

Coronavirus FAQs for Employers

06 March 2020

Coronavirus Resource Center

No. 1: Can I Force a Sick Employee to Stay Home? Go Home?

Yes. Employers are responsible for the health and safety of all of their employees. Employees with obvious symptoms of illness and disease, including all forms of the flu, should be encouraged to stay home or if they are at work when symptoms develop, to go home. Frequently, employees who wish to demonstrate their diligence and strong work ethic will try to “tough it out.” Allowing employees to do this only subjects the remaining workforce to added levels of exposure. Employers should speak with sick employees in private. Employees who insist on coming to work should be told that their effort is appreciated; however, the best interests of their co-workers and the business will be achieved if they recuperate away from the workplace. If, after such a dialogue, the employee continues to insist on being at work, employers do have the right to mandate sick employees to not come to work. Among other things, all employers have an obligation under the General Duty clause of the Occupational Health and Safety Act (“OSHA”) to maintain a healthy and safe workplace. (As with all good HR practices, insistence on an employee staying home should be approached in a consistent manner. The same rules for sending one sick employee home should apply to another ill employee unless there is some significant circumstance that dictates disparate treatment.)

No. 2: If I Force An Employee To Go Home Or Stay Home, Do I Have To Pay Them For The Time Away From Work?

Employees who are off work voluntarily or involuntarily due to the flu should be treated the same as any other employee who is off work due to a non-work-related illness or injury. A determination of whether that time off is paid or unpaid depends on a number of factors, such as their status under the Fair Labor Standards Act (“FLSA”) (exempt or non-exempt); a union contract; the length of the time off; the employer’s sick pay policies; the employee’s previous use of sick pay; and benefit plans, such as short-term disability. If an employer is not legally obligated to pay for such sick days, consideration can nevertheless be given to paying sick employees as an added incentive for them to stay home until they are no longer contagious. Also, see FAQ No. 12 below dealing with the Family and Medical Leave Act (“FMLA”).

No. 3: How Should Management Respond to the Employee Who is Fearful of Coming to Work or Traveling Out of Town?

An employer should first be sympathetic, and discuss the situation with the employee. The employer may explore whether a temporary suspension of travel for the job is a possibility or whether the duties and responsibilities associated with the position can be performed by telecommuting (from home). However, be

careful of initiating or approving home work arrangements as this may become a repeated request and one that becomes more and more difficult to approve due to on-site needs (the proverbial slippery slope of activity). Employees do not normally have a right to refuse to work.

Refusing to do a job because of potentially unsafe workplace conditions (such as exposure to Coronavirus) is not ordinarily an employee right under the OSHA or any other federal law. A union contract may provide for such rights, as may some state or local laws. Where such a refusal is permitted, it is only permitted when: (1) the employee reasonably believes that doing the work would put him/her in serious and immediate danger; (2) the employee has asked his/her employer to fix the hazard; (3) there is no time to call OSHA in order to report the condition/hazard; and (4) there is no other way to do the job safely. Employees are not protected for simply walking off the job – they must meet the criteria outlined above.

An employer can impose disciplinary action for refusing to work. However, employees may have the right to refuse to do a job if they believe in good faith that they are exposed to an imminent danger. “Good faith” means that even if an imminent danger is not found to exist, the worker had reasonable grounds to believe that it did exist.

No. 4: Can/Should I Require Employees to Have their Temperature Taken Upon Entering the Workplace?

Screening of all employees’ body temperature as they enter the workplace is likely to generate needless panic and would normally not be warranted. Employers should never force employees to submit to any form of invasive medical testing or evaluation against their will. (Besides being a poor general practice, such conduct likely violates the Americans with Disabilities Act (“ADA”)). There are normally other objective symptoms of Coronavirus that provide an employer with an adequate basis to take appropriate action to deal with sick employees. Employers should monitor advice on this issue from the US Centers for Disease Control and their state and local health departments. Thermal imaging devices can be purchased that allow quick and non-invasive sensing of body temperature. However, before implementing the use of such devices in the workplace, employers should obtain specific legal advice (as there may be a question of an invasion of privacy depending on the state and the local laws that apply).

No. 5: If an Employee is Coughing or Sneezing in the Workplace, Can I Require Their Temperature be Taken?

Employers who observe objective symptoms of Coronavirus or other illness in their employees should engage in an interactive dialogue with that employee, in private, to determine if the employee should be sent home. Employees should not be forced to have their temperature taken in the workplace. Rather, as discussed above, they should be encouraged to seek appropriate medical attention on their own. Employees who resist such efforts can be sent home until they are symptom free (see FAQ No. 1 above).

No. 6: Can/Should I Require Employees to be Tested for the Flu?

No. An employer may not mandate a medical test or examination; doing so likely constitutes a medical exam

or inquiry in violation of the ADA. Requiring a medical exam for Coronavirus is a decision to be made by the employee and his or her healthcare provider, not an employer.

No. 7: Can I Require an Employee to Visit His/Her Doctor to Check if they Have Coronavirus?

If an employee exhibits flu-like symptoms, an employer can recommend employees to seek medical care and require a physician's release before they are allowed to return to work. (See FAQ No. 5) In cases where an employee provides a full release to duty that seems contrary to objective indications of illness, the employer may require the employee to be examined by a physician of the employer's choosing and at the employer's cost before being allowed to return to work. Employers should not make inquiries about an employee's specific medical diagnosis like "Do you have Coronavirus?" Such inquiries, at least according to the EEOC, may violate the ADA (though whether Coronavirus is a disability is open to debate, especially since it is likely not a permanent condition) and patient privacy rights. Employers are entitled to know whether an employee is fit for duty and what limitations, if any, they have on their work activities. Answers to such legitimate questions, however, would not normally require the need to know the specific diagnosis.

No. 8: Can/Should I Require Employees to Receive a Flu Shot?

No. A flu shot is a medical treatment, and an employer may not mandate or require a specific medical treatment. See also FAQ No. 6 regarding medical exams. At the same time, however, an employer may offer, on a voluntary basis, a flu shot clinic and pay for flu shots for their employees. This is a common practice under many Wellness Programs implemented by employers.

No. 9: Should I Notify Employees If a Co-Worker has Been Diagnosed With Coronavirus?

Generally, no; however, there may be exceptions. Such a notification may be troubling for a number of reasons: (i) there is a risk of creating a panic among the workforce; (ii) as noted in other FAQ's, there are privacy rights at issue, and providing such a notice may violate the diagnosed employee's privacy; and (iii) there could be a risk of providing inaccurate or wrong information to employees (for example, if the alleged diagnosis was incorrect).

Healthcare providers who have diagnosed patients with Coronavirus are required to report that diagnosis to both national and state/local health agencies. It is not the employer's obligation to make such a report; and the employer should not undertake this responsibility. When a state or local health authority receives information about a contagious condition, they may direct the employer to take certain actions, including employee notifications, or they may come on-site to conduct confidential medical questioning or evaluations. These are all decisions that the public health authority should make, and not the employer.

If, however, an employer learns that one of its employees has been diagnosed with Coronavirus, and it has not been contacted by the local health authorities, it is generally a good idea for the employer to initiate contact with the health agency, advise them of the situation, and seek guidance as to employee communications or other steps the organization wants the employer to take. Acting at the direction of the health agency may insulate the employer from possible claims for breach of privacy that may otherwise

arise.

In certain rare circumstances, depending upon the employer's business or operations (such as a healthcare provider), it may be necessary to advise co-workers that have been exposed as to the possible exposure. Whenever such notification is provided, it should generally be done without providing the diagnosed individual's name. The notice should be simply that we have an unconfirmed (if this is true) diagnosis of Coronavirus in the work area, and all employees are reminded to vigilantly attend to those practices that are designed to prevent the spread of any contagions (see FAQ No. 15). Employees should be reminded of the common symptoms, asked to refrain from coming into work if they have any of the flu-like symptoms associated with Coronavirus, and advised to check with their own healthcare provider if they do have these symptoms.

No. 10: What Can I Do About Employees Who Insist On Wearing A Face Mask Or Respirator In The Workplace?

OSHA regulations apply to employers whether an employee is required or voluntarily seeks to wear a respirator in the workplace. The requirements under the regulations differ if the use is voluntary versus mandatory. Even when voluntary, employers must comply with the regulation on respirators, which includes a requirement to provide employees with a specific regulatory notice.

No. 11: Are There Requirements/Limitations?

When voluntary use alone is contemplated, an employer must still implement those elements of the written respiratory protection program (regulations) necessary to ensure that any employee using a respirator voluntarily is (i) medically able to use that respirator, and (ii) that the respirator is cleaned, stored, and maintained so its use does not present a health hazard to the employee. In addition, an employer must ensure that all employees receive the information contained in Appendix D of the Respiratory Regulations (Section 1910.134).

If the use of respirators is required – i.e., not voluntary – then, the employer MUST implement a Written Respiratory Program that includes provisions and procedures for (i) selection, (ii) medical evaluation, (iii) fit testing, (iv) training, (v) use, and (vi) care of the respirator.

If all that is being worn are surgical or dust masks, there are no specific requirements. However, neither surgical nor dust masks are sufficient to qualify as a respirator or to meet the requirements under the Respirator Regulations when they apply.

No. 12: Do I Have to Allow them to do so?

No. If respirator use is not required due to exposure to a hazard, then an employer is not required to permit voluntary use of respirators (or surgical/dust masks) in the workplace. As noted above, if an employer does permit voluntary use of respirators, compliance with the OSHA regulations with certain aspects of the respirator regulations are required. Where the wearing of a facemask or respirator is not warranted, an

employer should have a private discussion with the employee who insists on wearing one. The employee can be told that their unreasonable fear will likely cause needless concern among co-workers. Employers should approach these situations carefully and with sensitivity.

No. 13: Do I Have to Provide the Facemasks or Respirators?

If there is no hazard that requires the use of respirators, an employer is not required to provide the facemasks or respirators. If, however, there is exposure to a hazard that requires the use of a respirator, it is the employer's obligation to provide an appropriate respirator to all affected employees. An appropriate respirator is one that fits and meets the intended and required needs for protection. It is up to the employer whether to provide surgical/dust masks if it desires to do so.

No. 14: Can/Should I Require Respirators or Face Masks be Used in the Workplace?

Yes, it can be required IF the use of a respirator is required under the application of the OSHA regulations in order to protect against a hazard. However, doing so brings with it obligations of compliance. Where respirator use is required, an employer must have a written respiratory protection policy in place that meets all of the requirements of the OSHA Respirator Regulations. This includes training on appropriate respirator selection to meet the specific needs, medical evaluation before use is permitted, fit testing, training, use, and care instructions. Retraining is also necessary on a regular basis, and more frequently when the workplace environment or respirator chosen for use changes, or when other circumstances dictate such as where an employer learns of an employee's lack of comprehension of the policy/program through observation or otherwise).

No. 15 Does Coronavirus Qualify for FMLA Leave?

Generally, yes. If the employer is covered by the FMLA because it has 50 or more employees, or similar state or local laws, an employee suffering from Coronavirus could be eligible for FMLA if they have one year of service, worked 1250 hours in the prior year, work in a location that includes 50 employees within a seventy-five mile radius, and meet the definition of having a "serious health condition." That definition includes in pertinent part:

A period of incapacity lasting more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also includes: (i) treatment two or more times by or under the supervision of a health care provider (i.e., in-person visits, the first within 7 days and both within 30 days of the first day of incapacity); or, (ii) one treatment by a health care provider (i.e., an in-person visit within 7 days of the first day of incapacity) with a continuing regimen of treatment (e.g., prescription medication, physical therapy). See Department of Labor regulations on FMLA located at 29 CFR Chap. 825.

While FMLA is generally unpaid, employees can be required to use sick and vacation days as payment for those days off, so long as such a requirement does not conflict with any state law or collective bargaining agreement.

No. 16: If an Employee has a Sick Child with Flu-Like Symptoms, does FMLA Cover Any Absences Associated with the Employee Staying Home to Care for the Child?

Generally, yes. Assuming an employer is covered by FMLA and the employee has otherwise met the general eligibility requirements (see FAQ No. 15), an employee may be eligible for FMLA to stay home and care for a sick child if the child suffers from a “serious health condition.” Medical certification of the child’s serious health condition and the need for parental care is required. The medical certification provision that an employee is “needed to care for” a family member encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor. It also includes situations where the employee may be needed to substitute for others who normally care for the family member. This later scenario may arise in the case of a Coronavirus outbreak if a child’s regular caregiver becomes ill.

No. 17: Will Coronavirus Allow An Employee To Qualify For Short-Term Disability Benefits?

It depends. This is typically a matter of the employer’s short-term disability policy and its provisions. Most policies will define when benefits become available. Whether diagnosis with Coronavirus will meet that definition depends on the definition provisions in the policy itself.

No. 18: What are the Best/Common Infection Control Procedures Being Recommended Relative to the Prevention and Spread of Coronavirus?

The list is fairly obvious, but according to the US Center for Disease Control, as well as OSHA, the best procedures include the following:

- Employees should stay home if sick, especially if suffering from flu-like symptoms (fever of 100°F or higher, and cough, sore throat, runny or stuffy nose, body ache, headache, chills, unusual fatigue, diarrhea or vomiting)
- Wash hands frequently with soap and water for 20 seconds or with a hand sanitizer (that is at least 60% alcohol-based)
- Avoid touching nose, mouth and eyes
- Cover cough and sneezes with a tissue, or upper sleeve. Dispose of tissues in no-touch trash receptacles
- Wash hands or use hand sanitizers after coughing, sneezing, or blowing nose
- Avoid close contact with coworkers and customers (within 6 feet)
- Avoid shaking hands and always wash hands after physical contact
- Keep touched common surfaces (e.g., telephones, computer equipment, copiers, etc.) clean – use disinfecting sprays, if available
- Try not to use coworker’s phones, computer keyboards, etc.
- Minimize group meetings as much as possible (take advantage of web meetings, email, phone conferences)

- Ensure adequate room ventilation in meetings when you have in-person meetings
- Limit unnecessary visitors to the workplace
- Maintain a healthy lifestyle (attention to rest, diet, lots of fluids, and exercise)

No. 19: Can I Require Employees to Use Infection Control Procedures, Such as Covering their Mouths When they Cough or Sneeze, Washing Frequently, etc.?

Yes. There are no laws that prohibit employers from implementing such procedures, or a policy mandating their use. However, employers must be cognizant of employees that have disabilities that may require an accommodation to comply. For example, if an employee is allergic to alcohol-based, hand cleaning solutions, alternative solutions may have to be provided.

No. 20: Can I Discipline Employees for not Covering Their Mouths when Coughing/Sneezing or for Failing to Regularly Use Provided Hand Sanitizers?

Yes, assuming you have implemented an appropriate workplace policy/requirement. Employers should uniformly enforce their workplace policies and rules. If mandatory infection control practices have been implemented, then discipline may be applied if an employee refuses to adhere to the required practices. Obviously, an employer must avoid disparate treatment in the enforcement of its policies, and infection control rules are no different. In addition, an employer may be required to provide some forbearance from taking discipline if an employee's failure to adhere to certain infection control procedures is disability-related.

In Conclusion

There are many other questions and topics that can be covered in a FAQ that relate to an employer's attempts to address Coronavirus in the workplace. We have attempted to answer some of the more common of those Frequently Asked Questions. However, should you have other employee-relation Coronavirus questions, please call or email your regular labor and employment attorney. Also, please remember that collective bargaining agreements and specific state laws may have privacy rights or requirements that are applicable to the issues involving Coronavirus, and must be considered whenever action is taken.

It is expected that Coronavirus will become a much more prevalent and challenging occurrence. It is important to stay informed on developments and to regularly check with national, state and local public health service providers for new advice and counsel. One of the best resources for information on Coronavirus is the US Center for Disease Control. You can access this resource through the Center's web site where they have a specific Coronavirus page [found here](#).

Foley will continue to keep you apprised of relevant developments. [Click here](#) for Foley's Coronavirus Resource Center for insights and resources to support your business during this challenging time.

[Click here](#) for Part 2 of our Coronavirus FAQs for Employers series.

Coronavirus FAQs for Employers No. 2

09 March 2020

Coronavirus Resource Center

Foley & Lardner LLP's Labor & Employment Practice Group published twenty (20) FAQs with respect to employer-employee obligations and inquiries relative to the novel Coronavirus on Friday, February 28. This is our second installment to the Coronavirus FAQs. We will continue to publish additional FAQs based on inquiries from clients – sharing answers and best practices as this workplace challenge continues to develop.

No. 21: We recently received products that were shipped from one of the countries that the centers for disease control has designated "Level 3". My employees [or customers] are refusing to handle the product. What should I do?

There is still a lot about the COVID-19 virus that is unknown especially about how it spreads. However, based upon government information available as of March 9, 2020, it would appear there is a very low risk that the virus would survive on the surface of goods for the days or weeks it takes to ship products from one of the countries designated Level 2 or Level 3.

Under the Occupational Safety and Health Act ("OSHA") employees have a right to refuse to do work only when (1) the employee reasonably believes that doing the work or handling the product, would place the employee in serious and immediate danger; (2) the employee has asked the employer to fix that hazard; (3) there is insufficient time to report the alleged hazard to OSHA; and (4) there is no other way to handle the material. In a workplace where employees are represented by a union, the applicable collective bargaining agreement may also provide guidance as to how such disputes are resolved.

On a more practical level, if the employer can somehow sanitize the product or otherwise offer personal protection such as gloves, this may make any refusal to handle "unreasonable" under the circumstances.

Employers are cautioned against representing they know there is absolutely no risk of transmission from surface contact exposure. Instead, they should direct employees [customers] to the relevant portions of the CDC or WHO websites where these issues are addressed.

No. 22: In your first set of FAQs you advised respecting employee's privacy rights by not broadcasting to the workforce that a specific Employee has contracted COVID-19, been exposed to COVID-19, or has traveled to an area the CDC has designated a hotspot. However, the CDC website suggest we do tell all employees. Which is it?

Our earlier guidance was predicated on employee privacy rights that arise from a variety of state and federal anti-discrimination laws as well as the privacy laws. However, these are not normal times. What we now

suggest in the case where an employee who has contracted the virus or was been clearly exposed but is currently asymptomatic is to immediately contact your local public health agency and obtain their guidance as to who to tell and how to communicate it. It is likely they will want to take the lead in communicating the information that will then provide the employer with a modicum of protection against the claim of invasion of employee privacy rights.

No. 23: The above answer discusses employee privacy rights but you failed to say anything about HIPAA? Don't I have to respect employees' HIPAA privacy rights?

In our experience, there is a great misconception within the HR community that the type of employee health information an employer typically possess is protected by the HIPAA privacy rule. As explained below, in fact most employee health data held by an employer is not HIPAA protected. The HIPAA privacy rule only applies to "Covered Entities" which are defined by the regulations as 1) a health insurance plan; 2) a healthcare clearinghouse; and 3) a healthcare provider who transmits any health information in connection with a transaction related to the above (for example, a hospital submitting claim information to an insurance company). The rule also extends privacy rights only to "Protected Health Information" (PHI). The rule excludes from the definition of PHI, "individually identifiable health information ... and employment records held by a covered entity in a role as employer."

Given these definitions, most of the medical information obtained about an employee in the context of dealing with the Coronavirus outbreak will not be subject to the HIPAA Privacy Rule. Important Cautionary Note: An employer who self-insures its Group Medical insurance coverage will likely be subject to some aspect of the HIPAA Privacy Rule.

Nevertheless, just because HIPAA may not apply to the type of employee health information an employer possess, employers need to be cognizant of other employee privacy rights flowing from federal and state laws, and the general desire of most employees for privacy over their medical condition.

No. 24: Our HR department and/or ERP system is the repository of our employees' emergency contact information, which may or may not identify the relationship status of the emergency contact and the employee. We usually only provide the emergency contact information to managers on a need-to-know basis, but under the current circumstances, and the possible quick spread of COVID-19, should we expand access to employee emergency contact information to managers?

Generally no, but the answer will somewhat depend on state law. HR (and the ERP system) should be the repository of the contact information, not the manager. Employers should make it clear to employees that the information will be kept confidential, shared only on a need-to-know basis and used only in an emergency. The forms should be maintained in a confidential manner, but in a way that allows swift access when needed. If, however, an employee is sick or showing signs or symptoms of being infected, then yes, that individual's emergency contact information can be shared with a manager who needs to reach out to the contact. The relationship status for the purposes of an emergency contact in this case would be a permitted disclosure.

By the way, the emergency contact form should not require the employee to identify their relationship with the individual identified, but can (and should) ask if the company can discuss the employee's medical information with that individual. The employee can, however, voluntarily provide the relationship information.

As we noted above in a prior response, the CDC's guidelines provide that if an employee is confirmed to have COVID-19, the employer is to notify employees of their possible exposure to COVID-19 in the workplace. However, employers must maintain confidentiality and not identify the affected employee, as the ADA and state medical privacy laws generally prohibit employers from disclosing employees' confidential medical information to other employees (including managers), such as whether the individual has a communicable disease.

Instead, employers should consult local public health officials and, if advised to inform other employees, can inform potentially affected employees that an unidentified individual with whom they may have had recent contact has tested positive for COVID-19 and they should monitor themselves for the development of symptoms, including potentially seeking medical treatment. Alternatively, an employer may ask the affected employee whether it can share his or her name with other potentially impacted employees. A response to this request must be voluntary, but such a request is not generally advised except under very limited circumstances. You should seek legal counsel before disclosing any employee information to other employees.

No. 25: If an employee is quarantined while traveling on business and does not work, must I pay them?

There is no simple answer that will address every factual permutation that this question presents. The general rule is that if an employee is not working (or in the lingo of the Fair Labor Standards Act "being permitted or suffered to work"), then the employer does not have to pay the employee. Of course, an exempt employee who has worked any amount during the work week, should be paid his or her regular salary for the work week.

However, employees who contract diseases while in the course and scope of their employment are likely entitled to worker's compensation benefits. While workers' compensation laws are state specific, if workers' compensation is available, it will provide *partial* replacement for lost wages. The issue of course will be if the employee contracted the Coronavirus while on the job or did he or she contract the virus and bring it to the job? Under the latter scenario, it would be expected that workers' compensation benefits would not apply. Therefore, now would be a good time to review the details of your workers' compensation policy to determine what, if any, conditions triggered by Coronavirus may be covered. If there is no wage loss coverage through workers' compensation, employer flexibility will buy greater cooperation from employees and maintain positive morale during very trying circumstances.

Finally, employers should remember that if the employee is part of a bargaining unit subject to a collective bargaining agreement, the collective bargaining agreement may address these compensation issues and an

employer must comply with it or possibly be subject to a grievance for violation of the agreement.

Foley will continue to keep you apprised of relevant developments. [Click here](#) for Foley's Coronavirus Resource Center for insights and resources to support your business during this challenging time.