

Returning to the Workplace

The Centers for Disease Control and Prevention (“CDC”) maintains a website intended to address some of the issues concerning the return to work by employees. That website address is: <https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html>

What are the symptoms of COVID-19 infection?

According to the U. S. Department of Labor, Occupational Safety and Health Administration (“OSHA”): “Infection with SARS-CoV-2, the virus that causes COVID-19, can cause illness ranging from mild to severe and, in some cases, can be fatal. Symptoms typically include fever, cough, and shortness of breath. Some people infected with the virus have reported experiencing other non-respiratory symptoms. Other people, referred to as asymptomatic cases, have experienced no symptoms at all. According to the CDC, symptoms of COVID-19 may appear in as few as 2 days or as long as 14 days after exposure.”

How does COVID-19 infection spread?

According to OSHA: “The virus is thought to spread mainly from person-to-person, including:

- Between people who are in close contact with one another (within about 6 feet).
- Through respiratory droplets produced when an infected person coughs or sneezes. These droplets can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs.

It may be possible that a person can get COVID-19 by touching a surface or object that has SARS-CoV-2 on it and then touching their own mouth, nose, or possibly their eyes, but this is not thought to be the primary way the virus spreads. People are thought to be most contagious when they are most symptomatic (i.e., experiencing fever, cough, and/or shortness of breath). Some spread might be possible before people show symptoms; there have been reports of this type of asymptomatic transmission with this new coronavirus, but this is also not thought to be the main way the virus spreads. Although the United States has implemented public health measures to limit the spread of the virus, it is likely that some person-to-person transmission will continue to occur. The Centers for Disease Control and Prevention (“CDC”) website provides the latest information about COVID-19 transmission: www.cdc.gov/coronavirus/2019-ncov/about/transmission.html.”

Generally, when should an employee who has been exposed to COVID-19 infection return to work?

Obviously it will be very difficult for anyone to know with certainty if exposure to the virus has occurred. This is why social distancing is being emphasized in our country. A person who has been exposed to the virus can be “asymptomatic” in that the person has no symptoms and may not know he or she has been exposed. Such a person can nevertheless pass along the virus to others. According to the CDC, a person is most likely to be contagious when exhibiting symptoms. So, the best an employer can hope to do is to emphasize social distancing, follow the sanitation protocols recommended by the CDC and other public health authorities, and implore each of its employees to stay away from work if there is any reason to suspect the employee has been in contact with a victim of the virus and especially if the employee has any flu-like symptoms.

Generally, when should an employee who has been diagnosed with COVID-19 infection return to work?

How long someone is actively sick can vary, so the decision on when a person who has had the virus may return to work will vary. The decision involves considering specifics of each situation including disease severity, illness signs and symptoms, and results of laboratory testing for that person. Getting a release from a doctor might be a good idea, but in the current crisis our medical caregivers are stressed, making medical releases temporarily unrealistic. On July 20, 2020, the CDC changed its recommendations concerning the length of time that that employees should stay away from work and self-quarantine. For those recommendations, go to:

<https://www.cdc.gov/coronavirus/2019-ncov/hcp/disposition-in-home-patients.html>

Can an employer require employees to self-report regarding exposure to, symptoms of, or diagnosis of COVID-19 infection?

Yes, OSHA recommends that employers adopt policies and procedures for the prompt identification of employees who are sick or experiencing symptoms of COVID-19. According to OSHA: “Employers should inform and encourage employees to self-monitor for signs and symptoms of COVID-19 if they suspect possible exposure.”

Can an employer require employees to submit to testing for COVID-19?

Yes, if done properly and with planning. An employer may implement a screening process, such as taking each employee’s temperature, before employees enter the workplace. If the employer elects to do this, the following should be considered:

- Where the tests will be conducted?
- How they will be conducted (for example, can the employer secure sufficient thermometers that do not require physical contact)?
- How will the privacy of the employee be maintained (remembering HIPAA requirements)?
- Who will conduct the tests?
- Will all employees be tested every day, or will there be a gating or screening process to determine who will be tested?

- How will social distancing be enforced while employees wait to be screened and tested?
- How much time will the process take (this is particularly important for pay purposes for non-exempt employees)?
- Will screening and testing extend to contractors, customers, vendors, and visitors?
- On July 3, 2020, the Centers for Disease Control and Prevention issued additional testing guidance for employers not engaged in healthcare: <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/testing-non-healthcare-workplaces.html>
- On June 16, 2020, the EEOC added a new question to its publication, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws” (which can be found at: https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=) in which it states (at Q&A 7) the ADA does not allow employers to require *antibody* testing before allowing employees to re-enter the workplace. The EEOC distinguishes antibody testing from testing to determine if a person has an active case of COVID-19; the latter testing, per the EEOC, may be permissible under the ADA.

Can an employer require employees to return to the workplace following a period of temporarily working remotely in response to the COVID-19 pandemic?

Yes, an employer that implemented a remote working arrangement in response, directly or indirectly, to the requirements of local civil authority can end that arrangement. The employees may be required to resume their normal duties at their normal workplaces. Generally, an employee who refuses to resume normal duties at the normal workplace may be terminated.

Can an employer require employees to return to the workplace following a period of working less than full-time (half days or reduced hours, either as part of a work-sharing program or not) in response to the pandemic?

Yes, the employer’s returning to a full work schedule would end the employee’s right to benefits under a work-sharing arrangement with the local Employment Security Commission or equivalent State administrator of unemployment benefits. Generally, an employee who refuses to resume normal duties during normal hours may be terminated.

Can an employer require employees to return to the workplace following a furlough, layoff, or termination in response to the pandemic?

No, the status of an employee who has been furloughed, laid off, or terminated is such that the employer may offer reemployment, which offer the employee may accept or decline. If the employee accepts, then the administrative burdens normally associated with new hires may be avoided in some cases. Of course an offer of rehire may under State law be required to be communicated to the local Employment Security Commission or equivalent State administrator

of unemployment benefits, and an offer of reemployment would normally end the employee's right to unemployment compensation.

What should employers consider in the event an employee declines to return to work at the employee's normal workplace?

Generally, an employee who refuses to return to work can be terminated by the employer. There are, however, exceptions the employer should consider:

- What does the employer's normal leave (sick leave, vacation, or paid time off) policy allow? With various government agencies urging "flexibility" on the part of employers, employers should develop and implement a standard response to returning employees who request leave under a PTO or other policy. Employers may wish to consider temporarily suspending normal vacation and leave for reasons other than health or medical for a period of weeks or months to allow for recovery from the disruption caused by the COVID-19 pandemic.
- What are the employee's leave rights under current law? Under the Families First Act employees are entitled to paid leave for a variety of COVID-19 related reasons stated in that law. The law will continue in effect until December 31, 2020. The qualifying reasons for leave under the Families First Act are summarized by the U. S. Department of Labor at:
<https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave> .
- What are the employee's leave or accommodation rights under the Americans with Disabilities Act ("ADA") if the employee refuses to return to work due to the risk of COVID-19 infection? Under the ADA a fear of COVID-19 infection is generally not a covered disability, and the ADA does not grant an employee a general right to refuse work due to any disability (because that would mean the employee is refusing to perform the essential functions of the job). There may be situations in which the employee has some recognized disability that may need to be considered, however, and in that event the employer may need to grant accommodation to the employee; if such facts are encountered, the employer should engage in an interactive process with the employee to determine the proper course of conduct (and an experienced employment attorney should be consulted throughout the process). The Centers for Disease Control and Prevention has issued two recent notices regarding people who are at increased risk of contracting COVID-19 which employers should consider when an employee requests an accommodation.
 - One addresses people over the age of 60:
<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>.
 - The other addresses people of any age who have underlying medical conditions:
<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>.

How should an employer prepare the workplace for the return of employees?

Employers will need to adopt basic infection prevention measures and additional ones as may be appropriate for the specific workplace. For example, employers might:

- Promote frequent and thorough hand washing by providing employees and workplace visitors with a place to wash their hands. If soap and running water are not immediately available, the employer should provide alcohol-based hand sanitizers.
- Require employees to stay home if they are sick.
- Require companies that provide services and temporary staffing to keep their employees who are sick out of the employer's workplace.
- Encourage respiratory etiquette, including covering coughs and sneezes.
- Provide workplace visitors with tissues and trash receptacles.
- Discourage employees from using other employees' work spaces and equipment.
- Enhance housekeeping practices, including more frequent cleaning and disinfecting of surfaces, equipment, door handles, and other parts of the work environment.
- If the workplace is one that is normally deemed to be at higher risk for the spread of COVID-19 infection, such as a hospital, then provide adequate personal protective equipment (PPE) to appropriate employees.
- Limit the use of common and high-traffic areas in the workplace, such as cafeterias, breakrooms, conference rooms, and auditoriums.
- Limit face-to-face meetings and encouraging use of electronic communication.
- Minimize non-essential business travel and isolate employees following travel.

What about employees wearing facemasks? On June 10, 2020, the Occupational Safety and Health Administration (OSHA) released new guidance, in the form of frequently asked questions and answers, regarding the use of masks in the workplace: <https://www.osha.gov/SLTC/covid-19/covid-19-faq.html>. Beyond the OSHA guidance, the Centers for Disease Control and Prevention has recommended cloth face coverings for everyone: <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html>. While both OSHA and the CDC recommend masks, each employer has to determine whether or not to furnish masks to employees, and many employees will wish to bring their own masks to the

workplace. In addition, a growing number of State and local laws may require employees to wear masks in the workplace.

Can an employer require employees to submit to COVID-19 vaccinations?

Absent a clear government mandate to require vaccination, it will be more prudent for an employer not to require COVID-19 vaccinations as a condition of employment. Currently there is no guidance from the Federal Government, but in the case of other influenza outbreaks the general guidance from the EEOC has been that employers should educate about the benefits of a vaccine and then solicit voluntary vaccination. Under the Americans with Disabilities Act, if an employee has a health condition that reasonably prevents vaccination, then the employer cannot require it. There are also religious objections to vaccinations by some employees to consider. Concerning workplace safety, in 2009 OSHA took the position that an employer could require employees to take flu shots, while at the same time warning "... an employee who refuses vaccination because of a reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death (such as serious reaction to the vaccine) may be protected under Section 11(c) of the Occupational Safety and Health Act of 1970 pertaining to whistle blower rights." Go to: <https://www.osha.gov/laws-regs/standardinterpretations/2009-11-09>; in other words, there could be a cause of action against the employer for mandating vaccinations.

Are there immunity protections in place that protect employers and businesses?

Some States (including Louisiana, North Carolina, and Oklahoma) have enacted laws that seek to shield employers and business from liability related to COVID-19. The legislation is generally designed to protect employers and businesses from civil liability related to the spread of COVID-19, except in limited situations such as those involving the gross negligence or intentional misconduct of the employer or business. Governors in other States (including Arkansas and Mississippi) have issued Executive Orders that attempt to do the same thing.