

EMPLOYER GUIDANCE REGARDING COVID-19 (THE CORONA VIRUS)

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As the world grapples with the rapid spread of COVID-19, also known as the Coronavirus, The Kullman Firm is here to answer your questions and help you manage your workforce during this pandemic.

What can I do right now to make the workplace safer?

Encourage employees to wash hands frequently (minimum of 20 seconds), avoid touching their face, nose, mouth and/or other people, and cover coughs and sneezes with a tissue or their elbow. Encourage the use of telephone/video conferencing in place of face-to-face meetings. Make disinfectant sprays and wipes, hand sanitizers, and hand soap widely available. Direct employees to stay home when sick. Consider implementing a policy of disciplinary action if employees knowingly come to work sick. Eliminate all non-essential business travel and allow teleworking where practical. Do not base responses to requests for telework on whether a particular employee is likely to succeed/be productive with teleworking but rather consider objective job-related criteria and evenly apply any decisions.

What questions am I permitted to ask employees about their health?

You can ask employees if they have cold or flu-like symptoms—for example, if they have fever or chills and a cough or sore throat. You should generally avoid asking employees if they have been diagnosed as having COVID-19. While observation of physical symptoms is likely to justify a medical inquiry under the present circumstances – meaning the employer is permitted to ask if an employee has COVID-19 without violating the ADA – employees may not yet be diagnosed with the virus. As such, physical observation may be a more reliable indicator of illness at this stage. Employers are permitted to send employees home when physical symptoms of illness are observed. Employers should be wary of having employees fill out medical questionnaires, as this could create confidential medical records. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA and HIPAA.

Can I send employees home or make them work from home?

Yes. You can send employees home if they admit they are sick or exhibit symptoms of illness. You can also require employees to go home or work from home if they have been in close contact with someone confirmed to have COVID-19. You can even require employees with no known symptoms or exposure to telework if their job duties allow telework. For more information, see <https://www.cdc.gov/coronavirus/2019-ncov/php/risk-assessment.html>

What should I do if I think an employee has COVID-19?

If you reasonably believe an employee has COVID-19 or if an employee informs you she or he has the virus, you should consider sending home all employees who worked closely with the infected individual (but do not disclose the infected individual's identity). Employees who are sent home or quarantined should not return to work for 14 days plus 24 – 72 hours since they last had symptoms of the virus. **Do not identify any employees who have tested positive for COVID-19.**

Can I tell employees not to travel (even for personal reasons)?

Probably not. Some states disallow this, and moreover, it's likely to negatively impact morale. Some employees may have invested substantial money into vacations that are not refundable. A better approach is to put clear restrictions on employees who travel and then seek to return to work. For example, you could impose mandatory 14-day stay home periods for all employees returning from countries with a Level 3 Travel Health Notice from the CDC. These countries currently include China, Iran, Italy, and South Korea. See <https://www.cdc.gov/coronavirus/2019-ncov/travelers/after-travel-precautions.html>. You can also ask employees whether they are returning from these locations, even if the travel was personal.

Can I take an employee's temperature?

There is some precedent for this as the virus becomes more widespread but taking employee temperatures is nonetheless a risky step with questionable potential benefit. Not all persons infected with COVID-19 have a fever, and the CDC has deemed it not a good indicator of illness alone. Additionally, taking temperatures may create privacy issues. Employers are better served to look for visible signs of illness. If you do decide to test employees' temperatures, ensure that the tests are administered by health care professionals and apply the test evenly to all employees.

Do I need to pay employees who are off work due to COVID-19 – either because of their own illness or that of a family member?

Under federal law, employers can require employees with COVID-19 or those who are in a potential incubation period to use vacation time or other PTO for the absence provided that this is consistent with the company's policies. Employers should pay careful attention to any variances in and/or developments with state law. Colorado, for example, recently passed an emergency measure requiring certain employers to provide at least four days of paid sick leave to

employees with flu-like symptoms who are being tested for COVID-19. Employers should carefully balance business and personnel management needs against potentially incentivizing ill employees to come to work despite their illness. Also, keep in mind that exempt employees must be paid their full salaries for any weeks in which they perform any work, subject to limited exceptions.

Are work absences due to COVID-19 protected under the FMLA?

Deciding whether an employee with COVID-19 qualifies for protected leave likely depends on the seriousness of the condition. If the employee is able to telework, then FMLA leave is probably not required. If the employee is hospitalized due to COVID-19, the employer may want to send the appropriate designation and certification paperwork. Best practice is to provide FMLA (and/or similar state) paperwork and put the onus on the employee to take the next step of certifying and returning the paperwork.

Can an employee refuse to come to work because he or she is scared of contracting COVID-19?

Under the Occupational Safety and Health Act (OSHA), employees may refuse to work if they reasonably believe they are in imminent danger. As the virus progresses, this may become an issue. Notably here, if an employee discloses that he or she suffers from an underlying condition that would make exposure to COVID-19 potentially more serious than for the average, otherwise-healthy person, employers should consider whether a separate accommodation under the ADA is needed.

Can I require employees who want to come back to work following a vacation, illness, or suspected illness to produce a doctor's note clearing them of the virus?

Maybe, but you probably shouldn't. The CDC is advising that employers do not request a doctor's note clearing employees to return to work for fear of overwhelming healthcare providers during this health crisis. That said, if the employee's situation meets the ADA's "direct threat" standards (i.e., the employer is concerned the employee cannot safely perform his/her duties), employers are permitted to require a return-to-work doctor's note.

I am considering temporarily closing facilities and/or furloughing employees. What do I need to know in order to decide whether to proceed with that?

Temporary closings or furloughs may impact health insurance coverage. Be sure to read insurance policies carefully before taking such steps. Also, keep in mind that exempt employees must be paid their full salaries for any weeks in which they perform any work, subject to limited exceptions. As such, furloughs of exempt employees may not reduce salary expenditures. Also, note that widespread or extended furloughs may implicate federal or state WARN requirements.

Are OSHA standards impacted here?

Although there is no OSHA standard or regulation that specifically addresses COVID-19, OSHA’s general duty clause applies to most employers and requires that employers provide employees a workplace that is free from recognized hazards that are causing or likely to cause death or serious physical harm. OSHA’s personal protective equipment standards may apply to employers in certain industries. COVID-19 is a recordable illness under OSHA.

Do I need to provide or let employees wear facemasks?

For most categories of workers, the CDC advises against wearing facemasks to protect against COVID-19. Employers may refuse an employee request to wear self-provided respiratory protection and/or gloves if use of those items presents a hazard in the workplace and if such measures are not otherwise required.

What else do I need to know?

Depending on applicable state law, contraction of COVID-19 at work may create a viable workers’ compensation claim.

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