



Employer Preparation for Coronavirus (COVID-19)

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As the number of coronavirus (COVID-19) cases climbs in the U.S. and across the world employers should prepare for practical and legal issues brought on by the disease. While these efforts are complicated by the fact that, to date, much is still unknown about the transmission of COVID-19, government agencies have provided interim guidance to help employers and employees prevent infection.

Workplace Preventative Measures

The U.S. Centers for Disease Control and Prevention (CDC) have provided guidance to prevent workplace exposures to COVID-19 in non-healthcare settings. Employers should actively encourage sick employees to stay home. Employees with symptoms of acute respiratory illness should stay home and not come to work until they are free of fever, signs of fever, and any other symptoms for at least 24 hours, without the use of medicines to reduce fever or otherwise alter symptoms. This applies to contract or temporary employees, and the CDC suggests that employers discuss with providers the importance of sick workers staying home.

Within the workplace, the CDC recommends that employers separate employees who appear to have acute respiratory illness symptoms (such as coughing and shortness of breath) upon arrival to work or who become sick during the day from other employees. These separated employees should be sent home immediately, and sick employees should cover their noses and mouths with a tissue when coughing or sneezing. If an employee is confirmed to have COVID-19, employers should inform fellow employees of possible

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exposure to COVID-19 but maintain confidentiality as required by the Americans with Disabilities Act (“ADA”). Employers should suggest that employees exposed to a co-worker with confirmed COVID-19 refer to the CDC guidance to conduct a risk assessment of their potential exposure. Similarly, employees who are well but who have a family member at home sick with COVID-19 should notify the employer and should also check the CDC's guidance on risk assessment.

Employers should check the CDC's Traveler's Health Notice for the most up to date guidance and recommendations for each country to which employees will travel. Employers should advise employees to check themselves for symptoms of acute respiratory illness before starting travel and notify the employer and stay home if sick. Employees who become sick while traveling or on temporary assignment should notify the employer and promptly call a healthcare provider for any needed assistance. Employers may wish to suspend international travel that is not absolutely necessary to certain countries in CDC risk categories.

Employers should assess opportunities to clean the workplace and encourage proper employee hygiene. Specifically, employers should place posters encouraging proper cough and sneeze etiquette as well as hand hygiene at the entrance to the workplace and in other visible workplace areas. Employers should provide tissues and no-touch disposal receptacles for employee use, as well as soap and water and alcohol-based hand rubs in multiple locations or in conference rooms. Employers should routinely clean all frequently touched surfaces in the workplace, but the CDC does not recommend additional disinfection beyond routine cleaning at this time.

Even though information about COVID-19 is developing, the CDC encourages employers to prepare an Infectious Disease Outbreak Response Plan, which may include measures such as increase telecommuting, flexible work hours, staggered shifts, and altering business operations.

Notably, the CDC reminds employers to use its guidance only as described and warns against making determinations of risk based on race or national origin. This is a critical point for employers, as such discrimination is prohibited by federal and state employment law. Employers should also use discretion and maintain confidentiality of employees with confirmed cases of COVID-19.

Occupational Health and Safety

Similarly, the Occupational Safety and Health Administration (“OSHA”) summarized OSHA standards and directives potentially applicable to worker exposure to COVID-19. While there is no specific OSHA standard covering the disease, employers should be aware of two general OSHA standards that could apply to preventing occupational exposure to COVID-19.

OSHA's Personal Protective Equipment (PPE) standards require the use of gloves, eye and face protection, and respiratory protection for certain workers. When respirators are necessary to protect workers, employers must implement a comprehensive protection program in accordance with OSHA standards. Employers should review respiratory protection programs to ensure compliance and contact counsel with any questions.

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OSHA's General Duty Clause, Section 5(a)(1) of the OSH Act of 1970, requires employers to provide to workers "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." The General Duty Clause is broad enough that it may apply to COVID-19, depending on the workplace and spread of the disease.

Most importantly, employers should be aware that OSHA has deemed COVID-19 a **recordable illness** on OSHA 300 logs. This means that employers must record COVID-19 when a worker is infected on the job. Employers should also recall that Section 11(c) of the OSH Act prohibits retaliation against workers for raising concerns about safety and health conditions.

Employee Sick Leave

Employers should carefully review existing sick leave policies and any relevant state law to assess whether, and to what extent, employees may use sick leave to accommodate their own illness, a family member's illness, or even a COVID-19 quarantine period. Some states ensure paid sick leave for employees who remain home due to a public health emergency. Certain states require that employers allow employees to use accrued paid sick time without any supporting documentation, whereas others allow the employer to require certain forms of documentation. The CDC's recommendation is that employers not require a healthcare provider's note for employees who are sick with acute respiratory illness to validate their illness or to return to work, as healthcare provider offices may be extremely crowded and unable to provide documentation in a timely manner. The CDC further recommends that employers review existing sick leave policies to ensure flexibility and consistency with its public health guidance.

Depending on the severity of the illness and the duration of symptoms, employers should consider the availability of Family and Medical Leave, unpaid medical leave, or short-term disability if the employee qualifies. Finally, employers should note the potential for workers' compensation claims if employees prove that COVID-19 arises out of and in the course of employment.

Testing Employees for Fever and Other Symptoms

Employers should likely avoid testing employees for fever and other COVID-19 symptoms at this time. The ADA prohibits employee disability-related inquiries or medical examinations unless they are job-related and consistent with business necessity. Generally, inquiries or examinations are job-related and consistent with business necessity where the employer has a reasonable belief, based on objective evidence, that either the employee's ability to perform essential job functions will be impaired by a medical condition or that the employee poses a direct threat due to a medical condition. Direct threats are those that pose a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.

EEOC regulations identify four factors to consider when determining whether an employee poses a direct threat: 1) the duration of the risk; 2) the nature and severity of the potential harm; 3) the likelihood that potential harm will occur; and 4) the imminence of the potential harm. Whether COVID-19 rises to the level of a direct threat depends on the severity of the illness, and the EEOC instructs employers to rely on the CDC's severity determination.

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For example, when assessing pandemic influenza, the EEOC's guidance stated that if the CDC or state or local public health authorities determined that the illness was like seasonal influenza or the 2009 spring/summer H1N1 influenza, it would not pose a direct threat or justify disability-related inquiries and medical examinations. However, if the CDC or state or local health authorities determined that pandemic influenza was significantly more severe, it could pose a direct threat. The EEOC referenced this same guidance for employers preparing for COVID-19.

However, even without a test for fever or other symptoms, EEOC guidance is clear that employers should follow the CDC's recommendations of advising employees to go home or stay home when exhibiting certain symptoms.

Employers should monitor guidance from federal agencies as COVID-19 progresses for more information about how to limit risks of workplace exposure and to properly handle confirmed cases. Employers with questions regarding compliance and appropriate planning should contact the Burr & Forman attorney with whom they regularly work.

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