Labor regulations on FMLA located at 29 CFR Chap. 825.

Be cautious and think about modifying your attendance policies. Requiring these quarantines could encourage hourly workers who have no remaining paid sick days or other paid time off (PTO) not to reveal that they may pose a risk to others. If employers force someone to stay home for two weeks without pay or make them use PTO, they may push people to hide where they have been or what symptoms they are experiencing, which will defeat planning to ensure that management is taking all reasonable steps to prevent the illness from spreading through the workplace. While recognizing there is a possibility for abuse by employees who would like to stay home for two weeks, it really is up to employers to have best practices and training for managers on how to handle situations like this. Managers should work with their HR teams, who are familiar with signs that they need to dive in a little deeper to ensure that leave isn't being abused.

Employees who come to work with a contagious disease will spread that disease. Consider providing paid leave for those employees who have no paid leave available and who are confirmed with COVID-19. In the long run it may save more dollars than it costs. If you are not able to provide paid leave to employees who do not have paid sick leave or PTO available, allow employees to go into a negative sick or PTO balance, or consider providing job-protected personal leave.

What options do employees have if their child's school or day care closes for reasons related to COVID-19?

Employees should discuss their options with their employers. There may be paid sick leave or other paid leave that is available to employees. Telework may be an option for only some positions. Beyond that, an employer can provide either a paid leave for 14 days, as other countries are beginning to do, or offer a job-protected unpaid personal leave of absence. There are some states that may have additional leave options beyond this. For example, in California, employees at worksites with 25 or more employees may also be provided up to 40 hours of leave per year for specific school-related emergencies, such as the closure of a child's school or day care by civil authorities (see Labor Code section 230.8). Whether that leave is paid or unpaid depends on the employer's paid leave, vacation or other paid time off policies. Employers may require employees use their vacation or paid time off benefits before they are allowed to take unpaid leave but cannot mandate that employees use paid sick leave, for example. However, a parent may choose to use any available paid sick leave to be with their child as preventative care. Consult with your HR contact to discuss each situation on a case-by-case basis, as this particular issue will differ by state, industry, employer, position, and employee.

Can I require employees to use infection control procedures, such as covering their mouths when they cough or sneeze, washing frequently, etc.?

Yes. There are no laws that prohibit employers from implementing such procedures, or a policy mandating their use. However, employers must be cognizant of employees that have disabilities that may require an accommodation to comply. For example, if an employee is allergic to alcohol-based, hand cleaning solutions, alternative solutions may have to be provided.

Can I discipline employees for not covering their mouths when coughing/sneezing or for failing to regularly use provided hand sanitizers?

Yes, assuming you have implemented an appropriate workplace policy/requirement. Employers should uniformly enforce their workplace policies and rules. If mandatory infection control practices have been implemented, then discipline may be applied if an employee refuses to adhere to the required practices. Obviously, an employer must avoid disparate treatment in the enforcement of its policies, and infection control rules are no different. In addition, an employer may be required to provide some forbearance from taking discipline if an employee's failure to adhere to certain infection control procedures is disability related.

How should management respond to the employee who is fearful of coming to work or traveling out of town?

An employer should first be sympathetic and discuss the situation with the employee. The employer may explore whether a temporary suspension of travel for the job is a possibility or whether the duties and responsibilities associated with the position can be performed by telecommuting (from home). However, be careful of initiating or approving telework arrangements as this may become a repeated request and one that becomes more and more difficult to approve due to on-site needs. Employees do not normally have a right to refuse to work.

Refusing to do a job because of potentially unsafe workplace conditions (such as exposure to Coronavirus) is not ordinarily an employee right under the OSHA or any other federal. A union contract may provide for such rights, as may some state or local laws. Where such a refusal is permitted, it is only permitted when: (1) the employee reasonably believes that doing the work would put him/her in serious and immediate danger; (2) the employee has asked his/her employer to fix the hazard; (3) there is no time to call OSHA in order to report the condition/hazard; and (4) there is no other way to do the job safely. Employees are not protected for simply walking off the job – they must meet the criteria outlined above.

An employer can impose disciplinary action for refusing to work. However, employees may have the right to refuse to do a job if they believe in good faith that they are exposed to an imminent danger. “Good faith” means that even if an imminent danger is not found to exist, the worker had reasonable grounds to believe that it did exist. If that employee is forced to come to work because they feel that their employer gave them an ultimatum that if they do not show up they will be disciplined, and the employee is then exposed to the virus and contracts the virus, the employer may likely face legal exposure since they indirectly required the employee to show up. Our recommendation is that you get in touch with your HR contact to discuss each specific case before making any disciplinary action decisions.

Can/should I require employees to be tested for the flu?

No. An employer may not mandate a medical test or examination; doing so likely constitutes a medical exam or inquiry in violation of the ADA. Requiring a medical exam for Coronavirus is a decision to be made by the employee and his or her healthcare provider, not an employer.

Can/should I require employees to receive a flu shot?

No. A flu shot is a medical treatment, and an employer may not mandate or require a specific medical treatment. See also FAQ No. 6 regarding medical exams. At the same time, however, an employer may offer, on a voluntary basis, a flu shot clinic and pay for flu shots for their employees. This is a common practice under many wellness programs implemented by employers.

Is there an obligation to accommodate employees who do not want to work in public-facing positions due to risk of infection?

There may be an obligation to accommodate such employees if there is some objective evidence that they could potentially be exposed to individuals who may have returned from China—for example, airport employees who deal with travelers from China. Employees should not be disciplined for refusing to work if they believe that there is a risk of infection because making such a complaint may be a protected activity. If the employer can establish that there is no basis for any exposure to the disease, the employee does not have to be paid during the time period the employee refuses to work.

Should I consider providing information to my employees about the coronavirus?

Yes. Information is available at no cost on the CDC’s website.

Should I consider quarantining employees, or having employees remain off work, who have recently returned from areas with a Warning Level 3 or Warning Level 2?

You should consider telling employees returning from such areas that they should remain away from work for 14 days from their return. You can also consider telling the employees to self-monitor for any symptoms of coronavirus. If any of these symptoms occur, employees should consider being evaluated by a health care provider. Further, even if not symptomatic, employees may also want to consult a health care provider to confirm that they are not infectious before returning to work

Note: To check warning levels, visit: <https://www.cdc.gov/coronavirus/2019-ncov/travelers/index.html>.

Can an employer restrict travel to all locations under a CDC travel advisory?

An employer may restrict travel for business purposes. Employers should continue to consult the CDC's website: "Coronavirus Disease 2019 Information for Travel" for up-to-date travel notices concerning risk. The CDC advises that employers restrict all nonessential travel to areas with a Warning Level 3, and to exercise caution regarding travel to Warning Level 2 areas. Employees who travel to such locations need to be informed that they may be quarantined upon their return. In this situation, an employer may advise the employee about the risks of travel, including quarantine thereafter, and should avoid any action that could result in a claim of national origin discrimination. An employer may deny time off for an employee's personal travel, as long as such a denial is based on the destination, the business cost of a resulting quarantine, or other legitimate business-driven interest, not the national origin of the employee. An employer that has a reasonable belief an employee has traveled to a high-risk country or area and either has acquired COVID-19 or been exposed may ask that the employee not return to work for 14 days (per CDC recommendations) or may send the person home. In these instances, the employer should consult various leave and wage and hour laws to determine entitlement to leave and pay.

Does OSHA require non-healthcare employees to wear respirators?

At this time, there is no general requirement for non-healthcare employees to wear respirators or other types of personal protective equipment (PPE). The CDC has issued guidance regarding the use of PPE only for healthcare personnel caring for patients with confirmed or possible COVID-19. The CDC stresses: "This guidance is not intended for non-healthcare settings (e.g., schools) OR to persons outside of healthcare settings." Currently, the CDC is not recommending use of face masks or any other protective equipment by the general public.

Can an employer with a public-facing business prevent employees from wearing a surgical mask or respirator?

Many workers are understandably concerned about transmission of the virus. However, employers certainly have an interest in limiting fear and not causing client or customer alarm. Under OSHA's rule regarding personal protective equipment, "A respirator shall be provided to each employee when such equipment is necessary to protect the health of such employee. 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." 29 C.F.R. § 1910.134. At this time, 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. As this PPE has not been deemed necessary to protect health and safety at this time, employers have discretion as to whether to allow their usage. Where the wearing of a face-mask or respirator is not warranted, an employer should have a private discussion with the employee who insists on wearing one. The employee can be told that their unreasonable fear will likely cause needless concern among co-workers. Employers should approach these situations carefully and with sensitivity.

What if an employee requests to wear some type of mask as an accommodation?

The CDC does not recommend that people who are well wear some type of mask to protect themselves from respiratory disease, including COVID-19. The CDC does recommend that surgical masks should be used by people who show symptoms of COVID-19. If an employee shows symptoms or has been diagnosed with COVID-19, however, the CDC recommends that the employee be separated from other employees and be sent home immediately, thus negating the need for a mask as an accommodation.

If one of our employees has been diagnosed with COVID-10 and/or quarantined, should I notify our employees?

Generally, no; however, there may be exceptions. Such a notification may be troubling for a number of reasons: (i) there is a risk of creating a panic among the workforce; (ii) as noted in other FAQ's, there are privacy rights at issue, and providing such a notice may violate the diagnosed employee's privacy; and (iii) there could be a risk of providing inaccurate or wrong information to employees (for example, if the alleged diagnosis was incorrect).

Healthcare providers who have diagnosed patients with Coronavirus are required to report that diagnosis to both national and state/local health agencies. It is not the employer's obligation to make such a report; and the employer should not undertake this responsibility. When a state or local health authority receives information about a contagious condition, they may direct the employer to take certain actions, including employee notifications, or they may come on-site to conduct confidential medical questioning or evaluations. These are all decisions that the public health authority should make, and not the employer.

If, however, an employer learns that one of its employees has been diagnosed with Coronavirus, and it has not been contacted by the local health authorities, it is generally a good idea for the employer to initiate contact with the health agency, advise them of the situation, and seek guidance as to employee communications or other steps the organization wants the employer to take. Acting at the direction of the health agency may insulate the employer from possible claims for breach of privacy that may otherwise arise. In certain rare circumstances, depending upon the employer's business or operations (such as a healthcare provider), it may be necessary to advise co-workers that have been exposed as to the possible exposure.

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, however, disclose to coworkers the identity of the quarantined employee because confidentiality requirements under federal law, such as the Americans with Disabilities Act (ADA), or state law, such as California's Fair Employment and Housing Act (FEHA) and the Confidentiality of Medical Information Act (CMIA), may apply.

What privacy concerns do we need to be aware of when we are asking for the health information of our employees in order to evaluate whether they need to be quarantined?

Employers may ask employees if they are experiencing COVID-19 symptoms such as fever, tiredness, cough, and shortness of breath. Federal or state law may require the employer to handle the employee's response as a confidential medical record. To help mitigate this risk, employers should maintain the information in a separate, confidential medical file and limit access to those with a business need to know.

Can OSHA cite an employer for exposing my workforce to coronavirus without protective measures?

Perhaps. OSHA regulates safety hazards through its "general duty" clause that applies to "recognized hazards" in the workplace. OSHA will look to the CDC as the authority when issuing such citations. The agency will determine whether the employer's industry knows that exposure to infected individuals in the workplace is a hazard. If so, the agency would expect the employer to take feasible measures to protect the employees and, if it not does not take such action, the employer could be subject to citation. Employers should conduct a hazard assessment for potential exposures and develop an action plan that includes hazard identification, hazard prevention procedures, employee training, medical monitoring surveillance and record keeping.

Would I need to pay employees who go on leave during a quarantine period or because they have contracted coronavirus?

Perhaps. The employee may be required to be paid if the employee is subject to a contract or collective bargaining agreement that requires pay when employees go on work-required leave. In the absence of a contract, hourly employees work at-will and are not guaranteed wages or hours. In other words, these employees do not need to be paid. Exempt employees do not have to be paid if they are sent home for an entire workweek. However, if exempt workers work for part of the workweek, they would have to be paid for the entire week.

Should I ask for a doctor's note for an employee returning from a quarantine period who otherwise reports being asymptomatic?

Our recommendation is to first become familiar with any federal, state, and local laws that may offer protections to employees regarding sick leave. For example, in California, it is advised by the Department of Industrial relations that employers not ask for a doctor's note for any employee who has paid sick leave available, as there are job protections tied to that. If an employee who was out sick with relative COVID-19 symptoms (i.e. fever above 100 degrees, dry cough, difficulty breathing) does not have paid sick leave or any other state or local similar protection, then an employer may ask for the employee to provide a doctor's note releasing them to return to work. Keep in mind again, any federal or state leave of absence laws that may apply (i.e. if an employee has been off work for more than 3 consecutive days, that would trigger a need to verify employee eligibility for certain leave laws such as the federal FMLA).

Also, the CDC has advised the following: "Do not require a healthcare provider's note for employees who are sick with acute respiratory illness to validate their illness or to return to work, as healthcare provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely way." We would recommend the employee be encouraged but not required to go to an urgent care facility if one is available to at least be screened for infection.

We recommend that you follow CDC guidelines for safety, cleaning, and quarantine.

- › **CDC Guide – Steps when Sick**
- › **CDC GUIDE – Business Response**
- › **CDC Guide – Cleaning and Disinfecting**

First and foremost, please continue to educate staff with proper handwashing techniques, and ensure the facilities are cleaned regularly to help mitigate the spread of this illness. Make sure plenty of hand sanitizers are readily available and have established policies if anyone is exhibiting symptoms.

Sources:

https://www.eeoc.gov/facts/pandemic_flu.html

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

https://edd.ca.gov/about_edd/coronavirus-2019.htm

<https://www.foley.com/en/insights/publications/2020/03/coronavirus-faqs-for-employers>

<https://www.littler.com/publication-press/publication/coronavirus-covid-19-employer-faqs>

<https://www.seyfarth.com/news-insights/coronavirus-employer-liability-issues.html>

<https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/health-wellness-leave-benefits-help-employees-with-coronavirus.aspx>

https://www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/coronavirus-information-and-FAQs.aspx?utm_source=market%E2%80%A6

<https://www.dir.ca.gov/dosh/Coronavirus-info.html>

<https://www.dir.ca.gov/dlse/2019-Novel-Coronavirus.htm>

Additional Information

<https://www.fisherphillips.com/resources-alerts-comprehensive-faqs-for-employers-on-the-covid#L16>

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