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## Addressing COVID-19 Workplace Issues: Responding to Employers' Most Common Questions

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The NBA has suspended play. The NCAA tournament has been cancelled. The World Health Organization (WHO) has now declared that the COVID-19 Coronavirus is a pandemic. Either your business has already been directly or indirectly affected or it inevitably will be affected by COVID-19. What can you do as an employer? The following tips should help you navigate the novel issues created by this unprecedented situation.

### **1. What if an employee reports to work with flu-like symptoms – what can we do as an employer?**

If any employee presents themselves at work with a fever or difficulty breathing, employers may ask such employees if they are experiencing influenza-like symptoms, such as fever or chills and a cough or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the Americans with Disabilities Act (ADA). If an employee is experiencing these symptoms, the employee should be directed to seek immediate medical evaluation. It is also recommended that employers train supervisors on how to recognize these symptoms, while stressing the importance of not overreacting to situations in the workplace potentially related to COVID-19 in order to prevent panic among the workforce.

### **2. Can we ask an employee to stay home or leave work if they exhibit symptoms of the COVID-19 coronavirus or the flu?**

Yes. The Center for Disease Control (CDC) has made it clear that employees who exhibit influenza-like symptoms at work during a pandemic should leave the workplace and be asked to stay home. Employees who have symptoms of acute respiratory illness are recommended to stay home until they are free of a fever (100.4° F), signs of a fever, or any other symptoms for at least 24 hours, without the use of fever-reducing or other symptom altering medicines. Now that the COVID-19 virus has been declared a pandemic by the WHO, the Equal Employment Opportunity Commission (EEOC) has stated that advising workers to go home is not disability-related if the symptoms presented are akin to the seasonal influenza. An employer may therefore require workers to go home if they exhibit symptoms of the COVID-19 coronavirus or the flu without running afoul of the EEOC's interpretation of the ADA.

### **3. Can an employer take an employee's temperature at work to determine whether they might be infected?**

Maybe. The ADA places restrictions on the inquiries that an employer can make into an employee's medical status, and the EEOC considers taking an employee's temperature to constitute a "medical examination" under the ADA. The ADA prohibits employers from requiring medical examinations and making disability-related inquiries unless (1) the employer can show that the inquiry or exam 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 or safety of the individual or others that cannot otherwise be eliminated or reduced by reasonable accommodation.

The EEOC takes the position during a pandemic that employers should rely on the latest CDC and state or local public health assessments to determine whether the pandemic rises to the level of a "direct threat." The assessment by the CDC as to the severity of COVID-19 will likely provide the objective evidence needed for a medical examination. If COVID-19 becomes

widespread, as determined by state or local health authorities or the CDC, then employers would likely be permitted to take an employee's temperature at work. However, as a practical matter, an employee may be infected with COVID-19 without exhibiting any symptoms such as a fever, so temperature checks may not be the most effective method for protecting your workforce.

#### **4. An employee of ours has tested positive for COVID-19. What should we do?**

In addition to sending the employee with the positive test home, you should send all employees who worked closely with that employee home for a 14-day period of time to ensure the infection does not spread. Make sure the affected employee identifies all individuals who worked in close proximity (within six feet) with them in the previous 14 days to ensure you have a full list of those who should be sent home. When sending the employees home, do not identify by name the infected employee or you could risk a violation of the ADA. You may also want to consider asking a cleaning / remediation company to undertake a deep cleaning of your affected workspaces. If you work in a shared office building or area, you should inform building management so they can take whatever precautions they deem necessary.

#### **5. Can an employee refuse to come to work because of fear of COVID-19 infection?**

Employees are only entitled to refuse to report to work if they believe they are in imminent danger. Section 13(a) of the Occupational Safety and Health Act (OSH Act) defines "imminent danger" 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 is a relatively high standard that requires a "threat of death or serious physical harm," or "a reasonable expectation that toxic substances or other health hazards are present, and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency."

For an employee to refuse to report for work, the threat must be immediate or imminent, which means that an employee must believe that death or serious physical harm could occur within a short period of time. Requiring travel to certain areas of the world or requiring employees to work with patients in a medical setting without personal protective equipment at this time may rise to this threshold. Most work conditions in the United States, however, would not presently meet this threshold. Each case must be evaluated on its own merits and employers should seek to determine whether their workplace creates imminent danger to employees.

#### **6. May an employer require a new employee to have a post-offer medical examination to determine their general health status?**

Yes, the ADA allows a medical examination of a new employee as long as it is required only after a conditional offer of employment is made. The medical examination is permitted so long as all entering employees in the same job category are required to undergo the medical examination and the information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record.

Employers may also ask if they are experiencing any symptoms of COVID-19 – fever, cough, shortness of breath or other acute respiratory symptoms. If the applicant or new employee answers yes, then you can ask them to delay starting for 14 days. Be sure to maintain the confidentiality of the responses.

#### **7. May an employer encourage employees to telework (i.e., work from an alternative location such as home) as an infection-control strategy during a pandemic?**

Yes. Telework is an effective infection-control strategy that is also familiar to ADA-covered employers as a reasonable accommodation. In addition, employees with disabilities that put them at high risk for complications of pandemic influenza may request telework as a reasonable accommodation to reduce their chances of infection during a pandemic. An employer is not required to provide telework as an option to all employees, but is recommended that if the opportunity is presented to a certain classification of employees, all other employees in that job classification should similarly be permitted to telework.

#### **8. During a pandemic, may an employer require its employees to adopt infection-control practices, such as regular hand washing, in the workplace?**

Yes. Requiring infection control practices, such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal, does not implicate the ADA. The messages you should be giving to your employees are:

- Wash your hands often with soap and water for at least 20 seconds. If soap and water are not available, use an alcohol-based hand sanitizer.
- Avoid touching your eyes, nose, and mouth with unwashed hands.

- Avoid close contact with others, especially those who are sick.
- Refrain from shaking hands with others for the time being.
- Cover your cough or sneeze with a tissue, then throw the tissue in the trash.
- Clean and disinfect frequently touched objects and surfaces.
- And, perhaps most importantly, tell employees to stay home if they are sick.

**9. Can we require employees who are sent home or who do not report for work to use accrued PTO time?**

Yes. At least under Wisconsin law, an employer may require employees to use accrued PTO time if they are unable or unwilling to report to work – this is the case even if the employer shuts down a facility and the employee is therefore unable to work. The only exception in Wisconsin would be with respect to employees who suffer from a serious health condition under the Wisconsin FMLA. In such cases, an employer is not permitted to mandate that employees use their personal PTO time during the pendency of the Wisconsin approved portion of the FMLA leave (two weeks). After an employee has used up their two-week allotment of Wisconsin FMLA, an employer can then mandate that PTO be utilized.

**10. As Spring Break is approaching, what questions can I ask about employees' personal vacations?**

You can ask your employees whether they have traveled to any locations the CDC or state health officials have indicated are destinations with a risk of community-spread coronavirus—currently about 30 countries in Europe (along with China, Iran, Japan, Singapore, South Korea, Taiwan & Thailand). Check the CDC website for a list of current countries (<https://wwwnc.cdc.gov/travel>). The CDC recommends that anyone traveling to these countries should stay home for 14 days from the time the employee left the country and to practice social distancing. Some employers have initiated mandatory time away from work if employees are returning from a country on the CDC list.

You can also ask employees whether they been on a cruise ship. If on a cruise ship in the last 14 days, the employee should stay home for 14 days if a case of Coronavirus was reported on the ship during the cruise. Otherwise, it does not appear the CDC is currently recommending any work-related social distancing – unless the person is exhibiting symptoms – fever, cough, trouble breathing. However, the situation is in constant flux, so you may want to check the CDC website or contact legal counsel for up to date guidance.

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