



ALERTS

Coronavirus: An Employer Q&A

March 17, 2020

As of March 17, 49 states and the District of Columbia have reported cases of COVID-19 – a disease arising from the newly identified coronavirus.

The United States has banned travel from Europe, including the UK and Ireland for foreign nationals. U.S. citizens and foreigners with green cards may return from Europe, subject to quarantine.

The total number of cases reported in the United States remains relatively low compared to the overall population, but that number will continue to rise due to community spread and increased testing.

Here are some common questions being asked by employers.

Employer: Can I ban travel to affected locations?

Employers may ban any business-related travel to areas of high community spread. Employers should also strongly encourage their employees to avoid all nonessential travel to areas where coronavirus outbreaks are high, as the CDC has recommended. Employers with business involving travel to those areas should consider reasonable alternatives for their workforce, such as videoconferencing. As more countries and U.S. locations report cases of COVID-19, employers should recognize that assessments of elevated travel risks must remain dynamic.

Employers generally do not inquire into employees' lawful off-duty travel. Employers should consider advising employees about the risks associated with such travel and inform them of the consequences of undertaking such travel, including periods of quarantine (14 days is the current guidance) before being allowed to return to the workplace and apply any such practice on a non-discriminatory basis.

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Unionized employers should consider reviewing their applicable collective bargaining agreements to confirm their ability to unilaterally implement such a mandate, or discuss the issue with the employees' collective bargaining representative.

Employer: Can I force a sick employee to go home or stay home?

Under OSHA's "general duty" clause, employers are responsible for assessing the hazards in their workplace and taking appropriate steps to protect employees from those hazards. Given the current pandemic situation, employees with obvious symptoms of acute respiratory illness, including flu-like symptoms, may be required to stay at home or leave work and go home.

Employer: What should I tell other employees if we have a confirmed instance of an employee infected by coronavirus?

Employers will need to focus on their duty to protect the workforce, while not creating panic. An infected employee should not be identified due to medical privacy considerations, and confidential medical information about the employee should not be shared. However, the employer may inform the workforce that there has been a reported case of COVID-19, and identify steps being taken to address the issue, along with retraining on its infection control practices, including handwashing and sanitizing workplace areas.

Healthcare providers are required to notify federal, state and local health authorities of the diagnosis, and those authorities may provide additional guidance and requirements, including further notification, on-site medical questioning, or examinations. If an organization has not been contacted, the employer may initiate contact and seek further guidance.

Employer: If we have a furlough or temporary layoff due to coronavirus, are employees entitled to receive unemployment compensation?

Unemployment eligibility is determined by specific states under individualized statutory and regulatory frameworks. Eligibility generally turns on the reason for the unemployment period, as well as its duration, with funding provided by both the state and federal governments. On March 12, the [Department of Labor \(DOL\) issued new guidance](#) encouraging states to amend their unemployment laws to provide greater flexibility for unemployment arising from coronavirus. Federal law allows states to pay benefits where: 1) an employer temporarily ceases operations due to COVID-19, preventing employees from coming to work, 2) an individual is quarantined with the expectation of returning to work after the quarantine is over, and 3) an individual leaves employment due to a risk of exposure or infection or to care for a family member.

Federal law does not require an employee to resign employment in order to receive benefits due to the impact of COVID-19. In the event of a furlough or temporary layoff related to COVID-19, employers should encourage their employees to apply for unemployment benefits.

Employer: May I require employees to use paid-time off (PTO) for self-quarantine or in the event they are sent

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home due to illness?

An employer generally may require employees to use PTO so long as it is consistent with: 1) its policy provisions and application, 2) previous administration of the policy under the Family and Medical Leave Act (FMLA), and 3) for unionized employees, permitted by the PTO provisions of any applicable collective bargaining agreement. The policy should be applied consistently, and the employer should consider applicable state law and the potential employee relations implications of requiring use of PTO.

Please be mindful that the U.S. House of Representatives has passed an amendment to the FMLA to extend paid leave to employees impacted by COVID-19. As this legislation is working its way through Congress very quickly, it will likely will change how FMLA impacts all employers, not just those who have previously been subject to the FMLA.

Employer: May I require temperature screenings of employees and/or a return to work form from a physician for an employee returning from illness?

A temperature screening is likely to be considered a “medical examination” under the Americans with Disabilities Act (ADA). In order to conduct a medical examination for current employees, it must be job-related and consistent with business necessity, unless the employer can demonstrate an undue hardship. The Equal Employment Opportunity Commission (EEOC) has issued guidance that under the current pandemic, employers may measure employees' temperatures without violating the ADA. In connection, the EEOC notes some people with COVID-19 do not have a fever.

Employers who do implement screening additionally face potential an employee relations impact – legal questions may arise, such as whether any “waiting time” for such screening is de minimis or arguably compensable under the Fair Labor Standard Act and whether employees waiting together to be screened adds to potential exposure to the virus. A temperature screening would not eliminate all risk to the workforce, as some individuals will contract COVID-19 and not exhibit certain symptoms (e.g., elevated temperature). Employers should evaluate this issue carefully as it plans its pandemic response, and they should also be mindful of state laws since some states, such as California, do not recognize a de minimis exception.

Requiring a doctor's note certifying fitness to return to work is permissible if consistent with the employer's standard practices, but employers should be aware that such documentation may be delayed due to the high volume of patients being assessed by healthcare providers during this period, and the employee's return to work may be delayed.

Employer: May I ask an employee why they have been absent for work if I suspect it is due to a medical reason?

The EEOC specifically addressed this issue in its [Pandemic Preparedness guide](#) in 2009. Asking why an employee has not been at work is not a disability-related inquiry, and therefore, an employer may ask the reason(s) for the employee's absence.

Employer: Are workers that contract COVID-19 eligible for



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workers' compensation?

The question of eligibility for workers' compensation benefits is state-specific and will likely turn on a number of discrete factual and legal issues, including how the virus was contracted, how the injury or illness was sustained (including its severity) and related issues. If COVID-19 was contracted in the workplace, the employee may be eligible for workers' compensation as most jurisdictions include occupational illness for coverage.

Employer: How should I handle an employee who is concerned about reporting to work where remote work is not an option (e.g., retail, manufacturing, etc.)?

The current situation remains very fluid, but this question raises an important employee relations issue – how to handle workplace communication and concerns at a location where there are no known instances of COVID-19 and where employees must be present.

Employers should act with empathy, reassuring the workforce that it understands their concerns and that it is taking all practical steps to protect employee safety. Employers should communicate the COVID-19 preparedness steps listed below, reinforce social distancing (6 feet apart) on the work floor as practical, and consider implementing staggered shifts to assist with social distancing, as needed. If an employee still expresses concerns about reporting for work despite these steps, we recommend the organization discuss with the employee his or her options for paid and unpaid leave during the current situation.

Employer: What are the common policies or procedures an employer should have in place to address current (or future) pandemics?

A pandemic impacts a wide-range of employer practices. At a minimum, employers should have the following policies or procedures in their pandemic preparedness plan to address pandemic related issues with their workforce:

- Vacation/paid time off (PTO) and/or paid sick leave policies
- Family and Medical Leave Act policy (FMLA)
- Other unpaid leave policies
- Accommodating illness and disabilities
- Infectious disease control policy
- Furlough/temporary layoff policy
- Remote work policy
- Reporting of time worked

Employer: Has legislation been passed by the federal government imposing paid leave requirements?

On March 14, the House [passed a sweeping bill that provides for](#)

[emergency measures](#) that directly impose upon employers both paid family leave and new paid sick leave obligations. Should these provisions be adopted by the Senate, [this bill](#) will obligate even small employers to provide paid leave and paid sick time. On March 16, the House passed [several amendments to this bill](#), yet the Senate has not yet voted on the bill.

COVID-19 Preparedness

At this stage, all employers should take steps to mitigate the potential spread of COVID-19. Employers should educate and reassure employees and train them on what action to take to limit the potential spread of any virus, including COVID-19. The CDC recommends the following to prevent the spread of the virus:

1. Wash hands often with soap and water for at least 20 seconds, and if soap and water are not available, use an alcohol-based hand sanitizer
2. Avoid touching eyes, nose, and mouth with unwashed hands
3. Avoid close contact with people who are sick
4. Stay home when sick
5. Cover coughs or sneezes with tissues or cough into the elbow area, then discard the tissues in the trash and follow up with handwashing
6. Clean and disinfect frequently touched objects and surfaces regularly

As there is no present vaccine to prevent COVID-19, circulating these good hygiene practices to employees is the next best step for employers to stay proactive during the COVID-19 outbreak.

As the pandemic has reached community spread in the U.S., employers should also give serious consideration to implementing social distancing measures designed to prevent person-to-person spread of COVID-19. The purpose of social distancing is to delay the spread of COVID-19 so that local healthcare facilities are not overwhelmed with seriously ill patients (by flattening out the curve of the anticipated spike in recognized cases of COVID-19). Such measures include, for example, staggering work shifts, evaluating remote work options, limiting group meetings (use of video or telephonic conferencing), distancing workers at work as feasible (6 feet is the current recommendation), postponing any nonessential travel, and by training employees to avoid social gatherings at work that put them in close proximity.

In the event of exposure in the workplace (or concern about exposure), federal, state and local health agencies will interact with an affected employer. While it is important to comply with reasonable requests from government agencies with jurisdiction, otherwise it is necessary to keep employee private health information confidential.

For more information, please contact the Barnes & Thornburg attorney with whom you work, or Mark Keenan at 404-264-4044 or mark.keenan@btlaw.com, Patricia L. Ogden at 317-231-7712 or patricia.ogden@btlaw.com, Teresa L. Jakubowski at 202-371-6366 or teresa.jakubowski@btlaw.com, or Kathleen Anderson at 260-425-4657 or kathleen.anderson@btlaw.com.

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