

COVID-19/CORONAVIRUS – EMPLOYER CONCERNS AND QUESTIONS

The COVID-19/Coronavirus pandemic is fluid. Guidance is changing often as developments occur. We strongly recommend continued monitoring of credible information sources such as the:

Centers for Disease Control

<https://www.cdc.gov/coronavirus/2019-ncov/index.html>

Minnesota Department of Health

<https://www.health.state.mn.us/diseases/coronavirus/index.html>

There are a number of potentially applicable federal, state, and local laws and regulations that might apply to employment decisions and workplaces. While there is no one-size fits all answer for every scenario, below we've provided some guidance as to some common concerns and questions many employers and their employees may have.

Please note that the guidance sets out what restrictions or requirements might exist. Often, however, employers remain able to choose and shape what policies and practices they think are best for their organization given the circumstances and particular situations.

We welcome your inquiries to address specific questions, and will do our best to provide answers. Please remember that differing facts and situations may call for different answers, particularly as developments continue to change.

DISCRIMINATION CONCERNS

As with all employment matters, decisions should not be made upon race, color, national origin, and other protected classifications. Employers should be careful not to make decisions directly or indirectly based purely on national origin or race without evidence of illness or travel to country/area with confirmed COVID-19.

Employers should also take steps to minimize and prevent employees from engaging in talk to behavior that could be construed as discriminatory. Open communication and updates based upon the most recent guidance from the CDC and the Minnesota Department of Health will help minimize employee fear and limit risk.

MEDICAL CONCERNS

Can an employer require employees be tested for coronavirus?

No. Only health care providers can order a COVID-19 test.

Can an employer take employees' temperatures at work?

Under the current circumstances, doing so may now be allowed.

Generally, measuring an employee's body temperature is a medical examination, which would be prohibited under the ADA unless the need to do so is job-related and consistent with business necessity when the employer believes the employee will pose a "direct threat." A "direct threat" is a significant risk of substantial harm to the health or safety of the individual or others that can't be eliminated or reduced by a reasonable accommodation.

The Minnesota Department of Health has most recently recommended employer consider conducting regular health checks (e.g., temperature and respiratory symptom screening) of employees and visitors entering buildings where feasible. In our opinion, this recommendation from the Department of Health reduces the normal concern under the ADA to not conduct such examinations or screenings. The Department of Health's recommendation can be found at this link, under the "Workplaces" link for mitigation strategies:

<https://www.health.state.mn.us/diseases/coronavirus/action.html#work>

The EEOC has also provided guidance on this in the context of the coronavirus that can be found at:

https://www.eeoc.gov/facts/pandemic_flu.html.

Can an employer require an employee to get a return to work slip or release from a medical provider prior to returning to work?

Generally, yes, an employer can require an employee provide medical documentation before returning to work consistent with its current policies and procedures.

However, due to concerns about the burden the health system may face, the CDC has recommended all employers consider not require medical documentation as a temporary change to its policies and practices. Employers may consider a temporary change of its policies and procedures to help alleviate burden on the healthcare system.

Can an employer ask an employee if she or he has the coronavirus?

No. Employers can ask an employee how he or she is feeling in general, but should not inquire about a specific illness or condition due to the potential disability discrimination or perceived disability discrimination risks.

An employer *can* inquire if an employee has symptoms of acute respiratory illness, signs of a fever, or other symptoms that the CDC has noted.

What if an employee is exhibiting a fever, cough or other symptoms - can an employer send them home from work?

Yes, an employer may send that employee home, and direct them to stay at home until they are symptom-free. If it is determined that the employee has COVID-19, an employer can require the employee to stay away from the workplace for 14-days. If not COVID-19, employers should consider handling the illness as they would handle persons with the flu or similar illnesses.

If an employee refuses to be tested for COVID-19 and cannot identify a source of the illness, if they continue to exhibit symptoms and there is evidence of a potential direct threat, an employer can send that employee home, citing the need to provide a safe workplace.

WORK CONCERNS

If an employer has an employee with a confirmed exposure, can an employer require other employees to come to work?

Currently, yes, employers can generally require employees to work and address absences under your attendance policies. Consider potential ADA concerns and requests for accommodations. We recommend proactively considering alternative working arrangements such as working from home where possible, and other ways to maintain social distancing.

If an employee has to miss work, should it be unpaid?

In general an employer should follow its normal pay practices and policies.

The Fair Labor Standards Act requires exempt employees be paid their full week's salary when they perform any work in a week. If there are absences required by the employer during such a week, the exempt employee must still be paid his or her full week's salary. Therefore, while you may require the use of PTO if your policy allows for it, exempt employees must be fully paid even if he or she does not have PTO available.

Nonexempt employees need only be paid for actual hours worked unless employer policy and procedures, or collective bargaining agreements, are more generous.

Other considerations:

- If possible, work from home scenarios or social distancing may mitigate the loss of productivity and the loss of wages for employees.
- Consider employee morale and potential discrimination claims for singling out employees due to national origin.
- Consider ways to show appreciation for employee's picking up extra work for those who cannot work.
- For some employers, efforts such as continued regular wages for a period of time may be a viable option.

With any decisions, communication with your employees is key.

Please note that pay matters may be affected by federal legislation that is under consideration and likely to pass.

Does FMLA/sick leave apply when there are school/daycare closures?

If your organization is covered by the FMLA, it may be available to employees who contract COVID-19 or who have an immediate family member contract the virus who need the employees care. The same requirements for FMLA coverage (length of condition, etc.) apply to COVID-19. Your particular sick leave policy may be different and should be reviewed.

Some state and local sick leave laws may provide time off with job protection. Please consider any and all applicable laws. Please also consider collective bargaining/union agreements.

Generally these protections do not extend to healthy children who cannot go to school or daycare absent another agreement or contact. Employers should consider how they will address their employees in these situations. Federal assistance may be coming, but in the event it is not, consider how your employer will handle employees who need to stay home for child care in the context of your business needs and concerns.

PREGNANCY CONCERNS

According to the CDC, <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/pregnancy-faq.html>, it is not yet known if pregnant women have a greater chance of getting COVID-19 than the general public or have more adverse effects if they do contract COVID-19. It is unknown if COVID-19 would cause problems during or after the birth of a baby. The CDC recommends pregnant women take the same steps as the general public to avoid infection: cover your cough, avoid those who are sick, clean hands, etc.

Under the Minnesota Women’s Economic Security Act (WESA), pregnant employees are entitled to certain accommodations without the need to provide “proof,” such as more frequent restroom breaks/food/water breaks, seating arrangements, and limit of lifting more than 20 pounds:

<https://www.dli.mn.gov/business/employment-practices/womens-economic-security-act-faqs>

Under WESA, an employer must “actively engage with an employee to find other ways to accommodate her during her pregnancy, provided the accommodation does not pose any undue hardship.” The ADA and EEOC require similar steps.

Practically, if you are getting questions/concerns from pregnant employees, consider the following:

- Assure employees there are no present increased concerns for pregnant women.
- Consider that this may change and continue to monitor CDC, WHO, etc. for up to date information.
- Encourage the same safety steps (washing hands, etc.) be taken as all employees should be doing.
- If an additional accommodation request is made, engage in the interactive process and try to find a reasonable accommodation.
- Please note an employer cannot require a pregnant employee to accept any accommodation if she does not want it.
- Proactively consider options to accommodate pregnant employees (or other employees who may be at a higher risk) including work from home options, and provide alternative work spaces, increased ability to social distance, and increased opportunities to wash hands and the like.

ADA/PRIVACY CONSIDERATIONS

What if an employee tests positive for COVID-19?

An employer could, and should, inform your employees that a possible exposure has occurred, but try to do so without disclosing identifying information about the individual who may have tested positive. We realize those general admonitions might seem unwieldy under the circumstances, and as a practical level may seem superfluous given other pressing concerns, but it is an ADA requirement.

What if an employee requests to wear a mask or protective gear as an accommodation?

In general, an employer does not need to allow an employee to wear a mask. Different considerations should be given to healthcare workers and other employees whose contact

with the public and potential exposure to COVID-19 is different than that of the general public (OSHA has guidance on higher-risk jobs for employers), but generally the CDC has not recommended the public wear masks to protect themselves from COVID-19. If an employee is showing symptoms, a mask is an effective way to limit exposing others.

TRAVEL CONCERNS

What can an employer ask an employee about their travel or contact with persons who have traveled to areas affected by COVID-19?

An employer can create a plan to obtain information from employees. For example, you can ask employees where they traveled and whether they may have come in contact with a person who traveled to an affected area (please consider potential discrimination concerns – see above). You may also inquire about COVID-19 symptoms. Please refer to the CDC for current COVID-19 symptom lists or travel locations.

The ADA does contain prohibitions that might apply to these circumstances. For example, while an employer can ask an employee generally how he or she is doing or feeling, an employer should not inquire about a specific illness as they could rise to the level of a prohibited disability-related inquiry under the ADA. Even were an employer to learn that an employee may have tested positive for COVID-19 or another communicable disease, privacy rules under the ADA would restrict it from sharing that health information with other employees.

What if an employee traveled to a Level 3 Health Notice country – can an employer require them to stay home (and for how long)?

There are no laws that prohibit an employer from requiring an employee to remain away from the work site as a precaution. Employers have an obligation under OSHA to protect their workforce from known hazards – including communicable disease.

As of March 13, 2020, the following countries have Level 3 Travel Health Notices: China, Iran, South Korea, Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lichtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland, Monaco, San Marino, and Vatican City. Per the CDC, any persons traveling from these countries are to stay at home and practice social distancing. If an employer has an employee traveling from one of these affected countries, you can require them to stay out of work. The present guidelines recommend a 14-day incubation period.

Please continue to monitor the CDC website (www.cdc.gov) for any changes to this list and instructions on mandatory quarantines and consider potential ADA issues.

What if an employee did not travel to a Level 3 Health Notice Country, can I require them to stay home?

As outlined above, there are certain questions employers reasonably can ask an employee about their travel. Presently, there are not mandatory quarantine requirements for non-Level 3 Health Notice countries. However, there are increasingly areas of concerns outside these countries, and within the United States. If you are concerned about an employee's travel to a location with a known outbreak (such as Washington or certain parts of California), you may ask them certain questions about their travel.

Whether an employer can require these employees to stay home is not as clear. To analyze whether to keep an employee from the work place look to objective factors. What is the nature of the outbreak where the employee traveled from? Is there a reasonable risk employee came into contact with an infected person? The ADA indicates you can prevent an employee from coming to work if they would pose a "direct threat" to the health and safety of that person and others. Also consider the impact of whether an employee would be kept out of work on a paid or unpaid leave.

WORKERS' COMPENSATION CONCERNS

For related guidance and questions about workers' compensation concerns related to COVID-19, please see Lind Jensen Sullivan & Peterson's separate guidance:

<http://www.lindjensen.com/covid-19-and-workers-compensation-in-minnesota/>

If you have any employment or other questions regarding the ongoing COVID-19 pandemic as it relates to your employees, please do not hesitate to contact our employment team at Lind Jensen Sullivan & Peterson by email or phone (612) 333-3637.

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