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Frequently Asked Questions from Employers about COVID-19

FAQs

Martin Pringle's employment attorneys have fielded non-stop questions from clients about all aspects of responding to the current COVID-19 public health situation over the past several weeks. We have compiled a number of the most frequently asked questions here to serve as a resource. This information is offered as general guidance and does not constitute legal advice. Specific advice would need to be provided on a case-by-case basis.

Martin Pringle's attorneys practice in Kansas and Missouri. Other states may have state-specific laws applicable to these situations and questions. Readers are advised to consult with an attorney in their own state to determine how their situation may differ.

Unless otherwise noted, the answers provided here are based upon information available on March 27, 2020. We will make every effort to update these as necessary. Where they are updated, a notation will be added with the specific date.

Are employers required to respond to the COVID-19 situation at all?

The federal Occupational Safety and Health Act and Administration (OSHA) generally require an employer to maintain a safe workplace for employees. More specifically, Centers for Disease Control and Prevention (CDC) guidance indicates that employers should actively encourage employees who have symptoms to stay home. OSHA guidance advises that employers can take reasonable action with regard to employees who have traveled to high risk areas or have otherwise been exposed or who are exhibiting symptoms. OSHA also has taken the position that COVID-19 contracted by an employee in the workplace or while performing their job may be considered a recordable illness. Employers should be proactive and pay attention to guidelines promulgated by a variety of federal and state regulatory agencies on this topic.

Can an employer take an employee's temperature at work to determine whether they might be infected with the novel coronavirus?

Although the effectiveness of such measures is questionable as many of those with COVID-19 are asymptomatic, the short answer is yes. EEOC confirmed that measuring employees' body temperatures is permissible given the current circumstances. The ADA restricts the inquiries that an employer can make into an employee's medical status, and EEOC usually considers taking an employee's temperature to be a "medical examination" under the ADA, EEOC recognized the need for such precautions in light of CDC guidance

and community spread of COVID-19. Again, any policy like this should be applied with uniformity and not in a way that discriminates based on any protected class.

If an employee tests positive for COVID-19, can the employer disclose that information?

The Health Insurance Portability and Accountability Act (HIPAA) doesn't prohibit most employers from disclosing that information, as HIPAA regulates the use of personal health information only by healthcare providers, health insurers, and organizations that support those entities. According to the CDC, an employer should inform other employees and any customers/clients and vendors with whom the employee was in close contact that a worker has tested positive to allow them to take precautions. The employer should not reveal the employee's name to protect confidentiality under the ADA and/or other privacy laws.

Can an employer send an employee home if the employee tests positive for or exhibits symptoms of COVID-19?

Yes. The Equal Employment Opportunity Commission (EEOC) has cited to guidance which indicates that advising workers with symptoms to go home is either not a disability-related action (if the illness is merely flu-like) or allowed under the Americans with Disabilities Act (ADA) if the illness is serious enough to pose a direct threat to the employee or coworkers. CDC Interim Guidance for Business and Employers also advises that employees with certain fever and respiratory symptoms should stay home. If an employer does establish a policy to send these employees home, it should be applied uniformly, consistently, and not in a way that discriminates based on any protected class.

The CDC also provides the following recommendations for most non-healthcare businesses that have suspected or confirmed COVID-19 cases:

- It is recommended to close off areas used by the ill persons and wait as long as practical before beginning cleaning and disinfection to minimize potential for exposure to respiratory droplets. Open outside doors and windows to increase air circulation in the area. If possible, wait up to 24 hours before beginning cleaning and disinfection.

- Cleaning staff should clean and disinfect all areas (e.g., offices, bathrooms, and common areas) used by the ill persons, focusing especially on frequently touched surfaces.

- To clean and disinfect:

    O If surfaces are dirty, they should be cleaned using a detergent or soap and water prior to disinfection (Note: "cleaning" will remove some germs, but "disinfection" is also necessary).

O For disinfection, diluted household bleach solutions, alcohol solutions with at least 70% alcohol, and most common EPA-registered household disinfectants should be effective.

O Diluted household bleach solutions can be used if appropriate for the surface. Follow manufacturer's instructions for application and proper ventilation. Check to ensure the product is not past its expiration date. Never mix household bleach with ammonia or any other cleanser. Unexpired household bleach will be effective against coronaviruses when properly diluted.

O Cleaning staff should wear disposable gloves and gowns for all tasks in the cleaning process, including handling trash.

O Gloves and gowns should be compatible with the disinfectant products being used.

O Additional PPE might be required based on the cleaning/disinfectant products being used and whether there is a risk of splash. Follow the manufacturer's instructions regarding other protective measures recommended on the product labeling.

O Gloves and gowns should be removed carefully to avoid contamination of the wearer and the surrounding area. Be sure to clean hands after removing gloves.

- Employers should develop policies for worker protection and provide training to all cleaning staff on site prior to providing cleaning tasks. Training should include when to use PPE, what PPE is necessary, how to properly don (put on), use, and doff (take off) PPE, and how to properly dispose of PPE.
- If you require gloves or masks or other PPE, prepare a simple half-page Job Safety Analysis (JSA): list the hazards and the PPE (gloves, masks, etc., as needed), and the person who drafts the JSA should sign and date it.

If an employer sends someone home for exhibiting symptoms or because it has decided to close the office (with no remote work option), does the employer have to pay the employee?

The answer to this is that it depends on a few factors, including exempt status. Employers are not generally obligated to continue to pay someone who isn't working. However, if an exempt, salaried employee performs at least some work during their workweek, the employer is required to pay the employee's salary for that particular workweek. Pursuant to the new provisions of the Families First Coronavirus Response Act (FFCRA), certain employers will be required to offer paid sick leave in some circumstances. Employers will need to consult the FFCRA for their sick leave obligations.

In Kansas and Missouri, most employees are employed "at-will." However, an employer could have a legal obligation to keep paying employees pursuant to an employment contract or collective bargaining agreement.

Can an employer send an employee home if he/she is asymptomatic but has been in close contact with someone with COVID-19?

Yes. Under the CDC guidance, employees who are asymptomatic may be excluded from the workplace, if they have close contact with, sat on an aircraft within 6 feet (two airline seats) of, or live in the same household as, are an intimate partner of, or are caring for at home, while consistently using "recommended precautions," for a symptomatic individual with laboratory-confirmed COVID-19. CDC defines "close contact" as:

(a) being within approximately 6 feet (2 meters) of a COVID-19 case for a prolonged period of time; close contact can occur while caring for, living with, visiting, or sharing a healthcare waiting area or room with a COVID-19 case; OR

(b) having direct contact with infectious secretions of a COVID-19 case (e.g., being coughed on).

Note: Healthcare employees are subject to different CDC standards and guidance.

If your company is considering taking actions beyond the CDC's guidance, like transitioning your workforce to temporary remote work, you may wish to consult an attorney for additional guidance on related legal issues.

Can an employer send an employee home or require remote work if the employee is asymptomatic but returned from travel in area with widespread sustained community transmission?

Yes, if the employee falls into certain CDC risk categories. Among the considerations for these risk categories is travel to certain areas with "widespread sustained" transmission. Employers should monitor updates from the CDC and state and local public health authorities on recommended travel quarantines.

Can an employer require asymptomatic employees with no known COVID-19 exposure to work remotely if the local community has an outbreak?

As a general proposition, this is permissible as long as the employee's duties allow telework. The DOL has advised that requiring or encouraging employees to work remotely can be a useful infection-control or prevention strategy and may also be an appropriate ADA accommodation. Employers will want to keep up-to-date on local public health authority recommendations.

How long must a symptomatic employee be out before returning to work?

CDC guidance suggests that in general (non-healthcare) business settings, employees may return to work at least 24 hours after no longer having or exhibiting a fever, signs of

a fever, and any other COVID-19 symptoms, without the aid of fever-reducing medicines or other symptom-masking medicines.

These standards may be different for an individual with a confirmed COVID-19 diagnosis. Employers should consult CDC guidance.

Again, the CDC guidance differs for healthcare employees and should be specifically consulted.

Can an employer require employee with a confirmed COVID-19 diagnosis to use PTO for absence?

It depends on whether FFCRA applies. If the employer is a covered employer (fewer than 500 employees) the new Emergency Paid Sick Leave Act (EPLSA) applies. Under those laws, an employer cannot require that the employee use other paid leave provided by the employer before the employee uses the paid sick time under the EPLSA. It does not matter how much paid sick time the employee may already be entitled to from the employer.

If the employer is not a covered employer under FFCRA, then yes.

Can an employer require an asymptomatic employee who has been in close contact with someone with confirmed COVID-19 or who is otherwise in quarantine to use PTO?

Again, it depends on whether FFCRA applies. If the employer is a covered employer (fewer than 500 employees), then the employer must evaluate whether the employee's need for leave falls under one of the six qualifying reasons for leave under the EPLSA. If the employee's leave does qualify, then the employer cannot require the employee to use employer provided PTO before the employee uses the paid sick time under the EPLSA.

Can an employer advance not-yet-accrued PTO to cover COVID-19-related absences?

Likely yes, once the employee has exhausted all of his or her paid sick leave under the EPLSA, the employer could advance not-yet-accrued PTO to cover COVID-19 related absences IF the Emergency Family Medical Leave Expansion Act (EFMLEA) does not apply. The employer should document and draft a specific policy and/or agreement outlining the deviation from regular policy and detailing any "repayment" requirement for the advanced PTO (i.e., either "repaid" from newly earned PTO when it is accrued or from the employee's final paycheck if there is a separation before it is "repaid" by accrual).

If the reason for the leave qualifies the employees for EFMLEA leave, the employer may not require an employee to substitute any other leave after the first 10 unpaid days of leave.

Can an employer suspend its regular PTO policy and decide to not count COVID-19-related absences?

Yes, an employer can deviate from its established policies but are well-advised to document and communicate that the deviation is due to an extraordinary reason and for a temporary period. Any new, temporary policy must be applied uniformly and not in a way that discriminates based on any protected characteristic.

Employers should be cautious when suspending any existing policy to ensure that employees are not stripped of previously earned/accrued PTO, which could lead to problems with the Department of Labor.

Can an employee refuse to come to work due to fear of COVID-19 exposure? Can an employer discipline the employee for the refusal?

This is a potentially gray area. Nonsupervisory employees (union or not union) may have the right to refuse to work in conditions they believe to be unsafe, under the National Labor Relations Act (NLRA). The employees should have a "reasonable, good-faith belief" that working under certain conditions is not safe. Refusal to work for this reason would be protected. Employees may also be protected from retaliation under the OSH Act if the work involves "a risk of death or serious physical harm" and certain conditions apply. The specific facts of each situation would need to be analyzed before taking any disciplinary action.

Could COVID-19 be covered by workers' compensation?

Technically, yes. However, state workers' compensation laws require an employee to prove that he/she contracted the illness in the course and scope of employment. Certain states specifically exclude from coverage contagious diseases contracted after exposure to fellow employees. With current community transmission, it may be difficult to pinpoint the location of exposure. Employers should consult with their workers' compensation attorney for more specific information and to discuss specific facts.

Is COVID-19 a recordable illness for purposes of OSHA Logs?

Employers must record instances of workers contracting COVID-19 if the worker contracts the novel coronavirus while on the job. It must be a confirmed case, work-related as defined by OSHA regulations, and involve one or more of the general recording criteria set forth in the regs. The illness is not recordable if the worker was exposed to the virus while off the clock.

Should we implement a temporary remote work policy in response to the COVID-19 coronavirus outbreak?

Many jurisdictions are currently under stay-at-home or shelter-in-place orders which require non-essential businesses to close or work remotely for a certain period of time. Even those businesses deemed "essential" under the stay-at-home orders may consider a temporary remote work policy. More information about the legal issues to consider when implementing a remote workforce can be found at this article on our website:

https://www.martinpringle.com/news/view/legal-issues-to-consider-when-implementing-remote-workforce

How do employers complete Form I-9 if employees are working remotely?

DHS has extended some flexibility for complying with the Form I-9 requirements including inspection of documents remotely and a short extension of time for physical inspection of the documents. The flexible provisions can be used by employers for a period of 60 days from March 20, 2020 OR within three business days after the termination of the National Emergency, whichever comes first. This provision only applies to employers operating entirely remotely.

Does an employer have an obligation to provide notice under the federal WARN Act if it suspends operations as a result of the COVID-19 outbreak?

If the company is covered by the Worker Adjustment and Retraining Notification (WARN) Act, yes. The federal WARN Act imposes a notice obligation on covered employers (those with 100 or more full-time employees) who implement a "plant closing" or "mass layoff" in certain situations, even when they are forced to do so for economic reasons.

If an employer decides to lay off employees but intends to rehire them if and when the health crisis is over, are there any problems the employer or the employee may face regarding unemployment benefits?

The intent to rehire is not relevant to the application for unemployment. An employee can qualify for unemployment benefits if they are let go temporarily or otherwise or if there is a reduction in work hours. New unemployment guidelines have been issued, doing away with the wait period to be eligible and requiring employers to advise employees of potential unemployment benefits. Increased unemployment claims could affect an employer's experience rating and result in an increased contribution amount in the future but the impact is relatively small and may be unavoidable in certain economic circumstances.

If an employer lays off a number of employees due to economic conditions, can it hire back only some of them when the economy rebounds or is it exposed to liability for not hiring all of them back?

As noted above, Kansas and Missouri are at-will employment states, meaning that employment can be terminated for any reason (unless there is an employment contract or collective bargaining agreement) as long as that reason isn't discriminatory.