



Managing Illness in the Workplace

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The Novel Coronavirus (COVID-19) has been declared a public health emergency by the World Health Organization. It raises challenging issues for employers; from single-office companies to international businesses that employ a global workforce. Employers should be prepared by establishing protocol and guidelines in the event of a pandemic. The following are FAQs to assist employers.

MAINTAIN A SAFE WORKPLACE

CAN WE ASK AN EMPLOYEE TO GO HOME IF THEY APPEAR TO BE SICK?

- Yes, the employer may—and should—encourage the employee to go home if the employee is displaying symptoms of contagious illness, even if the employee does not want to be sent home. The CDC states that employees who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace, and the employer can advise the employee to do the same. Although the likelihood of your employee having COVID-19 is low, the employer should maintain safety first.

HOW LONG CAN WE ASK A SICK EMPLOYEE TO STAY HOME?

- Employers should recommend the employee to stay home and not go to work until the employee is free of: fever (100.4° F/37.8° C or greater), signs of a fever, and any symptoms for at least 24 hours, without the use of fever-reducing or other symptom-altering medication.

CAN WE ASK AN ASYMPTOMATIC EMPLOYEE WHO JUST RETURNED FROM A LEVEL 3 COUNTRY TO STAY HOME?

- The employer should consider telling the employee to self-quarantine and stay home for a 14-day period. The employee should be instructed to self-monitor for symptoms and to be evaluated by a health care provider if symptoms occur.

WHAT DO WE DO IF ONE OF OUR EMPLOYEES SELF-REPORTED THAT THEY CAME INTO CONTACT WITH SOMEONE WHO HAD A CONFIRMED (OR SUSPECTED, PENDING CONFIRMATION) CASE OF COVID-19?

- Send the employee home for a 14-day self-quarantine period, whether the employee has symptoms or not. Obtain a list of other employees that the self-reporting employee worked with closely. Without disclosing the identity of the self-reporting employee, the employer should inform the identified employees of the situation and recommend that they also self-quarantine themselves for a 14-day period out of precaution. Wipe down those employees' workspaces or hire a cleaning company to do so.

CAN AN ASYMPTOMATIC EMPLOYEE REFUSE TO COME TO WORK OUT OF FEAR OF INFECTION?

- Not likely, the employee can only refuse to go to work if they are in imminent danger—OSHA discusses imminent danger as where there is an immediate threat of death or serious physical harm, reasonable expectation that toxic substances or other health hazards are present, and exposure to them

will shorten life or cause substantial reduction in physical or mental efficiency.

CAN WE REFUSE TO ALLOW AN EMPLOYEE TO WEAR A MEDICAL MASK AT WORK?

- Yes, the World Health Organization stated that people only need to wear face masks if they are treating someone who is infected with COVID-19. Explain to your concerned employees that the best way to prevent risk of transmission is to wash their hands regularly, avoid touching their eyes, nose, and mouth, avoid contact with people who are sick, and clean and disinfect their workspaces regularly.

DO WE NEED TO DO ANYTHING SPECIAL RELATING TO TEMPORARY EMPLOYEES AND STAFFING AGENCIES?

- The CDC encourages employers to remain in communication with businesses that provide temporary or staffed employees to your workforce. These employees will often be governed by the staffing agency's policies. The employer should inform the staffing agency of the policies enacted for its own employees, and seek that the staffing agency follows suit with the staffed employees provided. It is likely not necessary to screen a staffed employee's recent travel, as any concerns or medical screening would have already occurred when the individual returned to the United States.

MANAGING LEAVE AND BENEFITS AND THE ADA

CAN WE ASK THE EMPLOYEE TO PROVIDE A HEALTH CARE PROVIDER'S NOTE TO VALIDATE THEIR ILLNESS OR RETURN TO WORK?

- Yes if that is the employer's practice, but the CDC has advised against requesting a note because health care provider offices and medical facilities may be extremely busy during this time and may not be able to provide such documentation in a timely way.

DO WE NEED TO CREATE SPECIAL POLICIES FOR OUR EMPLOYEES WITH CHILDCARE ISSUES?

- No, the employer is not required to enact special leave policies for employees with children, however, be prepared to institute a flexible workplace and leave policies for any employees that may require support. Consult with a member of our Employment and Labor practice group to review potential local or state laws which may provide for benefits.

DO WE NEED TO PAY EMPLOYEES WHO GO ON LEAVE DURING A QUARANTINE PERIOD?

- Maybe. Employers must proceed to pay employees subject to terms of an employment agreement or contract. In the absence of such an agreement, hourly employees are at-will and are not guaranteed wages or hours. Exempt employees do not have to be paid if they are sent home for an entire workweek, however, if exempt workers work for part of the workweek (i.e., they are only sent home for two days), then the employer would have to pay them for the entire week.

DOES THE FAMILY AND MEDICAL LEAVE ACT (FMLA) LEAVE APPLY FOR EMPLOYEES OR IMMEDIATE FAMILY MEMBERS WHO MAY CONTRACT COVID-19?

- Yes, assuming FMLA applies to the employer, COVID-19 would qualify as a serious health condition under FMLA, thereby allowing the employee to take FMLA leave if the employee or their immediate family member contracts the disease. State law may provide additional leave benefits—check with a member of our Employment and Labor practice group for more information.

WOULD THE EMPLOYER NEED TO PAY WORKERS' COMPENSATION FOR EMPLOYEES WHO CONTRACT COVID-19?

- Yes, if the employee contracted the disease in the course of their employment. If there is workers' compensation liability, employers are responsible for covering the costs of reasonable and necessary medical care, temporary total disability benefits, and permanent disability (if any). Check with a member of our Workers' Compensation practice group for more information.

WOULD THE EMPLOYER NEED TO PAY DISABILITY BENEFITS TO EMPLOYEES WHO CONTRACT COVID-19?

- Yes, if such payments are provided for in an employer's benefit plan.

DOES THE AMERICANS WITH DISABILITIES ACT (ADA) PROTECT AGAINST BIAS ON THE BASIS OF A POTENTIAL FUTURE DISABILITY THAT A HEALTH PERSON MAY EXPERIENCE LATER?

- No, the ADA protects against bias on the basis of a current, past or perceived disability, whether or not the individual actually has the perceived disability, but it does not protect against bias on the basis of a potential future disability.

CAN I ASK EMPLOYEES WHO HAVE JUST VISITED A LEVEL 3 COUNTRY TO UNDERGO A MEDICAL EXAMINATION?

- No, especially if they are asymptomatic. Medical examinations may be allowed only if the employer has reasonable belief based on objective evidence that: (1) the employee's ability to perform essential job functions will be impaired by medical condition; or (2) the employee will pose a direct threat due to medical condition.

WHAT IS A "DIRECT THREAT"?

- Equal Employment Opportunity Commission (EEOC) regulations identified four factors to consider if an employee posts a "direct threat": (1) duration of risk; (2) nature and severity of potential harm; (3) likelihood that potential harm will occur; and (4) imminence of potential harm.

DO WE NEED TO ACCOMMODATE EMPLOYEES WHO DO NOT WANT TO WORK WITH INDIVIDUALS WHO MAY HAVE RETURNED FROM A LEVEL 3 COUNTRY?

- Maybe, if there is objective evidence that the employee could potentially be exposed to risk of infection or if the employee is particularly at risk due to a pre-existing medical condition. Employees should not be disciplined for refusing to work if they believe there is a risk of infection because such a complaint may be a protected activity. If the employer can establish there is no basis for the employee's request for accommodation other than mere fear or paranoia, the employee does not have to be paid during the period.

MANAGING TRAVEL

WHAT ARE THE CURRENT TRAVEL RESTRICTIONS IN PLACE?

- China and Iran have been declared Level 3 countries. Foreign nationals who were physically present in the People's Republic of China (not Taiwan, Hong Kong, and Macau at this time) or Islamic Republic of Iran during the 14-day period preceding their entry or attempted entry into the United States is suspended entry into the United States. United States citizens, green card holders, and a long list of exempt categories of individuals are exempt from the Presidential Proclamation, however, if any of those exempt individuals has been in the Hubei province in China in the previous 14 days, they may be subject to a 14-day quarantine. South Korea and Italy have also been declared Level 3 countries. Japan has been declared a Level 2 country, and Hong Kong has been declared Level 1. At this time, entry of foreign nationals traveling from these destinations have not been suspended.

CAN AN EMPLOYEE REFUSE TO TRAVEL TO A LEVEL 3 COUNTRY FOR WORK?

- Yes, depending on the province or city of the Level 3 country, that is likely considered an immediate or imminent threat, in which case the employee can refuse to do so.

CAN WE RESTRICT AN EMPLOYEE'S PERSONAL TRAVEL?

- Generally no, but educate your employees who intend to travel of risky countries, and that upon their return from travel, to watch for signs of illness. Inform your employee that if they are traveling to a Level 3 country or other areas affected by COVID-19, that they may be asked to self-quarantine themselves for a 14-day period upon their return if the employee is exhibiting symptoms of illness.

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