



COVID-19 UPDATE FOR EMPLOYERS

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U.S. employers are in uncharted territory in the wake of the Coronavirus pandemic. The following is guidance for employers based on the information currently available. As the situation continues to evolve on a daily basis, our team will continue to keep you apprised of relevant developments. As always, please feel free to call us with additional questions.

Can we put employees on unpaid leave of absence?

No. When this article was first posted on March 17, the answer was yes, but that changed with the passage of the Families First Corona Virus Response Act, which became law on March 18 and will go into effect on April 2, 2020. For more information on the new law and the paid leave requirements associated with it, please see our updated entitled, "What the Families First Coronavirus Response Act Means to Your Business."

While Coronavirus-related leave must now be at least partially paid under various circumstances, employers in Texas can put employees on a mandatory leave of absence to ensure the safety and security of its workplace. Employers should be careful to use reasonable, non-discriminatory measures to determine who should be put on a mandatory leave. The Occupational Safety and Health Administration (OSHA) has published [guidelines](#) for employers to use to protect their workforce.

During the H1N1 pandemic, the Equal Employment Opportunity Commission (EEOC) stated that requiring workers to go home is not disability-related if the symptoms present are akin to the seasonal influenza or the H1N1 virus. Therefore, an employer may require workers to go home if they exhibit symptoms of the COVID-19 coronavirus or the flu. Employers may also consider implementing a mandatory quarantine policy for employees who have come in contact with an infected person or have recently traveled to severely impacted parts of the country or the world, such as Seattle, New York, Italy or China. The CDC has issued guidance suggesting the incubation period for the virus can be as long as 14 days so employers may choose to require a 14-day quarantine for employees returning from severely impacted areas. Employers should be careful not to rely on stereotypes or target specific groups by race, religion or national origin in determining who should go on leave.

Employers should also consider work from home possibilities to allow employees to continue working without risking the health of the workplace.

Can we ask employees for medical information?

It depends. The Americans With Disabilities Act (ADA) prohibits employers from requiring medical examinations and making disability-related inquiries unless: (1) the employer can show that the inquiry or exam is job-related and consistent with business necessity; or (2) 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. The EEOC's position during a pandemic is that employers should rely on the latest CDC and state or local public health assessments to determine whether the pandemic rises to the level of a "direct threat." Given that President Trump declared Coronavirus a "national emergency" on March 13, 2020, it is likely reasonable for employers to make health-related inquiries and/or take the temperature of a potentially ill employee. That being said, employers should limit the focus of the inquiry to determining whether the employee may have contracted Coronavirus and limit that information to the smallest number of people that "need to know" in the organization. Employers must protect the health information of employees, which would include any documentation related to Coronavirus to be housed in the employee's medical file separate from the standard employment file.

What if an employee tests positive for the virus?

1. Employees who test positive for the virus should be required to notify management as soon as possible. Employers should designate one person with management as the recipient of this information.
2. The employee should be sent home immediately and instructed to follow up with his or her primary care provider. The employer should not allow the employee to return to work until he or she is symptom-free for at least 14 days.
3. The identity of the infected employee must be kept confidential and shared only on a "need to know" basis.

4. Employers should ask the employee to re-trace his or her steps to identify all office areas and co-workers with which the employee interacted.
5. Extra measures should be taken to sanitize any areas of the office that the infected employee trafficked.
6. Without disclosing the identity of the infected employee, co-workers who may have had contact with the infected employee should be notified so that they can self-monitor their condition. The employer should also consider having those potentially infected co-workers self-quarantine at home for up to 14 days.

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

Only if the employee reasonably believes he or she is in imminent danger, which essentially means that he or she reasonably thinks that reporting to work would result in immediate death or serious physical harm. While asking an employee to travel certain parts of the world (i.e., China, Italy) may rise to this level, coming to work in the United States is unlikely to rise to this level based on the information available now. However, employers should remain sensitive to employee fear as we progress through the pandemic and try to work cooperatively with employees to keep everyone safe, calm and working.

Do short term disability or business interruption insurance cover this?

Employers should contact their short term disability carriers to inquire as to whether Coronavirus would be a covered illness under their policy. Often there is a one-week waiting requirement before benefits begin, so in some cases, the employee may not qualify if the mandatory leave is less than one week. Similarly, the employee would not qualify if he or she is asymptomatic but simply quarantined.

Unfortunately, most business interruption policies require some type of property damage for coverage to apply. But employers are encouraged to contact their insurance brokers or carriers to evaluate what coverage may be available.

What if my company is a nonsubscriber to workers' compensation insurance?

For Texas nonsubscribers to workers compensation employees testing positive for the virus are likely not covered under your work injury benefit plans. The benefit plans are designed to cover only those work injuries suffered in the "course and scope of employment." For that reason, the benefit plans only cover "occupational diseases" (those encountered exclusively in the workplace), not diseases the general population is exposed to. Even if an employee contends they were infected by a co-worker who was previously diagnosed, it is just as likely that employee was infected outside of work in the multitude manners in which the virus is transmitted in the community.

What should employers be doing?

- Plan – Develop an emergency response plan, which may include increasing employee ability to work from home in the event of a quarantine.

- Sanitation – Implement increased sanitation measures, which may include enhanced cleaning of commonly touched surfaces, providing hand sanitizer or gloves and posting signs that require frequent hand washing.
- Limit travel – For a limited period, consider restricting, or outright banning, travel by regional managers, salespeople and other employees who travel to other locations as part of their work routine. Instead, instruct them to conduct their work by phone or skype.
- Isolation Policy – Develop a policy on how to reasonably identify and isolate potentially infected employees in a non-discriminatory manner.
- Hotline – Larger employers may consider setting up a hotline so that employees can report they are experiencing symptoms and receive direction to a company-designated testing facility. Employers can likewise have payment set up with that facility as a benefit for their employees so the testing is free to the employee. As test kits are currently scarce, be advised that facilities are not obligated to test all people desiring a test, only those meeting the CDC testing criteria.
- **STAY CALM. Together, our communities and businesses will get through this.**

Related Practices

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