

SimplyHR | Employment & Labor Blog

COVID-19 Q&A: WHAT EMPLOYERS SHOULD KNOW

Author

Scott Cruz
312-345-5008
scruz@greensfelder.com

The coronavirus outbreak known as COVID-19 has been spreading around the world, including the United States. Employers must respond in rapid fashion and face a series of questions regarding the impact the virus will have on the workplace. Below are answers to various questions all companies must know.

What if an employee presents with symptom of COVID-19? Can we require the employee to leave work and stay home?

Yes. If an employee presents at work with symptoms generally associated with COVID-19, e.g., a fever or difficulty in breathing, especially after being in a high-risk location, the employer may send the employee home, and require that the employee remain at home to protect the other employees in the workplace from being infected, for the recommended 14-day quarantine period. The legitimate business reason for doing so is the Americans with Disabilities Act's ("ADA") *direct threat* defense, specifically, that the employee's presence would be a "direct threat" to the health or safety of the employee or others that cannot be reduced or eliminated by reasonable accommodation.

While an employee may allege that he or she is being "regarded" as disabled under the ADA, or that he or she is being singled out based on his or her particular race, the *direct threat* defense under the ADA should protect employers that apply this policy uniformly and in a non-discriminatory manner.

Additionally, the Center for Disease Control ("CDC") recommends that employees who have symptoms of acute respiratory illness are recommended to stay home and not come to work until they are free of fever (100.4° F/37.8° C or greater using an oral thermometer), signs of a fever, and any other symptoms for at least 24 hours, without the use of fever-reducing or other symptom-altering medicines (e.g., cough suppressants).

Further, the Occupational Health and Safety Act ("OSHA") has recently set forth the following guidance advising the following in cases of suspected employee exposure to COVID-19:



COVID-19 Q&A: WHAT EMPLOYERS SHOULD KNOW

- Employees who appear to have acute respiratory illness symptoms (e. cough, shortness of breath) upon arrival to work or become sick during the day should be separated from other employees and be sent home immediately.
- Take steps to limit the spread of the potentially infectious individual's respiratory secretions, including by providing a face mask.
- In health care and other situations where non-employees may be suspected of having the COVID-19, isolate those individuals from those with confirmed cases of the virus to prevent further transmission.
- Restrict the number of personnel entering isolation areas, including the room of a patient with suspected/confirmed COVID-19.
- Protect employees who must work in close contact with an actual or suspected infected person by using additional engineering and administrative controls, safe work practices and personal protective equipment.

What if an employee voluntarily discloses that he or she has tested positive for COVID-19 while having been in the workplace and working closely with others?

The answer is largely the same as above: The employee should immediately be sent home and required to stay home. Note, an employee who has been diagnosed with COVID-19 would qualify for leave under the Family and Medical Leave Act ("FMLA") as such an infection would constitute a serious health condition under FMLA. Under the Occupational Safety and Health Administration ("OSHA"), all employers are required to provide a safe and health workplace, and under the ADA's direct threat defense, that employee poses a direct threat to the health and safety of others in the workplace. Employers also should request that the infected employee identify all co-workers with whom he or she has come in close contact in the workplace in the past 14 days, and since the positive test. The employer should inform those employees that they may have been exposed to COVID-19 and send them home to seek treatment from their health care providers to ensure they have not contracted COVID-19. It is important for employers to remember their obligation to not violate confidentiality laws by disclosing the name of the infected employee to others.

Can employers require employees whom they suspect have been exposed to or contracted COVID-19 to be tested as a condition of returning to work?

Yes, under the ADA's direct threat defense, and its obligation under OSHA, employers may require such employees to undergo job-related fitness for duty exams prior to returning to work, which includes confirmation by the employee's health care provider of a negative test result. Note, however, that the CDC recommends that employers should not require a health care provider's note for employees who are sick with acute respiratory illness to validate their illness or to return to work, as health care provider offices



COVID-19 Q&A: WHAT EMPLOYERS SHOULD KNOW

and medical facilities may be extremely busy and not able to provide such documentation in a timely way. This is mere guidance, however. As with all such COVID-19 employment-related matters, employers should consult with their employment attorney for discussing best practices in addressing individual situations.

Is an employer required to pay wages to its non-exempt employees and/or the salary to its exempt employees whom it is prohibiting from returning to work based on its reasonable belief that the employee may have been exposed to, or has contracted COVID-19?

The answer is largely dependent on the employer's specific policies and the employee's specific classification under the Fair Labor Standards Act ("FLSA"). Exempt employees must be paid their full salary for any workweek in which they perform more than a *de minimus* amount of work. That payment may consist of the required use of accrued paid time off, unless such required use is inconsistent with the employer's paid time off policy. Once the accrued paid time off is exhausted, the employer may not deduct from an exempt employee's salary unless the employee performs no services for the entire workweek. Non-exempt employees are only entitled to be paid for any hours worked; again, absent an employer's paid time off policy and/or state or local law providing otherwise (e.g. paid sick leave, PTO or vacation).

Note, that on March 14, 2020, the U.S. House of Representatives passed COVID-19 designed to provide paid leave to employees during the outbreak. Labeled the Families First Coronavirus Response Act, if passed by the U.S. Senate and signed by President Trump, the legislation would require employers with fewer than 500 employees to provide American workers with up to 12 weeks of FMLA leave and two weeks of paid sick leave for certain reasons related to COVID-19. We have drafted a comprehensive summary of this legislation, which can be accessed [here](#).

If we choose not to pay, for example, non-exempt employees whom we are requiring to work from home or self-quarantine, will they be eligible for unemployment insurance benefits?

Likely yes, but it largely depends on your state's unemployment guidelines. Generally, unemployment insurance benefits provide temporary financial assistance to employees unemployed through no fault of their own that meet their state's eligibility requirements. Additionally, employees generally must be able to and available for work each week that they are collecting benefits. In mandated all personnel "work from home" or required self-quarantine scenarios, employees who are not otherwise incapacitated and unable to work, likely will meet the above eligibility requirements. In Illinois, Gov. J.B. Pritzker recently announced that emergency rules will be issued clarifying that under the Illinois Unemployment Insurance Act, an employee who is unemployed for reasons related to COVID-19, and through no fault of their own (*i.e.* mandated work from home policies), will be eligible for unemployment benefits.



COVID-19 Q&A: WHAT EMPLOYERS SHOULD KNOW

Should employers institute a temporary remote work/telecommuter policy for their entire workforce?

This answer is largely dependent on several individual factors relating solely to your company (e.g., industry, work force, area where workers reside, etc.). We have seen an increase in employers implementing such policies, however. For certain businesses and industries, telecommuting may be a good strategy for mitigating the illness through contact at work. Even if an employer does not implement a temporary work from home policy, employers should be prepared for an increase in inquiries about telecommuting from employees who prefer not to report for work (see guidance below on this specific issue). If an employee asks to work from home because of a medical condition that places him or her at higher risk for infection, an employer may be obligated to consider this request as a reasonable accommodation under the ADA or state law. Even where there is no legal obligation to provide accommodations, employers may find that allowing an employee to work from home is preferable to not having the employee work at all. Similarly, employers should examine their short-term disability policies, as they may provide benefits in the event the employee is unable to work.

In designing telecommuting policies and procedures, employers should first identify which jobs can be successfully performed outside of the office. Many jobs simply cannot be performed from home, and not all employers have the technology infrastructure or organization necessary to make working from home a productive option. Where working from home is permitted, employers should establish expectations for employees' work and communications while they are away from the office. For example, these may include specified working hours, expectations for responding to calls and email, and productivity goals. Employers should also ensure that their employees have a medium available to accurately reflect their hours. In Illinois, for example, employers are required to maintain a record of all hours worked each day and each week for *all workers*, which as of February 19, 2019, now includes *exempt employees*.

If an employee refuses to report to work due to fear of contracting COVID-19, and the employer has no *objective* reason to believe that there is a sufficient basis for such a concern *in its workplace*, may the employer discipline or terminate the employee for refusing to come into work?

That depends largely on the reasonableness of the employee's fear of infection in the workplace. Under the Occupational Safety and Health Act ("OSHA"), an employee may refuse to work if the employee believes that he/she is in imminent danger. Section 13(a) of OSHA defines imminent danger as "any conditions or practices in any place of employment which are such that a danger exists which could 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 means that the employee must believe that death or serious physical harm could occur within a short time, for example before OSHA could investigate the problem. For a health hazard, such as COVID-19, to



COVID-19 Q&A: WHAT EMPLOYERS SHOULD KNOW

constitute an imminent danger under OSHA, there must be 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.”

So, if an employee reasonably believes that there is a real danger of being infected with COVID-19 by coming to work, because of a confirmed and/or suspected case of COVID-19 *in the workplace*, it is likely that the employee would qualify for protection under OSHA from discipline or discharge. Satisfying this standard, however, would not entitle the employee to be paid for the time missed from work. Furthermore, even if the risk is not sufficient to trigger OSHA protections, if the employee’s level of fear, whether rational or not, results in or is a function of an anxiety disorder or a serious health condition for FMLA purposes, the employee may be entitled to time off as a reasonable accommodation for a disability under the ADA or as a protected leave of absence under the FMLA. Note too that Section 7 of the National Labor Relations Act protects employees (even in non-union settings) who engage in “protected concerted activity for mutual aid and protection.” A group of employees (or even one, on behalf of all others) who refuse to work based on their reasonable fear of being infected with COVID-19, likely will be protected from discipline or discharge for their attempt to improve the conditions of their employment.

What if local schools or day care centers have temporarily closed because of COVID-19, and an employee requests to take leave to stay home with his/her children during this time? Are employers obligated to provide this leave?

If the U.S. Senate approves the Families First Coronavirus Response Act, employers with fewer than 500 employees (as written now) would be required to permit eligible employees to take an FMLA leave of absence to care for their child (even if the child does not have a serious health condition), if the child’s school or place of care has been closed, or the children’s provider is unavailable due to a coronavirus. (See comprehensive summary of the Families First Coronavirus Response Act [here](#)).

State laws may impose different requirements. For example, California requires most employers to provide unpaid leave to parents, guardians, grandparents, stepparents, foster parents or persons standing in loco parentis to a child for child care during unexpected school closures. Similarly, New York City mandates that employers provide employees with leave necessitated by the “employee’s need to care for a child whose school or childcare provider has been closed by order of a public official due to a public health emergency.”

Can employers discipline or terminate employees (or a single employee, speaking on behalf of others) who are using social media to identify their employer and complain that the employer is not protecting them or the workplace from COVID-19?



COVID-19 Q&A: WHAT EMPLOYERS SHOULD KNOW

Generally, no, as the employee(s) complaints regarding working conditions likely constitute protected speech/concerted activity under Section 7 of the NLRA. Instead, employer should speak directly to the employee(s) regarding their concerns and try to address each individual concern, without taking retaliation action.

What if an employer temporarily shuts down a work location to protect its employees from COVID-19? Do we have to provide advance notice of the shut down, and if so, how much notice do we need to give our employees?

Yes, you likely do because temporary shutdowns of a facility may implicate federal and state “WARN” laws. Under the federal Worker Adjustment Retraining Notification Act (the “WARN Act”), employers with 100 or more employees are required to provide 60 days’ advance notice of a temporary shutdown if the shutdown will (i) affect 50 or more employees at a single site of employment and (ii) result in at least a 50 percent reduction in hours of work of individual employees during the month of the shutdown. However, 60 days’ notice is not required if the shutdown is a result of a “natural disaster” or “unforeseeable business circumstances.” Although the WARN Act does not specifically address whether a pandemic or potential pandemic qualifies as a natural disaster or unforeseeable business circumstance, the key factor for both is that the event was sudden, dramatic and not foreseeable within the required notice period. Employers should note that, even if these exceptions apply to the COVID-19 outbreak, the employer is still required to give as much advance notice *as is practicable*. Therefore, employers should be prepared to communicate to their employees that a temporary shutdown will occur as soon as the final decision has been made, even if the shutdown will not take effect for several days.

Additionally, many states including Illinois have “mini-WARN” laws that cover smaller employers or require notice for less significant shutdowns. For example, under the Illinois WARN Act, private sector employers that have (i) 75 or more full-time employees located in Illinois, excluding part-time employees; or (ii) 75 or more employees who work a total of 4,000 hours per week (exclusive of overtime hours), must provide 60 days’ advance notice in the case of a “mass layoff” or a “plant closing.” Under Illinois’ WARN Act, a “mass layoff” is defined as “a reduction in force which: (1) is not the result of a plant closing; and (2) results in an employment loss at the single site of employment during any 30-day period for: (A) at least 33 percent of the employees (excluding any part-time employees) and at least 25 employees (excluding any part-time employees); or (B) at least 250 employees (excluding any part-time employees.” And, under Illinois’ WARN Act, a “plant closing” is defined as “the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees.” The 60 days’ notice exception under the federal WARN Act also is available to Illinois employers if the shutdown is a result of a “natural disaster” or “unforeseeable business circumstances.”



COVID-19 Q&A: WHAT EMPLOYERS SHOULD KNOW

If an employer has a unionized workforce, is it required to bargain with the union over changes to unionized employees' schedules or other changes to their terms and conditions of employment in response to COVID-19?

Under the NLRA, unionized employers may have a duty to bargain over new policies developed in response to COVID-19. For example, if employers develop a pay policy addressing whether and/or how to pay employees whom the employer has requested to work from home temporarily, or have been self-quarantined because of a positive test or are experiencing symptoms of COVID-19, that policy would likely be considered a mandatory subject of bargaining for which the employer would need to bargain over with the union. However, whether there is such a duty really depends on the language and specific provisions in the collective bargaining agreement, including but not limited to the management rights provision, leaves of absence, paid time off, and health and safety.

Can employers prohibit international or domestic travel to high risk locations?

So long as the travel is for business-related reasons, yes. If for personal reasons, then likely not, or face a potential national origin discrimination claim if the personal travel is to the employee's home country. However, upon the employee's return, particularly if the travel was to a high-risk location, and/or on the CDC's restricted travel list, the employer should require the employee to stay home for the 14-day quarantine period and require a fitness for duty exam to return to work if the employee experiences any symptoms of COVID-19, has self-disclosed that while traveling he or she has come in close contact with another person who has tested positive for COVID-19, or the employee discloses that he or she has tested positive for COVID-19.

What if an employee returns from a domestic or international trip that is not on the CDC restricted travel list, can employers mandate a temporary self-quarantine?

You could, but you shouldn't. Remember, decisions should be based on rational, objective evidence, and should not be impulsive or based on emotion or paranoia. Unless the employee, for example, is experiencing symptoms of COVID-19, has self-disclosed that while traveling he or she has come in close contact with another person who has tested positive for COVID-19, or the employee discloses that he or she has tested positive, there is no reasonable belief that the employee poses a *direct threat* to the health or safety of the workplace that cannot be eliminated or reduced by a reasonable accommodation.

As with any and all COVID-19 employment-related matters, employers should consult with their employment attorneys for discussing best practices in addressing individual situations.

*Our **Employment & Labor Practice Group** is continuing to monitor these developments and is available to answer your coronavirus questions.*



COVID-19 Q&A: WHAT EMPLOYERS SHOULD KNOW

[Link to COVID-19 Resources page](#)

