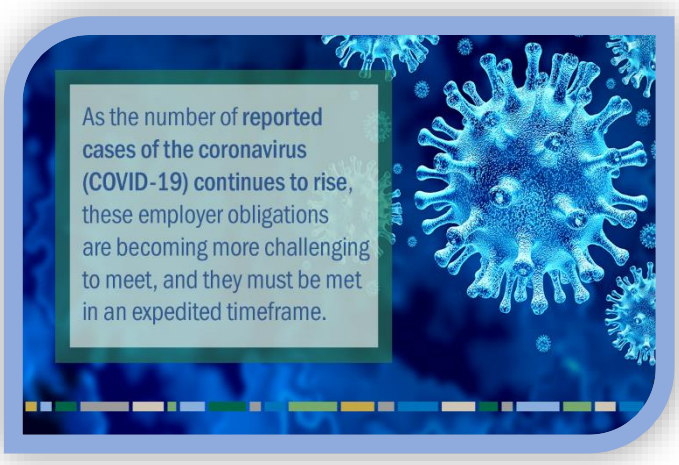
# Coronavirus and the Workplace
## Compliance Issues for Employers

With the number of novel coronavirus (COVID-19) cases on the rise, you must protect your employees. Here are a number of key steps to take to protect your employees in the workplace.




Employers are obligated to maintain a safe and healthy work environment for their employees and are subject to a number of legal requirements protecting workers. As the number of reported cases of the novel coronavirus (COVID-19) continues to rise, these employer obligations are becoming more challenging to meet, and they must be met in an expedited timeframe.

## I. COVID-19 Symptoms, Risk & Spread of the Virus

***What are the symptoms of the current coronavirus (COVID-19)?***

The most common symptoms of COVID-19 are fever, tiredness, and dry cough. Some patients may have aches and pains, nasal congestion, runny nose, sore throat, or diarrhea. These symptoms are usually mild and begin gradually.

Some people become infected but don't develop any symptoms and don't feel unwell. Most people (about 80%) recover from the disease without needing special treatment. Around 1 out of every 6 people who gets COVID-19 becomes seriously ill and develops difficulty breathing.

***Who is most at risk?***

The risk is highest for older people and those with other health conditions such as diabetes, high blood pressure, or heart problems. About 2% of people with the disease have died. People with **fever, cough, and difficulty breathing** should seek medical attention.

***How is the virus spread among humans?***

People can catch COVID-19 from others who have the virus. The disease can spread from person to person through small droplets from the nose or mouth which are spread when a person with COVID-19 coughs or exhales. These droplets also land on objects and surfaces around the person. Other people then catch COVID-19 by touching these objects or surfaces, then touching their eyes, nose, or mouth. Therefore, it is important to stay more than 1 meter (3 feet) away from a person who is sick. The CDC recommends as much as 6 feet. It is possible to catch the virus from someone even before they have symptoms, but little is known about this aspect of the virus at this time.

***Can the virus spread from contact with infected surfaces or objects?***

It may be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or possibly their eyes, but this is not thought to be the main way the virus spreads.

If you think a surface may be infected, clean it with simple disinfectant to kill the virus and protect yourself and others. Clean your hands with an alcohol-based hand rub or wash them with soap and water. Avoid touching your eyes, mouth, or nose.

***What is the incubation period?***

So far, public health authorities have consistently determined that people become ill between 2 and 14 days after exposure.

***Is there a test?***

U.S. public health officials have developed and are distributing diagnostic tests, which are being used to confirm whether a patient has the new coronavirus or another infection.

**How effective are masks?**

Authorities say that people with no respiratory symptoms, such as cough, do not need to wear a mask and that they cannot protect against the COVID-19 coronavirus when used alone. WHO recommends the use of masks for people who have symptoms of COVID-19 and for those caring for individuals who have symptoms, such as cough and fever.

***What else can employees do to protect themselves?***

The most important thing you can do is encourage your community to wash their hands frequently, for at least 20 seconds each time. Tell employees to wash their hands when they get home, before they eat, and other times that they are touching surfaces. Tell them not to touch their eyes, nose, or mouth. Wipe down objects and surfaces with household cleaner. Maintain a distance from people who are sick. Ask employees to cover their mouths and use good practices for disposal of tissues, etc.

***What if a community member tests positive or has been exposed to COVID-19?***

CDC provides guidelines in the event that a community member tests positive or has been exposed. It is important that employers keep in close contact with local health officials for current information about the spread of the virus in your local community and follow their guidance if a closure or specific quarantines are recommended.

# II. General Prevention Information

## Action Steps to Address COVID-19

There are a number of steps employers can take to address the impact of COVID-19 in the workplace. In addition to reviewing the compliance issues covered later in this article, employers should:

- Closely monitor the Centers for Disease Control and Prevention (CDC), World Health Organization (WHO), and state and local public health department websites to ensure you have the most up-to-date information.
- Proactively educate employees on what is known about the virus, including transmission and prevention.
- Establish a written communicable illness policy and response plan that covers communicable diseases readily transmitted in the workplace.
- Consider measures that can help prevent the spread of illness, such as flexible work options like working from home.

## Disease Prevention Tips for the Workplace

Whenever a communicable disease outbreak is possible, it is recommended that employers establish a written policy and response plan. Things to consider including in the policy:

- requiring employees to stay home from work if they have signs or symptoms of a communicable disease or if they have traveled to high-risk geographic areas until they can provide medical documentation that they are free of symptoms
- allowing employees to work remotely
- cancelling business travel to affected geographic regions
- requiring that employees notify their supervisor and HR department if they have recently or will be traveling to high-risk areas for personal reasons

# III. Legal Considerations When Developing Company Policies

There are also several legal considerations that employers should keep in mind when developing this policy. These considerations are addressed in the following sections.

## Recap of Occupational Safety and Health Act of 1970

Under the federal Occupational Safety and Health Act of 1970 (the OSH Act), employers have a general duty to provide employees with safe workplace conditions that are "free from recognized hazards that are causing or are likely to cause death or serious physical harm." Workers also have the right to receive information and training about workplace hazards and to exercise their rights as employees without retaliation.

There is no specific Occupational Safety and Health Administration (OSHA) standard covering COVID-19. However, some OSHA requirements may apply to preventing occupational exposure to COVID-19. In addition to the General Duty clause, OSHA's Personal Protective Equipment (PPE) standards and Bloodborne Pathogens standard may apply to certain workplaces, such as those in the health care industry.

Also, OSHA requires many employers to record certain work-related injuries and illnesses on their OSHA Form 300 (OSHA Log of Work-Related Injuries and Illnesses). OSHA has determined that COVID-19 is a recordable illness when a worker is infected on the job.

## Key Aspects of The Americans with Disabilities Act

The Americans with Disabilities Act (ADA) protects applicants and employees from disability discrimination. It is relevant to COVID-19 because it prohibits employee disability-related inquiries or medical examinations unless:

- They are job related and consistent with business necessity; or
- The employer has a reasonable belief that the employee poses a direct threat to the health or safety of him-or herself or others (i.e., a significant risk of substantial harm even with reasonable accommodation).

According to the Equal Employment Opportunity Commission (EEOC), whether a particular outbreak rises to the level of a "direct threat" depends on the severity of the illness. Employers are expected to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location and to make reasonable assessments of conditions in their workplace based on this information.

The EEOC has said that sending an employee who displays symptoms of contagious illness home would not violate the ADA's restrictions on disability-related actions because doing so is not a disability-related action if the illness ends up being mild, such as seasonal influenza. If the illness was serious enough, the action would still be permitted under the ADA as the illness would pose a "direct threat." In either case, an employer may send employees home, or allow employees to work from home, if they are displaying symptoms of contagious illness.

The ADA requires that information about the medical condition or history of an employee, obtained through disability-related inquiries or medical examination, be collected and maintained on separate forms and in separate medical files and treated as a confidential medical record. Employers should refrain from announcing to employees that a coworker is at risk of or actually has a disease. Instead, employers should focus on educating employees on best practices for illness prevention.

## Employee Leave Requirements for COVID-19

If an employee or an employee's family member contracts COVID-19, the employee may be entitled to time off work under federal or state leave laws. For example, an employee who is experiencing a serious health condition or who requires time to care for a family member with such a condition may be entitled to take leave under the Family and Medical Leave Act (FMLA). An illness like COVID-19 may qualify as a serious health condition under the FMLA if it involves inpatient care or continuing treatment by a health care provider. Employees may also be entitled to FMLA leave when taking time off for medical examinations to determine whether a serious health condition exists.

Many states and localities also have employee leave laws that could apply in a situation where the employee or family member contracts COVID-19. Some of these laws require employees to be given paid time off, while other laws require unpaid leave. Employers should become familiar with the laws in their jurisdiction to ensure they are compliant.

Employees may wish to stay home from work out of fear of becoming ill. Whether employers must accommodate these requests will depend on whether there is evidence that the employee may be at risk of contracting the disease. A refusal to work may violate an employer's attendance policy, but employers should consult with legal counsel prior to disciplining an employee.

## Compensation & Benefits of Missed Work Due to COVID-19

If employees miss work due to COVID-19, whether they are compensated for their time off will depend on the circumstances. As noted above, employees may be entitled to paid time off under certain state laws if they (or a family member) contract the illness. In other cases, non-exempt employees generally do not have to be paid for time they are not working. Exempt employees must be paid if they work for part of a workweek but do not have to be paid if they are off work for the entire week. Note that special rules may apply to union employees, depending on the terms of their collective bargaining agreement.

Employees may be entitled to workers' compensation benefits if they contract the disease during the course of their employment. Whether they are eligible for other benefits, such as short-term disability, will depend on the terms of the policy and the severity of the illness.

# IV. Frequently Asked Questions/Answers

## A. WAGE AND HOUR ISSUES

**Must we keep paying employees who are not working?**

Under the Fair Labor Standards Act (FLSA), for the most part the answer is "no." FLSA minimum-wage and overtime requirements attach to hours worked in a workweek, so employees who are not working are typically not entitled to the wages the FLSA requires.

One possible difference relates to employees treated as exempt FLSA "white collar" employees whose exempt status requires that they be paid on a salary basis. Generally speaking, if such an employee performs at least some work in the employee's designated seven-day workweek, the salary basis rules require that they be paid the entire salary for that particular workweek. There can be exceptions, such as might be the case when the employer is open for business, but the employee decides to stay home for the day and performs no work. A U.S. Department of Labor (USDOL) opinion letter addressing these matters can be accessed here.

Also, non-exempt employees paid on a "fluctuating-workweek" basis under the FLSA normally must be paid their full fluctuating-workweek salaries for every workweek in which they perform any work. There are a few exceptions, but these are even more-limited than the ones for exempt "salary basis" employees.

Of course, an employer might have a legal obligation to keep paying employees because of, for instance, an employment contract, a collective bargaining agreement, or some policy or practice that is enforceable as a contract or under a state wage law.

Finally, we caution employers to consider the public relations aspect of not paying employees who may not be working if they have contracted or are avoiding the COVID-19 coronavirus. Given the publicity surrounding this outbreak, it is possible that situations involving these kinds of issues could reach the media and damage your reputation and employee morale. Consider the big picture perspective when making decisions regarding paying or not paying your employees.

**Can we charge time missed to vacation and leave balances?**

The FLSA generally does not regulate the accumulation and use of vacation and leave. The salary requirements for exempt "white collar" employees can implicate time-off allotments under various circumstances. The USDOL has provided some guidance on this topic in an opinion letter that is accessible here. Again, however, what an employer may, must, or cannot do where paid leave is concerned might be affected by an employment contract, a collective bargaining agreement, or some policy or practice that is enforceable as a contract or under a state wage law.

## B. EMPLOYEE LEAVE/ADA

**Does family and medical leave (FMLA) apply to this situation?**

Employees requesting leave could conceivably be protected by the Family and Medical Leave Act (FMLA) to the extent they otherwise meet FMLA-eligibility requirements. Even in the absence of state or federal protection, an employer's internal policies may extend protection to such individuals. Of course, there is nothing to prevent you from voluntarily extending an employee's leave, even in the absence of any legal obligation.

Generally, employees are not entitled to take FMLA to stay at home to avoid getting sick. As with many employment laws, the worst thing an employer (or as is often the case, an untrained supervisor) can do at times like this is to reject immediately an unorthodox leave request before the facts are in. When in doubt, the wisest approach is to work with counsel to ensure legal compliance, thereby minimizing exposure to costly litigation.

**Does contraction of COVID-19 coronavirus implicate the ADA?**

Generally, no, because in most cases the COVID-19 coronavirus is a transitory condition. However, some plaintiffs could make an argument that the ADA is implicated if the virus substantially limited a major life activity, such as breathing. Moreover, if an employer "regards" an employee with COVID-19 as being disabled, that could trigger ADA coverage.

**Can I send employees home who exhibit potential symptoms of contagious illnesses at work?**

Yes, sending an employee home who displays symptoms of contagious illnesses would not violate the ADA's restrictions on disability-related actions.

**UPDATED QUESTION & ANSWER (March 12, 2020)**
**During a pandemic, may an ADA-covered employer ask employees who do not have symptoms to disclose whether they have a medical condition that the CDC says could make them especially vulnerable to complications?**

Generally, no. However, if the pandemic becomes severe or serious according to local, state, or federal health officials, ADA-covered employers may have sufficient objective information to reasonably conclude that employees will face a direct threat if they contract COVID-19. Only then may ADA-covered employers make disability-related inquiries or require medical examinations of asymptomatic employees to determine which employees are at a higher risk of complications.

**May an employer encourage employees to telework as an infection-control strategy?**

Yes. The EEOC has opined that telework is an effective infection-control strategy. The EEOC has also stated that 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.

## C. HEALTHCARE/HIPAA ISSUES

**Does the COVID-19 coronavirus emergency trump HIPAA privacy rules?**

No, the government recently sent a stern reminder to all employers, especially those involved in providing healthcare, that they must still comply with the protections contained in the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule during the COVID-19 coronavirus outbreak. The Office for Civil Rights of the U.S. Department of Health and Human Services (HHS) issued a reminder after the WHO declared a global health emergency. In fact, the Rule includes provisions that are directly applicable to the current circumstances.

**What are our obligations under the HIPAA privacy rules if we are contacted by officials asking for emergency personal health information about one of our employees?**

The privacy restrictions mandated by HIPAA only apply to "covered entities" such as medical providers or employer-sponsored group health plans, and then only in connection with individually identifiable health information. Employers are not covered entities, so if you have medical information in your employment records, it is not subject to HIPAA restrictions.

Nevertheless, disclosures should be made only to authorized personnel, and care should be taken even in disclosures to government personnel or other groups such as the Red Cross. Further, you should be careful not to release information to someone until you have properly identified them.

**UPDATED ANSWER (March 12, 2020)**
**How should we treat medical information?**

We recommend you treat all medical information as confidential and afford it the same protections as those granted by HIPAA in connection with your group health plan. In certain circumstances, if you have plan information, you can share it with government officials acting in their official capacity, and with health care providers or officially chartered organizations such as the Red Cross. For example, you can share protected health information with providers to help in treatment, or with emergency relief workers to help coordinate services.

In addition, you can share the information with providers or government officials as necessary to locate, identify, or notify family members, guardians, or anyone else responsible for an individual's care, of the individual's location, general condition, or death. In such case, if at all possible, you should get the individual's written or verbal permission to disclose.

However, if the person is unconscious or incapacitated, or cannot be located, information can be shared if doing so would be in the person's best interests. In addition, information can be shared with organizations like the Red Cross, which is authorized by law to assist in disaster relief efforts, even without a person's permission, if providing the information is necessary for the relief organization to respond to an emergency.

Finally, information can be disclosed to authorized personnel without permission of the person whose records are being disclosed if disclosure is necessary to prevent or lessen a serious and imminent threat to the health and safety of a person or the public.

These restrictions remain in effect, even after the outbreak has been declared a pandemic.

**May covered entities share protected health information with public health authorities?**

When there is a legitimate need to share information with public health authorities and others responsible for ensuring public health and safety, covered entities may share PHI to enable them to carry out their public health responsibilities. This may arise with the current outbreak of COVID-19. The key, as always, is to limit disclosures to the *minimum necessary* to the purpose, strictly in accordance with these parameters.

For example, covered entities may share information *as necessary* with the Centers for CDC, as well as health departments authorized by law to receive such information, to prevent or control disease or injury. You may even disclose PHI to foreign government agencies that are working with authorized public health authorities.

## D. WARN ACT/PLANT CLOSINGS

**Do we have an obligation to provide notice under the WARN Act if we are forced to suspend operations on account of the coronavirus and its aftermath?**

Yes, if your company is covered by the Worker Adjustment and Retraining Notification (WARN) Act. The federal WARN Act imposes a notice obligation on covered employers (those with 100 or more full-time employees) who implement a "plant closing" or "mass layoff" in certain situations, even when they are forced to do so for economic reasons. It is important to keep in mind that these quoted terms are defined extensively under WARN's regulations, and that they are not intended to cover every single layoff or plant closing.

Generally speaking, employers must provide at least 60 calendar days of notice prior to any covered plant closing or mass layoff. Note, however, that if employees are laid off for less than six months, then they do not suffer an employment loss and, depending on the particular circumstances, notice may not be required. Unfortunately, in situations like this, it is hard to know how long the layoff will occur so providing notice is usually the best practice.

Fortunately, even in cases where its notice requirements would otherwise apply, the WARN Act provides a specific exception when layoffs occur due to unforeseeable business circumstances. This provision may apply to the COVID-19 coronavirus. But due to the fact-specific analysis required, this exception is often litigated.

Moreover, this exception is limited, in that an employer relying upon it must still provide "as much notice as is practicable, and at that time shall give a brief statement of the basis for reducing the notification period." In other words, once you are in a position to evaluate the immediate impact of the outbreak upon your workforce, you must then provide specific notice to "affected employees." You must also provide a statement explaining the failure to provide more extensive notice, which in this case would obviously be tied to the unforeseeable nature of the outbreak and its aftermath.

The WARN Act has specific provisions requiring notice to employees, unions and certain government entities. The Act further specifies the information that must be contained in each notice. Keep in mind that some states have "mini-WARN" laws that may apply. Please work with your employment counsel to ensure compliance notices are provided.

**Will this law really be enforced this law in light of the outbreak?**

In the aftermath of an outbreak, the extent to which the USDOL will focus upon enforcement of the WARN Act remains to be seen. Nonetheless, the law provides stiff penalties for non-compliance, including up to 60 days of back pay and benefits, along with a civil penalty of up to $500 per day. More importantly, it provides for a private cause of action in federal court, suggesting that employers may soon be responding to lawsuits arising under the WARN Act regardless of the enforcing agency's official position.

Consequently, we advise that you evaluate your current situations to ascertain whether the most recent outbreak has triggered a WARN Act qualifying event in your organization. If so, provide as much notice to affected employees as is practicable under the circumstances. When in doubt, the best approach is to work through counsel to arrive at a safe but practical solution to a potentially thorny situation for many employers that are impacted by the outbreak, either directly or indirectly.

## E. WORKERS' COMPENSATION

**UPDATED QUESTION & ANSWER (March 9, 2020)**

**My employee alleges that they contracted the coronavirus while at work. Will this result in a compensable workers' compensation claim?**

It depends. If the employee is a health care worker or first responder, the answer is likely yes (subject to variations in state law). For other categories of employees, a compensable workers' compensation claim is possible, but the analysis would be very fact-specific.

It is important to note that the workers' compensation system is a no-fault system, meaning that an employee claiming a work-related injury does not need to prove negligence on the part of the employer. Instead, the employee need only prove that the injury occurred at work and was proximately caused by their employment. Additionally, the virus is not an "injury" but is instead analyzed under state law to determine if it is an "occupational disease." To be an occupational disease (again subject to state law variations), an employee must generally show two things:

- the illness or disease must be "occupational," meaning that it arose out of and was in the course of employment; and
- the illness or disease must arise out of or be caused by conditions peculiar to the work and creates a risk of contracting the disease in a greater degree and in a different manner than in the public generally.

The general test in determining whether an injury "arises out of and in the course of employment" is whether the employee was involved in some activity where they were benefitting the employer and was exposed to the virus. Importantly, special consideration will be given to health care workers and first responders, as these employees will likely enjoy a presumption that any communicable disease was contracted as the result of employment. This would also include plant nurses and physicians who are exposed to the virus while at the worksite.

As for other categories of employees, compensability for a workers' compensation claim will be determined on a case-by-case basis. The key point will be whether the employee contracted the virus at work and whether the contraction of the disease was "peculiar" to their employment. Even if the employer takes all of the right steps to protect the employees from exposure, a compensable claim may be determined where the employee can show that they contracted the virus after an exposure, the exposure was peculiar to the work, and there are no alternative means of exposure demonstrated.

Absent state legislation on this topic, an employee seeking workers' compensation benefits for a coronavirus infection will still have to provide medical evidence to support the claim. Employers who seek to contest such a claim may be able to challenge the allowance if there is another alternative exposure or if the employee's medical evidence is merely speculative.

Finally, employers should be aware that states are taking action on this issue. For instance, Washington Governor Jay Inslee recently directed his Department of Labor and Industries to "ensure" workers' compensation protections for health care workers and first responders. The directive instructs the Department to change its policies regarding coverage for these two groups and to "provide benefits to these workers during the time they're quarantined after being exposed to COVID-129 on the job." We expect other states to follow Washington's lead.

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