

Navigating the Legal Complexities of the Coronavirus

Businesses around the country, and world, are grappling with how to handle the myriad of issues arising in the wake of COVID-19. This FAQ Sheet is meant to address some of the most common questions that Berliner Cohen is fielding from companies.

The law is changing daily. We are doing our best to update this FAQ as information becomes available. This FAQ is current as of March 15, 2020 unless noted in the heading of the item differently.

I. MANAGING THE WORKPLACE

Can Employers take Employee temperatures?

Yes. While measuring an employee's body temperature is a medical examination, when a pandemic influenza is widespread in the community as assessed by state or local health authorities or the CDC, then employers may measure employees' body temperature.

Can Employers send Employees home if they have symptoms?

Yes. The CDC states that employees who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace. Advising such workers to go home is not a disability-related action. Additionally, the action would be permitted under the ADA if the illness were serious enough to pose a direct threat.

Can Employers Require Employees to Self-Quarantine?

Employers should consider telling employees returning from China, Italy or any other high-risk region as identified by the CDC or other appropriate agency that they should remain away from work for 14 days upon their return.

Further, even if not symptomatic, Employers may also want to have Employees consult a health care provider to confirm that they are not infectious before returning to work. Employers should offer to cover the cost if they are requiring this step.

When Employer's implement such policies and procedures, it is important to ensure that they are being uniformly applied so that there is not a claim of disparate impact or a treatment differential.

During a pandemic, may an employer require its employees to adopt infection-control practices, such as regular hand washing, at the workplace?

Yes. Requiring infection control practices, such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal, does not implicate the ADA.

During a pandemic, may an employer require its employees to wear personal protective equipment (e.g., face masks, gloves, or gowns) designed to reduce the transmission of pandemic infection?

Yes. An employer may require employees to wear personal protective equipment during a pandemic. However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, or gowns designed for individuals who use wheelchairs), the employer should provide these, absent undue hardship.

During a pandemic, may an employer ask an employee why he or she has been absent from work if the employer suspects it is for a medical reason?

Yes. Asking why an individual did not report to work is not a disability-related inquiry. An employer is always entitled to know why an employee has not reported for work.

May an ADA-covered employer require employees who have been away from the workplace during a pandemic to provide a doctor's note certifying fitness to return to work?

Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees.

As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.

II. LAYOFFS/CLOSINGS/WARN ACT

Does Warn Act Apply During Pandemic?

Yes. Both the California and Federal Worker Adjustment and Retraining Notification (WARN) Acts impose a notice obligation on covered employers who implement a "plant closing" or "mass layoff" in certain situations, even when they are forced to do so for economic reasons.

Generally speaking, employers must provide at least 60 calendar days of notice prior to any covered plant closing or mass layoff. Note, however, that if employees are laid off for less than six months, then they do not suffer an employment loss and, depending on the particular circumstances, notice may not be required. Unfortunately, in situations like this, it is hard to know how long the layoff will occur so providing notice is usually the best practice.

While both WARN Acts provides a specific exception when layoffs occur due to unforeseeable business circumstances, which certainly one would believe the COVID-19 coronavirus outbreak would be one when businesses are ORDERD closed by governors and other officials, each case is fact specific.

One key fact is that even if an employer is providing less than 60 days' notice, the Employer should provide as much notice as is reasonably practicable. If the governor issues an order, then the Employer should act promptly in giving notice to affected employees.

The WARN Act has specific provisions requiring notice to employees, unions and certain government entities. The Act further specifies the information that must be contained in each notice.

Will WARN Act Notice requirements be enforced this law in light of the outbreak?

In the aftermath of an outbreak, the extent to which the USDOL will focus upon enforcement of the WARN Act remains to be seen. Nonetheless, the law provides stiff penalties for non-compliance, including up to 60 days of back pay and benefits, along with a civil penalty of up to \$500 per day. More importantly, it provides for a private cause of action in federal court, suggesting that employers may soon be responding to lawsuits arising under the WARN Act regardless of the enforcing agency's official position.

Consequently, we advise that you evaluate your current situations to ascertain whether the most recent outbreak has triggered a WARN Act qualifying event in your organization. If so, provide as much notice to affected employees as is practicable under the circumstances. When in doubt, the best approach is to work through counsel to arrive at a safe but practical solution to a potentially thorny situation for many employers that are impacted by the outbreak, either directly or indirectly.

III. REMOTE WORK – THE BASICS

Do you have to allow employees who ask to work from home?

Most likely, No. While many employees may make this request, a company is not required to allow them to work from home, especially if the company doesn't have work at home positions already in place. However, if a company does allow employees in certain departments to work from home, a blanket no to any new request without first evaluating whether it is feasible may create problems down the road. Thus, any request to work from home will have to be evaluated based on the historical practice of the company, its ability to meet the request and the feasibility that productive work can be done from home.

Should companies institute a temporary remote work policy in light of the COVID-19 coronavirus outbreak?

A remote work policy will depend on the industry, the company, the employees and the company's capabilities. This may not be the time to test something that has never been done before.

A key to success is identifying which positions, roles and jobs are critical to the business operations and determine whether those individuals can carry out their jobs while working remotely with current technology.

What are considerations for work from home policies?

A work from home policy should lay out expectations for workers including when it begins and ends (noting you may have to extend the end date), how employees track their work hours, how the company will measure their performance and how they are to communicate when they are working remotely. The key to the policy is to maintain as much normalcy in the day to day operations as possible. Therefore, employees should be told the hours they are expected to be working as well.

Questions to ask as Company Management:

- Are your workers encouraged to work at home or barred from coming to the office?
- Will there be exemptions for “essential” personnel that need to be at a certain physical location?
- How will you handle payroll?
- Will employees need to be available at all times during working hours, or will remote meetings and appointments be scheduled ahead of time? (Be mindful that many workers are caregivers that likely will have children or elderly at home distracting and dividing their time).
- Will remote meetings take place online, over the phone, or on camera?
- Are employees prohibited from meeting together in person during this period?
- If employees are meeting are their limits on the size of the meeting?
- Are employees banned from meeting with third parties while doing company business during this period of time?
- Can employees work in places other than their home, i.e. coffee shops?
- If employees are allowed to work from places other than their home what security measures are in place for your network – do employees know the security protocols.
- Can workers perform work on their own devices? If so, is Company data secure?
- The Company should pick a platform, i.e. Webex, ZOOM, Whatsapp, Skype, etc. for communications and then provide information on how it should be used.
- Employees should receive regular communication from managers when working remotely and should be asked to report in at least once a week to report on what they are working on, this will help them stay connected. Managers should also arrange one team call a week to keep the lines of communication open.
- Virtual lunches, meetings, and team challenges also keep people connected. Think of activities that keep employees engaged, such as at home exercise tips, sharing recipes and the like.

IV. LAWS RELATING TO LEAVE ACCOMODATION

Does FMLA or CFRA Apply to the Coronavirus?

If the Employer is subject to FMLA or CFRA, then Yes, the coronavirus would qualify as a "serious health condition" under both the FMLA and CFRA. Employers should allow an employee to take FMLA leave if either the employee or an immediate family member contracts the disease. The employee would be entitled to job reinstatement as well. State law may provide additional leave benefits.

It is important that Employers properly notify Employee's that they are out on a protected leave and document their interactions.

Are Employees Eligible for Workers Compensation if they contract the coronavirus?

Maybe. If the employee contracts it while on a work trip, it makes it incrementally more likely that would be a covered event. The question is "Does the employees' work require them to be exposed to persons who are infected?". An easy example of this are health care workers.

If an employee incidentally contracts the disease from a co-worker, there likely will be no workers' compensation liability. If there is workers' compensation liability, employers are responsible for covering the costs of reasonable and necessary medical care, temporary total disability benefits, and permanent disability (if any). Employers should engage a competent medical professional on infectious diseases for advice to determine whether the disease is work-related.

An employer should evaluate whether it has adequate worker's compensation insurance coverage and coverage limits that include occupational diseases.

If an employee contracts the disease and it is not occupationally related, the employee may be entitled to disability benefits if the employer provides such benefits. Again, the extent of such benefits and any exclusions should be carefully evaluated by the employer. The employer must consider that the virus is going to involve significant medical issues, such as determining (1) whether the employee is infectious, (2) what type of treatment is necessary, (3) whether the employee presents a health risk to others and, (4) when the employee can safely return to work.

Does the Americans with Disabilities Act (ADA) restrict how I interact with my employees due to the coronavirus?

It could. While the ADA protects employees with disabilities, when there is a National or global health emergency, as recently declared by the World Health Organization (WHO), employees can be required to be medically examined to determine if they have contracted the disease when an employer has a reasonable belief that employees will pose a direct threat due to a medical condition. As of February 28, 2020, the World Health Organization raised its risk assessment of the coronavirus to its highest level.

The Equal Employment Opportunity Commission has stated that the ADA and Rehabilitation Act rules continue to apply, but they do not interfere with or prevent employers from following the guidelines and suggestions made by the CDC about steps employers should take regarding the Coronavirus.

The EEOC has also issued Employer guidance, which states, "if the CDC or state or local public health authorities determine that the illness is 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. By contrast, if the CDC or state or local health authorities

determine that pandemic influenza is significantly more severe, it could pose a direct threat. The assessment by the CDC or public health authorities would provide the objective evidence needed for a disability-related inquiry or medical examination."

The ADA protects qualified employees with disabilities from discrimination. A disability may be a chronic physical condition, such as difficulty breathing. Employees may be entitled to an "accommodation" such as leave or be allowed to work remotely for a limited period. While Employees who have contracted the virus must be treated the same as noninfected employees, this is true so long as the infected employees can perform their essential job functions WITHOUT posing a health or safety threat to the workforce. Given that all local, state and federal agencies are requiring individuals with symptoms or a positive test to self-quarantine, an Employer would be justified in requiring the same of its Employees.

Can You Take a Survey of Employees and Not Violate ADA and EEOC?

Yes. The EEOC has recommended the following survey:

ADA-COMPLIANT PRE-PANDEMIC EMPLOYEE SURVEY

Directions: Answer "yes" to the whole question *without specifying the factor that applies to you*. Simply check "yes" or "no" at the **bottom of the page**.

In the event of a pandemic, would you be unable to come to work because of any one of the following reasons:

- If schools or day-care centers were closed, you would need to care for a child;
- If other services were unavailable, you would need to care for other dependents;
- If public transport were sporadic or unavailable, you would be unable to travel to work; and/or;
- If you or a member of your household fall into one of the categories identified by the CDC as being at high risk for serious complications from the pandemic influenza virus, you would be advised by public health authorities not to come to work (e.g., pregnant women; persons with compromised immune systems due to cancer, HIV, history of organ transplant or other medical conditions; persons less than 65 years of age with underlying chronic conditions; or persons over 65).

Answer: YES _____ , NO _____

As you can see this is a very generic survey. However, with a YES employers can then begin an interactive process in accordance with the guidelines, which can be found here:

https://www.eeoc.gov/facts/pandemic_flu.html

If An Employee Contracts COVID-19 Does the Condition Implicate the ADA?

It depends. COVID-19 coronavirus is a transitory condition. However, if the virus substantially limited a major life activity, such as breathing or if the employer "regards" an employee with

COVID-19 as being disabled, that could trigger ADA coverage. This will be a case by case analysis.

During a pandemic, how much information may an ADA-covered employer request from employees who report feeling ill at work or who call in sick?

ADA-covered employers may ask such employees if they are experiencing influenza-like symptoms, such as fever or chills and a cough or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

Further, during a pandemic even if such questions are deemed disability-related, they are justified by a reasonable belief based on objective evidence that the severe form of pandemic influenza poses a direct threat.

What Does OSHA Require?

Under the Occupational Safety and Health Act (“Act” or “OSHA”), the employer has a legal obligation to provide a safe and healthful workplace. One of the agency’s enforcement mechanisms is the ability to issue citations with monetary penalties to employers. The “General Duty Clause” (Section 5(a)(1)) of the Act requires an employer to protect its employees against “recognized hazards” to safety or health which may cause serious injury or death.

OSHA does not have a specific regulation which deals with the virus, thus OSHA would rely upon recommendations issued by the Centers for Disease Control (“CDC”), the National Institute for Occupational Safety and Health (“NIOSH”), the World Health Organization (“WHO”) or other similar resources. If employees at a worksite are reasonably likely to be “exposed” to the virus (e.g., serving as healthcare providers, emergency responders, transportation workers, etc.), OSHA will expect the responsible employer to develop a program based upon a “hazard assessment” of potential exposure at the worksite (hygiene and decontamination).

Further, it is likely that a worker will refuse to work because s/he believes that his/her health is in imminent danger at the workplace due to the actual presence or reasonable probability of the disease at the workplace. An employee who makes such a complaint is engaging in “protected activity” under Section 11(c) of the Act and is not subject to adverse action by the employer for refusal to work until the employer can establish through “objective” evidence that there is no hazard or that the employer has developed a response plan that will reasonably protect the employee from exposure to the disease.

OSHA has issued a fact sheet regarding protecting workers in the case of a global health emergency. Employers should review its policies and evaluate how to best address risks caused by the Coronavirus:

- Which job activities may put them at risk for exposure to sources of infection, i.e. travel?

- What options may be available for working remotely, or how to utilize an employer's flexible leave policy when employees are sick.
- Social distancing strategies, including avoiding close physical contact (e.g., shaking hands) and large gatherings of people.
- Good hygiene and appropriate disinfection procedures, including adding sanitizers and the like.
- What personal protective equipment is available, and how to wear, use, clean and store it properly.
- What medical services (e.g., post-exposure treatment) may be available to them.
- How supervisors will provide updated pandemic-related communications, and where employees should direct their questions.

Do Employee's Get Paid for Time Off Due to the Coronavirus Even if They Don't Have Any Paid Time Off?

Maybe. If the employee is subject to a contract or collective bargaining agreement that requires pay when employees go on work-required leave, then yes. In the absence of a contract, hourly employees work at-will and are not guaranteed wages or hours. In other words, these employees do not need to be paid.

Exempt employees do not have to be paid if they are sent home for an entire workweek. However, if exempt workers work for part of the workweek, they would have to be paid for the entire week. Thus, be mindful that exempt workers that are working from home, even a little, will be entitled to full compensation.

Hourly employees not subject to a contract do not receive paid time off as a matter of law beyond their state mandated sick leave. However, employers are being encouraged to extend the amount of time they issue for sick leave. Of course, there are economic ramifications for paying for employees who are not working. Thus, each business will need to evaluate this individually.

Can Employers Ask for a Medical Note Before Returning to Work After Foreign Travel or Leave Due to Coronavirus?

Yes. And the employer should offer to pay for any associated expenses. However, be mindful that it may be hard to get tested and therefore it may not be realistic to expect an employee to present a medical note.

Do Employers Have to Give Time Off to Employees Not Wanting to Work with Public due to risk of infection?

This is going to depend on the position, the nature of their duties, and the current regulations and recommendations in effect. There may be an obligation to accommodate an employee's request not to work if there is some objective evidence that they could potentially be exposed

to individuals who may have returned from China, Italy or any other known outbreak region or area—for example, customs agent handling travelers from the infected regions in China.

Employees should not be disciplined for refusing to work if they believe that there is a risk of infection because making such a complaint may be a protected activity. If the employer can establish that there is no basis for any exposure to the disease, the employee does not have to be paid during the time period the employee refuses to work.

It would be best to consult legal counsel before any personnel decisions are made relative to an employee not wanting to risk exposure.

V. Medical Coverage and HIPAA

Is COVID-19 testing covered by our group health plan?

In California, likely yes. On March 10, 2020 it was confirmed insured plans in California, New York, Oregon, and Washington must cover COVID-19 testing at no cost to members. Coinsurance or copay waivers for testing are problematic for persons enrolled in high-deductible health plans (HDHPs) with health saving accounts (HSAs). One fundamental requirement of an HDHP/HSA is that it may not provide benefits in any plan year until the deductible for that plan year is satisfied. However, the IRS provides an exception to that general rule for certain types of “preventive care” – preventive care provided without cost sharing under the ACA (mandatory), and preventive care that may be provided with no or low-cost sharing or lower deductibles, via other applicable IRS guidance and safe harbors (permissive).

On March 11, 2020 the IRS issued Notice 2020-15, clarifying vaccines are considered preventive care and until further notice, health benefits, medical services, and items purchased in association with testing for or treatment of COVID-19 may be provided by a health plan without a deductible, or at reduced or no cost to participants, without disqualifying the HDHP or covered individual from making HSA contributions.

Is COVID-19 Information Exempt from HIPAA?

No. HIPAA is still in full force. In March the Office for Civil Rights of the U.S. Department of Health and Human Services (HHS) issued a reminder of the HIPAA guidelines and specifically stated it applied to the pandemic.

Privacy restrictions mandated by HIPAA only apply to “covered entities”. Since employers are not covered entities, employment records are not subject to HIPAA restrictions. However, employers should still maintain employee privacy

V. TRAVEL

Can Employer Restrict Travel?

This depends. If the Employee is travelling for work, of course the Employer can restrict that travel. However, if the Employee is travelling for leisure, an Employer could put in place either a

request to avoid unnecessary travel or a requirement that the Employee self-quarantine or work from home. Each business model is unique and there is no one size fits all answer given the virus is new, the information is changing daily and the plan will not be universal.

If an Employer is still requiring travel during this time, Employees should also be informed that there may not be adequate medical services available if they travel to an infected region and become ill. If an Employee refuses work that involves travel the Employer must be careful not to engage in any conduct that could be seen as retaliatory.

When an employee returns from travel during a pandemic, must an employer wait until the employee develops influenza symptoms to ask questions about exposure to pandemic influenza during the trip?

No. These would not be disability-related inquiries. If the CDC or state or local public health officials recommend that people who visit specified locations remain at home for several days until it is clear they do not have pandemic influenza symptoms, an employer may ask whether employees are returning from these locations, even if the travel was personal.

VI. THIRD PARTY CLAIMS

Can Third Parties Have Claims Against A Company?

Under general common law principles in most jurisdictions, a landowner (sometimes the Employer) who allows third parties to enter upon its premises for business or related purposes (such as clients, vendors, contract employees), owes these individuals a duty of “reasonable care” to protect them against hazards at the premises which are not “open and obvious.” In the case of the virus, if the landowner (for example, a healthcare provider, emergency responder, transportation related company) is (or should be) aware that there are infectious persons at the premises (whether its own employees or tenants) who may create a health hazard to these third party entrants, there may be a duty to warn such third parties, or to prevent access to certain facility areas. In the event that the building ventilation system or washroom facilities may have become contaminated with the virus, the landowner may have an obligation to prevent such contamination through enhanced sanitation measures.

In many cases, the legal duty of the landowner for site security and sanitation will be defined by contractual documents, such as leases. The landowner should make sure to review such documents to confirm its obligations regarding third parties who may have access to the property.

VI. CONCLUSION

The virus is new and as such how each Company should respond is going to be changing on a daily and weekly basis. If a Company feels that it needs to take corrective action against an affected Employee or an Employee refusing to work for fear of exposure they should consult legal counsel.

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STILL HAVE QUESTIONS?

CRA Members have exclusive access to legal help. Members get one call (not to exceed 15 minutes) of legal advice every month. To set up a call with one of our legal partners, please call 800.765.4842 ext. 2743 or email helpline@calrest.org

RESOURCES

Informational Websites

California Department of Public Health <https://www.cdph.ca.gov/>

Center for Disease Control – www.cdc.gov

U.S. Department of Health & Human Services www.flu.gov

OSHA – www.osha.gov or CalOSHA <https://www.dir.ca.gov/dosh/>

The World Health Organization - www.who.int

CDC Emergency Response Hotline for health employers - (770) 488-7100



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