



Returning Township Employees to the Workplace **Frequently Asked Questions**

(Prepared by Fishel Downey Albrecht & Riepenhoff LLP)

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As Governor DeWine and Director Acton begin easing restrictions under the Stay at Home Order and off-site township employees begin to return to the workplace, Ohio townships face many new challenges. This document is intended to answer some of the most frequently asked questions related these challenges and offer some best practices based on current information.

While this document provides general guidance and answers to frequently asked questions, townships should consult with legal counsel and their human resources advisors before taking action.

1. When may a township return non-essential employees to the workplace?

Answer: Under the terms of Governor Mike DeWine's Responsible Restart Ohio Plan, and the Director's Stay Safe Ohio Order issued April 30, 2020, general office environments, construction, manufacturing, and distribution operations were able to reopen beginning May 4, 2020, as long as those offices/operations can meet mandatory safety requirements for customers and employees. Because many township employees who are considered non-essential ordinarily work in office environments, townships may require employees to return to work beginning May 4, 2020. However, to the extent a township operates any gyms, adult daycares, senior centers, or vocational rehabilitation service centers, these facilities must remain closed.

2. What are some best practices for making a workplace safe for returning employees?

Answer: There are several steps a township can take to prepare the workplace for returning employees, some of which townships may have already implemented. First, employers should require employees to conduct a daily self-assessment before coming into work. This can include self-temperature checks and requirements that employees not come to work if they are experiencing COVID-19 symptoms. In the Director's Order, employers are asked to require sick employees to stay home until they are free of fever (without the use of medication) for at least 72 hours (three full days) and symptoms have improved for at least 72 hours and at least seven days have passed since symptoms first began.

Employers may also stagger shifts and workdays or work hours to reduce the number of employees who interact with each other in the office each day, and can still require full or partial teleworking where appropriate.

Employers should require their employees to remain six feet apart wherever possible. This may include limiting the number of total employees and members of the public allowed in township facilities or buildings. If physical separation is not possible, employers should consider barriers

(such as plexiglass) to separate employees from each other or members of the public. Employers may also consider closing breakrooms or common areas to help prevent employees from congregating in these areas. Employers should consider requiring employees to obtain approval before scheduling meetings with members of the public or employees of another office, and should eliminate work travel.

Employers should implement daily cleaning policies to keep workspaces as hygienic as possible. This could include requiring employees to sanitize their workspaces on a daily basis, wiping down high-touch or high-traffic surfaces and shared office equipment (such as copiers, phones, staplers, hole punches, refrigerator handles, microwaves, etc.), and forbidding employees from using employer-owned kitchen utensils and coffee mugs.

3. Can a township require employees to wear masks?

Answer: Yes. In fact, under the Ohio Department of Health Director's Stay Safe Ohio Order issued April 30, 2020, employees must be required to wear masks by their employer while at work, except for one of the following reasons:

- a. Facial coverings in the work setting are prohibited by law or regulation;
- b. Facial coverings are in violation of documented industry standards;
- c. Facial coverings are not advisable for health reasons;
- d. Facial coverings are in violation of the business's documented safety policies;
- or
- e. There is a functional (practical) reason for an employee not to wear a facial covering in the workplace.

For example, where the facial covering would interfere with other personal protective equipment ("PPE"), the employer could allow the employee to remove the facial covering to utilize the PPE.

The township may require employees to utilize their own, or township provided, facial coverings.

4. Can employers exempt employees from wearing a mask?

Answer: Yes, but only in limited circumstances. Employees who have a medical condition that prevents them from wearing a mask can be exempted from the mask requirement as a reasonable accommodation under the Americans with Disabilities Act (ADA). As with any ADA issue, the employer is entitled to documentation supporting the underlying medical condition and must engage in the interactive process with the employee to determine if an accommodation can be made, which may or may not include an exemption from the mask requirement. Remember, employees are entitled to a reasonable accommodation under the circumstances, not necessarily their preferred accommodation. A reasonable accommodation may not work for every employee who claims a physical or mental impairment prevents them from wearing a mask. These situations must be considered on a case by case basis.

Employers may not allow employees to refrain from wearing a mask based on personal preference or because it is "uncomfortable". Once an employer begins to make exceptions, other than where

legally required, it will be difficult to enforce the policy. In addition, employers should remember the main reason to wear masks is to reduce the possibility of spreading COVID-19. While some employees may be uncomfortable wearing a mask, others may be uncomfortable if co-workers are not wearing a mask.

5. Can employers require employees to wear gloves?

Answer: Yes, although employers should recognize gloves must be used properly to be effective. For example, gloves should be changed frequently and are not a replacement for washing hands. Employers expecting employees to wear gloves should be prepared to provide the gloves. As with masks, employers need to address any ADA issues if an employee claims a medical condition preventing them from wearing gloves. Employers can simply permit employees to wear gloves if they so choose or require employees to wear gloves when they are performing certain tasks such as opening mail.

6. Can employers require customers and members of the public coming to their offices or facilities to wear masks?

Answer: Yes. Under the current Stay Safe Ohio Order, employers have the option to require or not require members of the public to wear masks. As with employees, a member of the public may have protection under the ADA if they have a physical or mental impairment that prevents them from wearing a mask. As a reminder, unlike employees, it is not mandatory for customers and members of the public to wear masks but an employer, including a township, may require this practice when in township facilities.

7. Can townships require employees to undergo a test to diagnose COVID-19?

Answer: Probably. The U.S. Equal Employment Opportunity Commission (EEOC) has issued guidance stating such tests do not violate the Americans with Disabilities Act. Of course, if the employer is requiring such testing, it needs to ensure employees have access to a COVID-19 test. Unlike private employers, townships must also be mindful of potential constitutional issues. The Fourth Amendment of the U.S. Constitution regulates the government's ability to conduct searches and seizures. Requiring a township employee to take a COVID-19 test likely implicates the Fourth Amendment. And while COVID-19 tests may not be a *per se* violation of the Fourth Amendment, townships should consult with legal counsel before imposing such a requirement.

An employer requiring COVID-19 testing of its employees must be aware of other potential issues. For example, it is possible an employee may have an ADA related reason why they cannot undergo such testing. Similarly, some employees may assert a religious reason why they do not want to be tested. In these instances, the appointing authority must work with the employee to determine if the reason for refusing the test is legitimate and whether there is a reasonable accommodation that can be applied. Again, in these scenarios, it is crucial for townships to consult with legal counsel.

8. Can townships require employees to undergo the antibody test for COVID-19?

Answer: At this point, townships probably cannot require employees to take the test for antibodies for COVID-19. The U.S. Equal Employment Opportunity Commission has not issued guidance indicating whether such a test is lawful as it has for the diagnostic test. Moreover, these tests require a blood draw which is more intrusive than the diagnostic tests and current antibody tests are not yet proven reliable. Under the ADA, a medical test must be required by business necessity. It is difficult to articulate a business necessity that would support this test at this point. Therefore, such tests could be a violation of the ADA. There are also potential Fourth Amendment concerns for blood tests under these circumstances. These tests could also potentially implicate the Genetic Information Non-Disclosure Act (GINA) which prohibits employers from obtaining certain genetic-related medical information about employees.

The answer to this question could change over time depending on technology and EEOC guidance. Due to the complexity of legal issues associated with this type of testing, townships should consult with legal counsel.

9. Can employers require a fitness for duty certification for employees returning to work following a physician's recommendation to self-quarantine?

Answer: Yes. Employers are permitted under the ADA to require such certifications. However, it may not be possible or prudent to do so given the capacity of hospitals, limitations of reaching physicians, and potential exposures by requiring employees to enter healthcare facilities. The EEOC suggests using alternative certification methods, such as using local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the virus.

10. Can employers require employees to complete COVID-19 questionnaires prior to their return to work?

Answer: Yes. Employers can also ask if employees have travelled outside the state, if they have been in physical contact with someone who has been diagnosed with COVID-19, or if they have recently experienced any symptoms of COVID-19. Employers can also continue checking employee temperatures prior to starting work each day. All of this information must be treated as a confidential medical record and stored appropriately.

However, employers generally may not ask an employee if they have any underlying conditions, such as a compromised immune system or a chronic health condition, that puts them at higher-risk of COVID-19.

11. How should employers treat employees with certain underlying medical conditions or who are 65 years old or older?

Answer: It appears to be a scientific fact that individuals with certain underlying medical conditions or those who are 65 and older may be more susceptible to COVID-19. As a result, townships should be prepared to excuse employees in these categories from work at this point if so requested.

However, Townships should not *prohibit* employees who fall within these categories from working, unless they are experiencing symptoms. Instead, these employees should be treated the same as other employees unless they raise concerns about working for one of these reasons.

Employees who claim an underlying medical condition can be required to provide documentation of the condition. An employer can offer or even require telework to these employees if feasible. Telework is not necessarily mandated and should be considered on a case by case basis. Also, employees in this category who cannot work or telework should be permitted to use applicable leave. For employees with an underlying medical condition, the time off work may be designated as FMLA leave as well if the condition qualifies as a serious health condition under the FMLA.

12. What happens if an otherwise healthy employee under 65 years old does not want to work?

Answer: Generally, healthy employees under the age of 65 can be required and expected to work. An employer is under no obligation to allow employees to stay home because they have generalized concerns about COVID-19 that are not based on age or medical factors. There are laws that do protect employees who refuse to work because they reasonably believe they are in imminent danger, as opposed to a generalized fear of contracting an illness. If a healthy employee refuses to work, it is a best practice for an employer to discuss the employee's concerns with them, which may resolve the situation. If not, an employer is not required to allow an employee to take leave under these circumstances and can order an employee to return to work. Employers should be careful in excusing employees from work in this situation because it will be difficult to deny requests from other employees to be excused. An employee who is ordered to return but fails to do so may be subject to discipline, up to and including termination. Public employers should be mindful of due process considerations and should consult with legal counsel before implementing discipline.

13. If a COVID-19 vaccine becomes available, can an employer compel employees to take the vaccine regardless of the employees sincerely held religious beliefs?

Answer: No, although there is not yet a COVID-19 vaccine, if a vaccine becomes available employers likely cannot force employees to take the vaccine over the employees sincerely held religious beliefs.

14. How should I treat employees who leaves the state on vacation leave?

Answer: Under the Director's April 30, 2020 Stay Safe Ohio order, out of state travel is not prohibited. The order states that it is advisable that, upon return to the state, individuals self-quarantine for 14 days. Based on this order, employers may, but are not mandated, to require employees to stay away from work upon return to the state.

An employer who intends to require employees to stay at home for 14 days after returning from out of state should have a policy informing employees of this expectation. When an employee requests vacation leave, the employer may ask the employee of their intended destination and should remind employees of this requirement. Employees can be required to use vacation leave,

personal leave or comp time during this quarantine period, and in some circumstances may be placed on leave without pay. Absent an actual illness, this time likely would not qualify for sick leave or FMLA leave.

15. Is a township required to offer telework to its employees?

Answer: No. Many employers have offered telework to allow employees to continue working during the stay at home part of the pandemic. Even with the April 30, 2020 order, many employers are continuing to require/allow telework. The decision to permit employees to telework is almost exclusively at the discretion of the employer and is not required. Telework only should be offered if it is feasible and productive. Employers can offer partial telework which can include some time in the office as employees transition back to work. This alternative can be a way to minimize contact among employees.

Employers should consult with legal counsel if telework is being requested by an employee as a reasonable accommodation under the ADA.

16. What are teleworking best practices for townships?

Answer: Historically, teleworking has not been common with townships. If a township chooses to offer teleworking, it is important to implement and enforce telework policies to ensure maximum efficiency among employees and reduce potential liability. Teleworking policies should include elements such as:

- A requirement that the work area be suitable for a productive workday
- A definition of the expected workdays and work hours;
- A requirement for non-exempt employees to properly record their work hours;
- A prohibition against off the clock work;
- A requirement that employees who must use internet-based communication are responsible for providing and maintaining it;
- A requirement for employees to protect and preserve confidential township information while teleworking;
- A statement that teleworking assignments do not change the basic terms and conditions of employment;

17. What if an employee complains about safety concerns with coming to work?

Answer: A township must respond to allegations of unsafe working conditions. The employer's response depends on how and when an employee makes a complaint. First, many collective bargaining agreements include provisions about health and safety. Townships should check their collective bargaining agreements for specific language about workplace safety complaints and their obligations to respond.

Second, employees can report alleged safety violations pursuant to R.C. §4113.52. Under this whistleblower statute, if an employee becomes aware in the course of the employee's employment of a violation of any state or federal statute or any ordinance or regulation of a political subdivision

that the employee's employer has authority to correct, and the employee reasonably believes that the violation is a criminal offense that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety, a felony, or an improper solicitation for a contribution, the employee orally shall notify the employee's supervisor or other responsible officer of the employee's employer of the violation and subsequently shall file with that supervisor or officer a written report that provides sufficient detail to identify and describe the violation. Employers cannot retaliate against employees reporting a violation in good faith under R.C. §4113.52. Employees claiming unlawful retaliation can file a lawsuit within 180 days of the alleged violation.

In any of these situations, an employer should investigate the allegation as soon as possible. Some investigations may be lengthy and others can be accomplished more quickly. Employers should keep employees apprised of the investigation and let them know the outcome.

18. What role does the Union have regarding return to work issues?

Answer: Under Ohio law, a public employer has the duty to bargain with the union over topics that affect wages, hours or terms and conditions of employment. This is a very broad standard. Townships should remember, however, this standard only requires an employer to bargain in good faith. Depending on the circumstances, it does not necessarily mean the parties must reach an agreement. In general, the employer should inform the union of changes being made to wages, hours or terms and conditions of employment in response to the COVID-19 pandemic. Some common issues include work hours, schedules, overtime approval or denial of leave and aspects of teleworking. Issues relating to layoffs also may present bargaining obligations.

In general, employers should have a plan for how they intend to address any potential changes in terms and conditions affecting bargaining unit employees. Townships should communicate those potential changes to the union and, if requested by the union, engage in good faith bargaining about the changes with the union.

19. What are best practices for bargaining in a time of economic uncertainty?

Answer: There is no right or wrong way to bargain for a successor collective bargaining agreement when money is a problem. In the current environment, public employers might consider the following:

- Don't claim a lack of funds unless the appointing authority is experiencing or expecting a lack of funds. The economic impact from COVID-19 may be uneven and impact different public employers and regions in different ways.
- Share economic information with the union and employees.
- Consider withdrawing any current proposals in order to modify them to reflect changing circumstances related to COVID-19.

Employers should also remember that they have certain emergency powers during the pandemic. In *SERB v. Toledo City Sch. Dist. Bd. of Edn.*, Case No. 2000-ULP-05-0274, the State Employment Relations Board held that a party cannot modify an existing collective bargaining agreement

without the negotiation by and agreement of both parties unless immediate action is required due to: (1) exigent circumstances that were unforeseen at the time of negotiations; or (2) legislative action taken by a higher-level legislative body after the agreement became effective that requires a change to conform to the statute. This standard can be difficult to apply and townships should consult with legal counsel before taking any action affecting wages, hours or terms and conditions of employment.

20. Can a township allow more than 10 individuals into a meeting/hearing room for a public meeting?

Answer: No. As of the date of this document, the Director's Stay Safe Ohio Order restricts gatherings of 10-or-more people, through at least May 29, 2020. However, House Bill 197 amended the Open Meetings Act and permits townships to hold meetings and hearings virtually under most situations, and with proper notice. A township need only provide access to the content of a public meeting, but the law still requires a public body holding a virtual public hearing to provide a way for the public to access the meeting, as well as for interested parties to provide input, review materials, and ask questions of witnesses. Townships should consult directly with legal counsel before holding a virtual public meeting or public hearing to ensure all requirements have been met.