

## ***CORONAVIRUS –FAQ’S FOR HUMAN RESOURCES AND MANAGERS***

*From your Jackson Lewis Madison Office Team*

### **WORKPLACE SAFETY**

#### **Can we ask an employee to stay home or leave work if they exhibit symptoms of the COVID-19 coronavirus or if they reside with someone who exhibits symptoms?**

Yes, if any employee presents themselves at work with a fever or difficulty in breathing, this indicates that they should seek medical evaluation. You are permitted to ask them to get tested for COVID-19, and ask them to share the results with you. The results of the test cannot be shared without the employee’s approval. Any test results must be filed in the employee’s confidential and limited-access medical file. You are also permitted to ask them to leave work. You can do this even if you do not have reliable medical information yet from a medical provider because the Americans with Disabilities Act (ADA) gives employer’s the right to make temporary changes in terms and conditions of employment (like sending a person home or sending them to receive medical care) for the purpose of obtaining more information so that the employer can assess the situation and its obligations. Though it is not required, it is advisable to consider placing the employee on paid leave while they are being tested. Advise supervisors on the importance of not overreacting to situations in the workplace potentially related to COVID-19 in order to prevent panic among the workforce.

#### **May employers bar asymptomatic employees from entering the workplace if a household member has traveled to designated WHO or CDC affected regions?**

Yes, given the close contact ordinarily experienced by household members, we believe employers usually would be justified in barring employees from entering the workplace in these circumstances.

#### **May employers require employees confirmed for COVID-19 infection to test negative for COVID-19 infection before they return to work?**

Yes, we anticipate such inquiries will satisfy ADA standards for disability-related inquiries or medical examinations, however, as a practical matter, testing capacity may be limited and employers may need to consider other reliable methods to certify that an individual does not have the pandemic virus.

#### **An employee of ours has tested positive for COVID-19. How do we handle those who worked closely with him?**

You should send home all employees who worked closely with that employee for a 14-day period of time to ensure the infection does not spread in the workplace. Employees should be encouraged to work from home assuming they are not ill. If working from home is not possible, you should discuss whether or not you wish to pay them during the 14-day period. You are NOT required to pay employees if they are not working, but many employers are currently deciding to pay employees for some or all of these periods as a gesture of care from the employer.

#### **Can an employee refuse to come to work because of fear of infection?**

It depends. Employees are only entitled to refuse to work if they believe they are in imminent danger. *See* section 13(a) OSHA. Most work conditions in the United States, however, do not meet the elements required for an employee to refuse to work. Once again, this guidance is general, so you should determine on a case-by-case basis whether it is permissible for employees to refuse to work. Employees who are pregnant, or who have respiratory problems or underlying health issues can be treated differently than other employees.

## **Would it matter if multiple employees expressed unwillingness to work due to safety concerns?**

It might. Such situations should be evaluated carefully to determine if the employees are engaged in protected concerted activity under the National Labor Relations Act (NLRA).

## **May employers require employees to wear masks while working?**

Absent contractual limitations including those in collective bargaining agreements, employers should generally be permitted to dictate the terms and conditions of at-will employees. The efficacy of wearing masks will depend on an employee's occupation and likely close contacts with individuals during the course of their employment. Social distancing practices may be equally, if not more, effective than masks for many positions. In some instances, employees may have difficulty wearing masks due to medical conditions and employers may need to consider excusing such a requirement as a reasonable accommodation under the Americans with Disabilities Act, absent a showing of direct threat or undue hardship.

## **May employers restrict employees from wearing masks while working?**

Absent contractual limitations including those in collective bargaining agreements, employers should generally be permitted to dictate the terms and conditions of at-will employees. Both OSHA and state laws, however, generally require that employers provide employees a safe workplace that is free from recognizable hazards. Some states have recognized common law wrongful discharge actions where employees have been discharged for refusing to work under conditions that pose a substantial risk of death, disease or serious physical harm and are not contemplated within the scope of the employee's duties. Employers should anticipate employee claims that a mask is necessary to allow them to work safely. While considerations may vary based on occupation, if employees do not have close contacts with individuals during the course of their employment, it appears wearing masks will be of limited value in preventing community transmission of COVID-19 infection.

## **TRAVEL**

### **What current travel restrictions are in place?**

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

### **May employers ask employees about geographic areas where they have traveled or intend to travel?**

Yes, absent a claim that an employee has a recognized privacy interest in their travel activities. Employers should take steps to reduce any reasonable expectation of privacy that employees might have in those activities. If an employer asks this question, it should ask it of all similarly-situated employees.

### **Can we prohibit an employee from traveling on their personal time?**

No, generally you cannot prohibit otherwise legal activity, such as travel abroad by an employee. However, you should educate employees before they engage in travel to risky environments about what we will do upon their return, and you can – and should – monitor the employees returning from such travel for signs of illness.

### **What should we do if an employee has recently traveled to an affected area or otherwise may have been exposed to the COVID-19 coronavirus, but has no symptoms?**

The ADA places restrictions on the inquiries that you can make into an employee's medical status. The ADA prohibits employers from making health-related inquiries and requiring medical examinations, unless: (1) the employer can show that the inquiry or exam is job-related and consistent with business necessity, or (2) where 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.

To satisfy these legal requirements, we suggest assessing whether a “direct threat” exists by requiring employees who have traveled to high-risk areas identified by CDC, or who are in a close personal relationship with someone who has, to provide you with further information about their situation before they return to the workplace. The ADA allows an employer to temporarily change an employee’s terms and conditions of employment (**such as temporarily prohibit them from returning to the workplace**) for the purpose of allowing the employer to obtain sufficient information to make a determination about whether the employee has a health condition that may be a disability and otherwise complete the employer’s duty to evaluate each employee’s medical situation on a case-by-case basis. There are no “one size fits all” rules under the ADA, so temporarily pausing on a return to work is allowed, legal, and may serve the short-term interests of both the employee and employer.

### **Can employees refuse to travel in the U.S. as part of their job duties?**

If employees refuse to travel for business for fear of catching the COVID-19 coronavirus, you should try to work out an amicable resolution. Is the travel essential? If not, you shouldn’t push it. Can the meeting or other event be conducted electronically/virtually? Can the manager or another member of the team sub in?

## **WAGE AND HOUR ISSUES**

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

Absent a contractual commitment to pay, including in an applicable collective bargaining agreement, under the Fair Labor Standards Act (FLSA), for the most part the answer is “no.” FLSA minimum-wage and overtime requirements for non-exempt employees attach to hours worked in a workweek, so employees who are not working are typically not entitled to the wages the FLSA requires.

However, you should 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 reputation and employee morale. You will have to decide.

### **Must we pay a Salaried, Exempt Employee if we close the business for less than a full workweek?**

Yes. If the employer closes the business for less than a full workweek, the employer must pay the employee’s full salary, though the employer could, depending on the employer’s leave policy, deduct PTO days.

### **If, on the other hand, the business is closed for a full workweek, do we have to pay the salaried, exempt employees for that week?**

No. If the business is closed for a full workweek, the employer does not need to pay the exempt employee for that week.

## **EMPLOYEE LEAVE/ADA**

### **Does 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, or the state law equivalent. Generally, employees are not entitled to take FMLA to stay at home to avoid getting sick; however any such requests should be reviewed by legal counsel.

## **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.

## **DISCRIMINATION/HARASSMENT/EEO ISSUES**

### **Do we have any EEO concerns related to the COVID-19 coronavirus?**

Employers cannot select employees for disparate treatment based on national origin. The CDC recently warned: “Do not show prejudice to people of Asian descent, because of fear of this new virus. Do not assume that someone of Asian descent is more likely to have COVID-19.”

You should closely monitor any concerns that employees of Asian descent are being subjected to disparate treatment or harassed in the workplace because of national origin. This may include employees avoiding other employees because of their national origin.

An employer may not base a decision to bar an employee from the workplace on the employee’s national origin. However, if an employee, regardless of their race or national origin, was recently in China and has symptoms of the COVID-19 coronavirus, you may have a legitimate reason to bar that employee from the workplace.

## **LABOR RELATIONS**

### **Do we need to bargain changes with a union in employment requirements?**

Yes if the employees are represented by a union. The NLRA imposes on employers the duty to bargain in good faith over mandatory subjects of bargaining such as wages, hours, and terms and conditions of employment. Generally speaking, employers who make unilateral changes to these facets of employment (like performing work in the employer’s workplace) may be subject to unfair labor practice charges that would apply even in emergency situations such as this one.

### **How much notice do I have to give the union before I make a change to my contract?**

The law requires employers to give the union “adequate” notice of a proposed change to the collective bargaining agreement, so as to engage in meaningful bargaining over that change on request. There is no hard and fast rule as to how much notice is adequate. But where an employer can show a need for a prompt change and time is of the essence, a notice period as short as a couple of days might be considered adequate under the circumstances.

## **VISITORS TO CAMPUSES**

### **May we bar visitors from entering our offices if they have travelled to designated WHO affected areas?**

Yes, as long as you act consistently based on travel activities and you do not say or do things to suggest you believe such visitors actually have a physical or mental impairment, such steps are not likely to violate federal, state or local public accommodation laws. You should guard against intentional discrimination claims that may be driven by activities stigmatizing or perceiving to stigmatize individuals of particular races or national origins.

**May we ask visitors to disclose the geographic areas where they have traveled before authorizing their entry to their premises?**

Yes, absent a claim that visitors have recognized privacy interests in their travel activities, businesses may ask them if they have traveled to areas of concern.

## **WORKERS COMP**

**If employees claim COVID-19 infections arose out of work-related contacts, are such claims covered by workers' compensation benefits?**

Workers compensation coverage will presumably be available in connection with workplace exposures that lead to infection and COVID-19 disease, but will depend on state law. This may provide some protection for employers concerned about potential liability and damages. However, where there is wide-spread community spread of the virus, it may be difficult if not impossible to prove that the exposure that lead to infection occurred at work.

**If employees claim COVID-19 infections arose out of work-related contacts and they spread the infection to family members, can family members file personal injury claims against the employer?**

It's possible these types of claims will be made against employers.

## **OSHA**

**Does OSHA mandate that employers take steps to safeguard employees from COVID-19 exposures?**

OSHA requires employers to provide employees with employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to such employees. If all appropriate steps are taken to protect an employee, then under OSHA, it would not be reasonable to believe there is risk of danger of death or serious injury such that an employee could refuse work. The key is ensuring training, engineering controls, administrative controls, and proper personal protective equipment.