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COVID-19: EMPLOYEE EXPOSURE & EMPLOYER RESOURCE FAQ

The following post highlights employer FAQs related to employee exposure. A PDF of the below information can be found [here](#). For additional COVID-19 resources and risk management recommendations, please visit our [COVID-19 Risk Management Center](#).

1. What to do when an employee tests positive for COVID-19?

a. Advise the infected employee to stay home: An employee who reports that he/she has tested positive for COVID-19 should be instructed to stay home and follow the advice of healthcare providers and the local health department about the duration of home isolation. General guidance from the Centers for Disease Control (“CDC”) about when to discontinue home isolation can be found [here](#) and varies based on whether the employee was asymptomatic at the time of the positive test.

Beginning on April 1, 2020, if you are an employer with less than 500 employees, the infected employee would qualify for Emergency Paid Sick Leave under the [Families First COVID-19 Response Act](#) because either the employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 and/or the employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19. Employers should also keep in mind that state or local sick leave laws, as well as the PTO/leave policies found within the employer’s handbook, may affect an employee’s right to pay if they are out of work as a result of COVID-19.

b. Inform fellow employees: If an employee is confirmed to have a COVID-19 infection, the Centers for Disease Control (“CDC”) states that employers “should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (ADA).” It is recommended that you ask the infected employee which employees and customers he/she has had close contact with (6 feet or less) for at least 15 minutes during the 48 hours prior to the onset of symptoms or the two weeks prior for an employee with a positive test but no symptoms. In addition to informing fellow employees, customers should also be notified about the positive identification and possible exposure. We have prepared templates in [English](#) and [Spanish](#) to notify employees of a positive COVID-19 test.

c. Send home employees in close contact with infected employee: In order to prevent the further infection of other employees, it is recommended that all employees in close contact with the infected employee be sent home for 14 days even if they test negative during that 14 day period. (unless the employee is an essential worker, as defined by the CDC and/or your governor, in which case the person may continue to work following the potential exposure if certain precautions are taken. See [CDC’s new guidelines](#) for essential workers who have been exposed to COVID-19). When determining if someone worked “close to” the infected employee, determine if they worked within 6 feet of the infected employee for a prolonged period of time (i.e., 15 minutes or more). If the employee is not able to perform his/her job requirements remotely, there is no requirement that you continue to pay employees who are not working. The employee may elect to use any accrued vacation/PTO or there may be other applicable State or Local sick leave laws which may apply.

d. Clean/Disinfect areas used by infected employee: All areas used by

the infected person should be closed off until such area(s) are cleaned/disinfected. Wait as long as practical, 24 hours if possible, before you clean and disinfect to minimize the potential for exposure to respiratory droplets. Cleaning staff should clean and disinfect all areas used by the infected person, focusing on frequently touched surfaces such as doorknobs, keyboards, tables, phones, light switches, etc. For specific guidance on how to clean/disinfect your facilities, as well as direction on the Personal Protective Equipment (“PPE”) and hand hygiene recommended for the cleaning staff, please visit the CDC Website. ([Guidance for Cleaning and Disinfection](#)).

2. What do we do when one of our employees has a suspected or presumed, but not yet confirmed, case of COVID-19?

Treat the situation the same as if the suspected case were a confirmed case and follow all the precautions outlined above, including requesting potentially exposed employees to remain at home for at least 14 days.

3. Can we send an employee home who is exhibiting symptoms of COVID-19? If so, how will the employee be paid?

Yes, the CDC states that “employees who appear to have symptoms (i.e., fever, cough, or shortness of breath) upon arrival at work or who become sick during the day should immediately be separated from other employees, customers, and visitors and sent home.” Further, the Equal Employment Opportunity Commission (“EEOC”) has also confirmed that advising workers to go home is permissible and not considered disability-related if the employee exhibits symptoms which are consistent to COVID-19. Note that any records related to an employee’s illness or perceived illness should be kept in compliance with the ADA as a confidential medical record.

Beginning on April 1, 2020, if you are an employer with less than 500

employees, the employee will be eligible for Emergency Paid Sick Leave under the Families First COVID-19 Response Act. The Act states that an employee is eligible if he/she is “experiencing COVID-19 symptoms and seeking a medical diagnosis.” Employees qualifying for this reason will generally be paid at the employee’s regular rate of pay, capped at \$511 per day and \$5,110 in the aggregate.

4. Can an employee refuse to come to work because he/she is afraid of contracting the virus?

Probably not, unless work poses an “imminent danger” to the employee. The term “imminent danger” is defined by the Occupational Safety and Health Act as “...any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated” (i.e., before the Occupational Safety and Health Administration (“OSHA”) could investigate the problem).

For example, while asking healthcare staff treating COVID-19 patients to work without personal protective equipment may qualify as working conditions which places the employees in imminent or immediate danger, most places of employment would not meet this high standard.

One word of caution – before you take any employment action in response to a refusal to work, the National Labor Relations Act (“NLRA”) may provide protection for employees who band together in groups to contest what they claim are unsafe or hazardous working conditions. As such, you should consult with employment counsel before you take any disciplinary action, including discharge, for engaging in any organized effort with fellow employees.

For those employees who are refusing to come to work, assuming the business is following CDC/OSHA guidance for precautions, you may terminate the employee following the company's attendance guidelines. If the employees have a specific safety complaint, you should make sure to address the potential safety issue and determine whether the complaint is reasonable and in good faith. If the complaint is not in good faith, the employee may be terminated for violations of the attendance policy.

The employee may elect to take accrued vacation/PTO, but they would not qualify for Emergency Paid Sick Leave simply because they refuse to come to work because he/she is afraid of contracting the virus at work.

While the analysis does not change if an employee is in a higher risk class, you may want to work with the employee by suggesting that they use PTO/vacation or taking a leave of absence. If, however, the employee is otherwise disabled and requests an accommodation related to that disability, you would still be obligated to go through the interactive process under the ADA.

5. What happens when an employee has been ordered to quarantine based on exposure to person who tested positive?

Employees are eligible for Emergency Paid Sick Leave due to a need for leave because: (1) the employee is subject to a federal, state or local quarantine or isolation order related to COVID-19; (2) the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; and/or (3) the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis. Employees who are ordered to quarantine are eligible for Emergency Paid Sick Leave.

6. What do we do if an employee must remain home to take care of a



family member who is sick or be with their children as a result of school closures?

Employees are eligible for Emergency Paid Sick Leave due to a need for leave because: the employee is caring for an individual who is subject to an order or self-quarantine; the employee is caring for a son or daughter if school or child care is closed/unavailable; and/or the employee is experiencing “any other substantially similar condition” specified by the US Department of Health and Human Services. An employee eligible for paid sick leave for these reasons is eligible to be paid at two-thirds of their regular rate of pay, capped at \$200 per day and \$2,000 in aggregate.

The first ten (10) days of Emergency FMLA leave is unpaid, during which time the employee may elect to use any accrued but unused vacation, personal leave, or medical/sick leave, including Emergency Paid Sick Leave. So, the employee may elect to have the two weeks of unpaid leave under EFMLA run concurrent with the Emergency Paid Sick Leave or may elect to use other accrued PTO during that period.

After the initial ten (10) days of EFMLA, the company will provide EFMLA leave. Employees are eligible to be paid two-thirds of their regular rate of pay for the number of hours they would normally be scheduled to work, up to \$200 per day and \$10,000 total per eligible employee.

7. Can we require an employee to notify the company if they have symptoms which suggest they may have COVID-19, but no test was obtained to confirm?

Yes, the EEOC has issued guidance that permits employers to ask employees if they are experiencing symptoms of the pandemic virus. Employees should be instructed to notify his/her supervisor whenever the employee exhibits

symptoms which suggest the employee may be infected. The employee should be instructed to go home or remain home until: (1) they have had no fever for at least 72 hours without the use of medication; (2) other symptoms have improved; and (3) at least 10 days have passed since your symptoms first appeared.

8. What do we do if an employee reports that they have been exposed (outside the workplace) to someone who has tested positive?

If an employee reports that they have been exposed, outside the workplace, to someone who has tested positive, the employee should self-quarantine for at least 14 days if they were in close contact with the person. If the employee has been at work since being exposed, those who worked in close contact with the employee should also self-quarantine.

The CDC guidance indicates a person has low exposure risk by being in the same indoor environment as a person who has tested positive for a prolonged period of time if they were not in close contact with the person. If the employee was not in close contact with the person who tested positive, they may continue to work but should practice recommended social distancing.

9. What if an employee alleges he/she contracted COVID-19 while at work?

If an employee reports that he/she has tested positive for COVID-19 and that employee reports that he/she contracted COVID-19 while at work, you should immediately report the claim to your insurance carrier.

a. Will this claim be a compensable WC claim?

A standard Workers Compensation Policy includes coverage for “occupational disease”. If an employee can establish a direct connection to their workplace

as the source of the coronavirus infection, Workers Compensation coverage may be triggered. The burden of proof will typically be on the employee to establish that the occupational disease arose out of and in the course and scope of his/her employment. Most state laws suggest that if an employee can prove the specific source of infection was a workplace exposure, then the effects of the resulting disease are compensable.

It may be difficult, if not impossible, in most circumstances to establish how or when a person contracts a disease that can be spread person-to-person or is capable of community spread, such as COVID-19. However, depending on your industry, this burden of proof may be easier to meet. For example, it may be easier for medical staff working with persons infected with COVID-19 to demonstrate that they were exposed to the virus while at work, as opposed to a clerical worker at a manufacturing plant.

Several states have enacted legislation or issued executive orders to make it easier for some employees to prove a COVID-19 occupational disease claim. In most of these states, this legislation eliminates the burden of proof for those workers on the frontlines of the pandemic, such as first responders, health care workers, grocery store clerks, and other essential employees. On May 6th, 2020, California became the first state to create a rebuttable presumption of compensability for employees contracting COVID-19 which is not limited to emergency or frontline workers.

b. Will this be a recordable illness for purposes of OSHA Logs?

Under OSHA's recordkeeping requirements at 29 CFR Part 1904, covered employers must record certain work-related injuries and illnesses on their OSHA 300 log. However, employers are only responsible for recording cases of COVID-19 if all of the following are met:

- i. The case is a confirmed case of COVID-19 (see CDC information on persons under investigation and presumptive positive and laboratory-confirmed cases of COVID-19);
- ii. The case is work-related, as defined by 29 CFR 1904.5; and
- iii. The case involves one or more of the general recording criteria set forth in 29 CFR 1904.7 (e.g. medical treatment beyond first-aid, days away from work).

On May 19, 2020, OSHA released [updated guidance](#), which provides that all employers must now make work-relatedness determinations for COVID-19 infections pursuant to 29 CFR § 1904 (updating its previous guidance issued on April 10, 2020, which required only employers of workers in the healthcare industry, emergency response organizations and correctional institutions to make such work-related determinations).

If an employee reports a positive COVID-19 test, an employer will need to assess whether the infection was “work-related” and whether it meets the additional criteria for a recordable injury (e.g. an injury that results in a fatality, days away from work, restricted duty or medical treatment beyond first aid).

Under the OSHA Recordkeeping Rule, “an injury or illness must be considered work-related if an event or exposure in the work environment caused or contributed to the injury or illness or significantly aggravated a pre-existing injury or illness.” With respect to COVID-19 infections, analyzing the nature of the environment the infected employee was working in the weeks leading up to the infection will be important in determining whether the illness is work-related. The issue of whether this infection is work-related is very case specific.



To assist OSHA's Compliance Safety and Health Officers charged with enforcing OSHA's Recordkeeping Rule, OSHA provided the following (non-exclusive list) of the types of evidence that may weigh in favor of or against work-relatedness of COVID-19 infections:

- i. COVID-19 illnesses are likely work-related when several cases develop among workers who work closely together and there is no alternative explanation.
- ii. An employee's COVID-19 illness is likely work-related if it is contracted shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case of COVID-19 and there is no alternative explanation.
- iii. An employee's COVID-19 illness is likely work-related if his job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation.
- iv. An employee's COVID-19 illness is likely not work-related if she is the only worker to contract COVID-19 in her vicinity and her job duties do not include having frequent contact with the general public, regardless of the rate of community spread.
- v. An employee's COVID-19 illness is likely not work-related if he, outside the workplace, closely and frequently associates with someone (e.g., a family member, significant other, or close friend) who (1) has COVID-19; (2) is not a coworker, and (3) exposes the employee during the period in which the individual is likely infectious.
- vi. CSHOs should give due weight to any evidence of causation, pertaining to the employee illness, at issue provided by medical

providers, public health authorities, or the employee herself.

If, after the reasonable and good faith inquiry, the employer cannot determine whether it is more likely than not that exposure in the workplace played a causal role with respect to a particular case of COVID-19, the employer does not need to record that COVID-19 illness. In all events, it is important as a matter of worker health and safety, as well as public health, for an employer to examine COVID-19 cases among workers and respond appropriately to protect workers, regardless of whether a case is ultimately determined to be work-related.

On March 9, 2020, OSHA released guidance to help employers prepare their workplaces for an outbreak of COVID-19 that includes such recommendations as developing an infectious disease preparedness and response plan, implementing basic infection prevention measures and developing policies for the identification and isolation of symptomatic workers. For your reference, a copy of this guidance can be found [here](#). Please contact your Safety Services Consultant for additional details about your OSHA reporting obligations and workplace conditions related to the COVID-19 pandemic.

10. What can we do to protect our employees from exposure at the workplace? Should we be scanning employees daily for a temperature and asking if they have any symptoms?

On March 19, 2020, the Equal Employment Opportunity Commission (EEOC) issued updated guidance specific to COVID-19 and the Americans with Disabilities Act (ADA). The EEOC confirmed that measuring employees' body temperatures is permissible given the current circumstances with COVID-19 and its classification as a "direct threat" by the Centers for Disease Control and Prevention (CDC). While the ADA places restrictions on the inquiries that an employer can make into an employee's medical status, and the EEOC

considers taking an employee's temperature to be a "medical examination" under the ADA, the federal agency recognizes the need for this action because the CDC and state/local health authorities have acknowledged community spread of COVID-19.

Note: Employers should verify that state (e.g. California Consumer Privacy Act) requirements regarding the collection of body temperature are not more stringent than federal requirements.

Symptom ([CDC - Watch for Symptoms](#)) and temperature checks have been required by some regulators for settings such as nursing homes and hospitals. Other industries have required employers to conduct symptom and temperature checks when an employee is suspected to have COVID-19 or was confirmed to be COVID-19 positive and was in close contact with co-workers in the two days prior to the onset of the employee's symptoms. Check your specific state Departments of Health for symptom and temperature screening.

As an added measure of infection control, employees should be encouraged to self-monitor their own temperature at home prior to coming to work and stay home if they have a fever of 100.4 °F or greater.

Note: Close contact is defined by CDC as being less than 6 feet of the person for a prolonged period of time (15 minutes or greater).

11. What if our operations were ordered to close by State or Local Government?

If your operations were closed pursuant to an Order issued by your state or local government, you should cease operations unless a waiver is obtained to provide an exemption for your work or until the Order is lifted by the government or otherwise expires. Furloughed or terminated employees affected by the closing of your operations can file for unemployment benefits.

Many states have waived the applicable waiting period for those persons seeking unemployment benefits as a result of the COVID-19 pandemic.

12. Do we have an obligation to provide notification under the WARN Act if we need to furlough or lay off employees as a result of the economic fallout from the coronavirus?

Yes, if your company is covered by the Worker Adjustment and Retraining Notification (WARN) Act. The federal WARN Act imposes a notice obligation on covered employers (those with 100 or more full-time employees) who implement a “plant closing” or “mass layoff” in certain situations, even when they are forced to do so for economic reasons. It is important to keep in mind that these quoted terms are defined under WARN’s regulations, and that they are not intended to cover every single layoff or plant closing.

Generally speaking, employers must provide at least 60 calendar days of notice prior to any covered plant closing or mass layoff — which can be triggered if a layoff includes as few as 50 employees under federal law (potentially less under applicable state laws). Note, however, that if employees are laid off for less than six months, then they do not suffer an employment loss and, depending on the particular circumstances, notice may not be required. Unfortunately, in situations like this, it is hard to know how long the layoff will occur and notice cannot be provided retroactively, so providing notice is usually the best practice.

In cases where its notice requirements would otherwise apply, the WARN Act provides a specific exception when layoffs occur due to unforeseeable business circumstances or are the result of a natural disaster. These provisions may apply to the COVID-19 coronavirus. But due to the fact-specific analysis required, these exceptions are often litigated.



Moreover, these exceptions are limited, in that an employer relying upon it must still provide “as much notice as is practicable, and at that time shall give a brief statement of the basis for reducing the notification period.” In other words, once you are in a position to evaluate the immediate impact of the outbreak upon your workforce, you must then provide specific notice to “affected employees” (as well as unions and government entities, as discussed below) as soon as practicable. You must also provide a statement explaining the failure to provide more extensive notice, which in this case would obviously be tied to the unforeseeable nature of the outbreak and its aftermath.

The WARN Act has specific provisions requiring notice to employees, unions and certain government entities. The Act further specifies the specific information that must be contained in each notice. Even a seemingly minor deviation from these requirements can trigger a violation. Also keep in mind that some states have “mini-WARN” laws that may apply. Please work with your employment counsel to ensure compliant notices are provided.