

CORONAVIRUS WORKPLACE ALERT

March 9, 2020

We are getting more and more client questions about the Coronavirus, and the rights and responsibilities of employers. We thought it might be helpful to discuss some of the questions that might arise, and provide some general guidance. Like many employment law issues, the circumstances and facts may well dictate the response. Therefore, this is a general guide, and you may want to get legal advice when you encounter a tricky issue. Also, if you have employees employed under a collective bargaining agreement, you should see if the CBA applies.

1. May we require an employee who is exhibiting symptoms of Coronavirus to go home?

Yes. If an employee has symptoms of a respiratory illness, including fever, cough and shortness of breath (Coronavirus symptoms according to the CDC), you may send them home.

2. Can we ask an employee to stay home?

Yes. If the employee has the Coronavirus, then you want to make sure that they don't return to work until they are not infectious and we recommend that you rely on a qualified medical opinion that states that they are safe to return to work (see doctor's note questions below).

In the case of an employee who is out of work because of respiratory illness symptoms but does not have the Coronavirus, we recommend that you direct the employee to stay home until they are symptom free for at least 24 hours without the use of medicines.

3. Can we direct an employee to stay home because they have recently returned from a country where there is a significant outbreak of the Coronavirus?

Yes, depending on the countries. You will want to review information supplied by the CDC and the World Health Organization and other government agencies. This is a constantly evolving situation, and before making a decision make sure you have the latest information. To the extent the employee suffers no loss of pay through either telework or paid leave, this will clearly mitigate your legal risk.

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4. Can we ask all employees who have been out sick with symptoms of a respiratory illness for a doctor's note clearing them as safe to return to work?

We believe that this is the best practice. You have a general duty under OSHA to protect employees from hazards in the workplace.

There is a practical and legal issue with this requirement. If medical providers get overburdened, this could significantly delay an employee's return to work because of difficulties getting appointments. The legal issue is the argument that the employer is requiring an employee to have a medical examination subject to ADA limitations. A medical examination or a disability-related inquiry must be job-related and consistent with business necessity. A medical examination could be justified using the "direct threat" analysis under the ADA. Namely, the chance that the employee carries the virus would pose a direct threat to the health or safety of the workforce.

The EEOC has issued past guidance: (https://www.eeoc.gov/facts/pandemic_flu.html), Pandemic Preparedness in the Workplace and the Americans with Disabilities Act, in the event of a global health emergency (issued in 2009). Hopefully, the EEOC will issue new guidance, and address the direct threat issue in the context of the Coronavirus. Some employers may understandably want to opt for the safety first option, which would be requiring the doctor's note, and not wait for the new guidance from EEOC.

5. Can we ask employees who live with a person infected with the Coronavirus to stay home and get a doctor's note and/or be tested for the Coronavirus before a return to work?

Yes, it would be advisable to require the employee to stay home.

And yes, a note or a test could be required, subject to the same factors discussed in response to Question 4 above.

6. Could federal and Maine family medical leave apply?

Yes. Certainly Coronavirus would qualify as a serious health condition under the federal and Maine family medical leave laws. Other respiratory illnesses could also qualify for FMLA, depending on the duration of the illness.

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7. What are the pay obligations for an employee out of work for a quarantine period or on leave because they contracted Coronavirus?

An hourly non-exempt employee does not have to be paid for time missed from work, unless it's required by a collective bargaining agreement or policy. Certainly employees may use sick and other paid time off benefits. A salaried employee does not have to be paid if they miss an entire week of work. But if they miss a few days in the week, they should be paid for the whole week.

8. What are the confidentiality requirements for employees?

If you have an employee diagnosed with Coronavirus, or suspected to have the Coronavirus, you must maintain the confidentiality of their medical condition (just like other medical information). We view this as of critical importance, and you should drill this into your supervisors. Also, if the rumor mill starts cranking, you should act to stop it. Medical information must be kept in separate medical files, and not in a personnel file.

9. What is your responsibility to notify other employees if a co-worker has the Coronavirus?

If the infected co-worker could have exposed other employees to the Coronavirus, we recommend that you inform those employees of the possible exposure – while making every effort to protect confidentiality. Limiting the disclosure of information on a “need to know” basis is important. Given the competing legal risks, you may want to consult with counsel.

10. What if an employee refuses to work because of the fear of infection?

Tread carefully with these situations, and evaluate them on a case-by-case basis. Discuss the employee's concerns, and explore accommodations if necessary. You might need to provide reasonable accommodations, including a leave of absence if the employee's medical issues warrant such an accommodation.

In the case of a threatened walk-out by a larger group of employees, be aware of possible protected concerted activity, and it would be wise to consult with counsel before taking any disciplinary action.

Closing Comments

There are a myriad of practical and legal issues that may arise when dealing with this difficult and fast-moving issue. This Q&A is not intended as a substitute for legal advice and employers when faced with a tricky situation should obtain counsel. Like any sensitive personnel matter, the devil will lie in the details.