

# Labor & Employment Advisory

## WHAT EMPLOYERS NEED TO KNOW ABOUT CORONAVIRUS DISEASE 2019 (COVID-19)

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As the novel Coronavirus, known as Coronavirus Disease 2019 or COVID-19, begins to spread around the United States, employers are faced with the prospect of managing their business during a potential pandemic of unknown proportions. In an effort to minimize that disruption, the World Health Organization ("WHO") and U.S. Center for Disease Control ("CDC") have issued recommendations for how employers and businesses should prepare for and respond to COVID-19 in their communities. For employers in the United States, the challenge will be to balance recommendations from public health authorities, compliance with applicable employment laws, and business needs.

### THE CDC'S RECOMMENDATIONS

The CDC has issued [Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 \(COVID-19\)](#), which applies to most employers. The CDC recommends that most employers take certain steps to prevent the spread of infection in their workplaces. The CDC's recommendations fall into six categories:

1. Actively encourage sick employees to stay at home;
2. Separate sick employees from healthy employees, and send sick employees home;
3. Encourage "respiratory etiquette" and "hand hygiene;"
4. Perform routine cleaning, particularly of frequently touched surfaces in the workplace;
5. Address work-related travel; and
6. Develop a plan for dealing with employees who develop COVID-19 or who live with someone who does.

The CDC directs employers to OSHA standards addressing prevention of disease in the workplace. Those standards and other considerations related to COVID-19 in the workplace are discussed below.

The CDC has issued more detailed guidance and recommendations for health care professionals to assist them in the treatment and care of patients with COVID-19. These are not discussed in this Client Advisory, but are available [here](#). The CDC has also issued detailed guidance and recommendations for commercial air carriers, including detailed guidelines for cleaning and disposing of personal protective equipment, available [here](#).

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Elizabeth's practice is focused on advising employers about their policies and practices, as well as representing employers in disputes with their employees. Elizabeth's clients benefit from her pragmatic approach to employer and employee issues.



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Pat Miller assists companies in developing and implementing workplace safety and health policies and programs, with a particular focus on Occupational Safety and Health Administration (OSHA)- and Mine Safety and Health Administration (MSHA)-required policies. Representing numerous clients, including big-name clients across many industries, Pat is among the most highly regarded OSHA attorneys in Colorado.

## THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION'S TAKE

The Occupational Safety and Health Administration ("OSHA") has dedicated a page on its website to COVID-19, available [here](#). While OSHA acknowledges that the majority of workers in the United States do not face a risk of exposure, it identifies certain industries in which the risk is greater. These include healthcare, deathcare, airline operations, waste management, and any occupation involving travel to China or other areas with high rates of infection. While there are no OSHA standards that directly address COVID-19, OSHA reminds employers of their obligations to assess workplaces for potential respiratory hazards and to provide the appropriate personal protective equipment ("PPE"), including, if appropriate, respirators. OSHA has concluded that workplace infections from the virus, unlike transmissions of the common cold or flu, are illnesses that must be recorded on an employer's injury and illness logs. Employers should evaluate the risk of COVID-19 exposure in their workplaces and update their respiratory program and PPE requirements accordingly. Also, while not directly applicable to COVID-19, OSHA recommends referring to the protective measures found in its Bloodborne Pathogens Standard as a possible framework for protecting employees.

### Nondiscrimination Obligations

COVID-19 originated in China. As a result, most of the people who initially contracted the illness were Chinese. Title VII and state antidiscrimination laws prohibit employment discrimination and harassment based on race, national origin or ancestry. Employers should take care to treat employees similarly, regardless of race and national origin, and regardless of association with individuals of Chinese heritage.

### Encouraging Employees to Stay Home if Sick

COVID-19 is spread from person to person. The early symptoms of COVID-19 are similar to other respiratory illnesses: cough, fever, and shortness of breath. The CDC recommends that employers encourage employees with coughs (mild or otherwise), fevers, shortness of breath, or those using over-the-counter medication to mask those symptoms, to stay at home until they are symptom-free without medication for at least 24 hours.

- **Remote Work.** Encouraging employees to miss work for even a mild cold could be disruptive to business operations, particularly during cold and flu season. In addition, employees may be hesitant to use paid leave for what they perceive to be a minor bug. If an employee's work can be performed remotely, permitting telework is an option to consider. Before implementing a new telework policy or liberalizing an existing policy, employers should take care to protect trade secrets and confidential business information that employees might take home with them when working remotely. Employers should identify methods of ensuring accountability while employees work remotely.
- **Sick Leave and Paid Time Off.** Some tasks simply cannot be performed remotely. For example, sales clerks, delivery drivers, and pilots cannot perform their duties from home. The WHO and CDC recommend that employers adopt generous and flexible paid leave policies, and make employees aware of other benefits available to them (e.g., short-term disability plans, employee hardship funds, etc.). These agencies are concerned that, if leave is unpaid, sick employees will have an incentive to come to work despite feeling ill. Employers without the financial resources to offer extensive paid leave may consider temporary unpaid leaves of absence.
- **FMLA Leave.** Companies with at least 50 employees should be mindful of whether the Family and Medical Leave Act ("FMLA") applies to a particular employee's COVID-19 absence. The FMLA requires covered employers to provide eligible employees with up to 12 weeks of job-protected leave if the employee has a serious health condition or needs to care for a family member with a serious health condition. The common cold generally will not qualify as a serious health condition warranting FMLA leave. Some people who contract COVID-19 experience serious complications, including breathing impairment requiring hospitalization. For at least some people, therefore, COVID-19 will be a serious health condition warranting leave under the FMLA.
- **Fitness for Duty Releases.** The CDC recommends that employers temporarily suspend requirements that sick employees provide releases to return to work. The CDC's rationale is that healthcare providers will be freed from providing releases to return to work, which will enable them to focus their attention on treating sick patients. However, employers who grant leaves of absence under the FMLA or under the Americans with Disabilities Act ("ADA") may need to be sure that an

employee's return to work has been approved by a healthcare provider.

- **Independent Contractors, Consultants, and Business Associates.** The CDC recommends that employers encourage the temporary employment agencies, consulting firms, and other independent contractors that place workers at their worksites to adopt generous and flexible leave policies. However, employers should be cautious not to develop a joint employer relationship by directing the benefits or terms and conditions of another company's employment relationships. Imposing specific requirements for paid time off or directing another entity's sick employees to leave work could create the appearance of joint employment and expose the employer to liability under various laws, including antidiscrimination and antiretaliation laws. Employers would be better served by having general conversations with the managers of the companies that provide contract workers to ensure that those companies are taking precautions to avoid the spread of COVID-19.

### Sending Sick Employees Home

The CDC recommends that employers proactively identify sick employees and send them home. Employers should be careful when inquiring about an employee's health status. The ADA permits employers to make medical inquiries of employees that are job-related and consistent with business necessity. Whether an inquiry is job-related and consistent with business necessity depends on the surrounding facts and circumstances. For some industries, like food service and healthcare providers, this standard will be met easily. Other industries, particularly those in which employees work on their own in isolated locations, may not meet this standard. Employers who make the decision to send an employee home because the employee is sick should carefully document all of their reasons for believing the employee was sick, including observations of physical illness, the employee's comments, and observations of the employee's use of symptom-controlling medicine.

### Encouraging Good Hygiene

The CDC believes that employees can reduce transmission of COVID-19 by coughing and sneezing into a tissue or shirtsleeve rather than into a hand or the open air, and by regularly washing hands in soapy water for at least 20 seconds or using a hand sanitizer of sufficient strength to kill viruses. The CDC recommends that employers educate employees about respiratory etiquette and hand hygiene by posting notices in bathrooms and on intranets. The CDC recommends that employers make tissues, hand-washing facilities, and hand sanitizers readily available throughout their workplaces.

### Routine Cleaning

The CDC recommends routine cleaning of the workspace, with particular emphasis on frequently touched surfaces (e.g., worktops, doorknobs, and elevator buttons). The CDC also recommends making cleaning supplies, such as disinfecting wipes, available to employees so that they can maintain the cleanliness of work areas throughout the day. Employers should be careful not to assign exempt employees extensive cleaning duties; de minimis routine cleaning should not alone defeat the employee's exemption under the Fair Labor Standards Act and state law. Employers that outsource cleaning may need to speak with cleaning services to be certain that frequently touched surfaces are thoroughly cleaned on a regular basis.

### Work-Related Travel

Business travel poses particular risks of transmitting COVID-19. The CDC publishes [Traveler's Health Notices](#) and recommends that most employers delay or cancel business travel based on information contained in those notices. The CDC recommends that employers encourage employees not to travel if they have symptoms of acute respiratory illness before their trip begins. The CDC also recommends that employers tell employees to notify a supervisor and contact a healthcare provider if they become ill while traveling. To these recommendations, the WHO adds that employees who travel outside of the United States or to a region with significant COVID-19 activity should work from home for the first 14 days after they return to the United States. Employers requiring employees to self-quarantine after business or personal travel should consider whether the employee can telecommute and, if not, whether the employer will offer paid leave.

## Planning for the Worst

The CDC predicts that COVID-19 will disrupt many Americans' lives. Although the CDC's prediction is short on details, other countries have shuttered factories, ordered large-scale school and daycare closures, and banned gatherings. The news has reported on cruise ship passengers and air travelers unable to return to work after planned vacations because of mandatory and voluntary quarantines. Employers should make a plan now for responding to possible disruption from COVID-19. Employers' plans should take into account at least the following:

- Preparing to conduct a risk assessment if an employee or someone an employee lives with is diagnosed with COVID-19. Interim guidance from the CDC on how to conduct a risk assessment in most workplaces is available [here](#). Interim guidance on conducting a risk assessment in healthcare settings is available [here](#). Employers may contact public health agencies for more information, and are not currently required to report suspected COVID-19 workplace exposures to any federal, state, or local agencies.
- Designating a decision maker or team of decision makers to take steps based on the results of the risk assessment. For example, the risk assessment may necessitate prohibiting a particular employee or group of employees from business travel and from coming to work for a period of time.
- Communicating with employees about the results of risk assessments and other COVID-19 issues. The ADA requires employers to maintain medical information about employees as confidential, so employers should not disclose the identity of any employee diagnosed with COVID-19. Employers should, instead, advise impacted employees that they may have been exposed to COVID-19 and their level of risk of exposure. Employers should promptly inform at-risk employees of any resulting restrictions on business travel and presence of COVID-19 in the workplace. In addition, if COVID-19 necessitates temporary or permanent layoffs or plant closures, employers may be obligated to provide prompt notice under the Worker Adjustment and Retraining Notification ("WARN") Act.
- Preparing for how to handle employees who are absent from work as a result of COVID-19, including with expansion of paid and unpaid leave programs, and ensuring adequate staff to administer a higher-than-normal volume of FMLA requests within timelines set by law. Employers may also wish to speak with their employee assistance programs managers about benefits they can offer to employees.
- Identifying core operations that must continue even if COVID-19 disrupts some aspects of the business. Knowing who key customers are and their needs, and understanding the company's services and business functions will help employers determine how to cross-train employees to minimize the impact of significant unplanned absences. Identifying alternative supply chains and logistical options will help companies minimize disruption, and avoid furloughs and layoffs.

Because responding to COVID-19 in the workplace touches on a variety of legal issues, employers should consider seeking legal advice to ensure that their response to any potential or actual case of COVID-19 is handled properly.