

EMPLOYER GUIDANCE FOR COMMON RETURN-TO-WORK CONCERNS

In light of the coronavirus (COVID-19) pandemic, many organizations are taking precautions to best ensure the health and safety of their workforce. As return-to-work plans are implemented, employees are also concerned about safety—and are often addressing concerns directly with their employers.

As organizations address new challenges, many are seeking answers regarding what they can, and cannot do in response to common return-to-work concerns. This article serves as a general guide for employers regarding safety and workplace precautions as organizations prepare and implement return-to-work plans and prepare to address common concerns as employees return to the workplace.

Employee and Employer Rights

Both employees and employers have rights, and—as workers return to the workplace and organizations consider appropriate actions to keep everyone safe—conversations about those rights will be ongoing.

During this time, employees are prioritizing safety, and they will not be afraid to address issues they feel may be a risk. As employees bring forward individual concerns, employers should review guidance as they respond to each unique situation. While, in some cases, employees may be protected under federal or local laws and guidelines, employers should be aware of what rights they also have.

Common Issues

Each organization will address their own set of concerns, though there are some common issues that many employers face. Some of these common issues fall into categories, including:

- Employees returning to work
- COVID-19 symptoms
- Employee testing
- Masks and face coverings
- Health conditions
- Workers' compensation and hazard pay
- Federal and local guidance

Employers should be aware that federal, local and state guidance changes frequently and should be monitored on an ongoing basis. The U.S. Equal Employment Opportunity Commission (EEOC) has provided COVID-19 resources, and the Centers for Disease Control and Prevention (CDC) offers updated guidance for employers.

Employers should be aware that these considerations will vary depending on the locality of a workplace. The guidelines provided in the questions and answers that follow are not legal advice, and employers should consult with legal counsel for guidance, and before changing or implementing policies.

Employees Returning to Work

We've asked an employee to come back to work, but they are having an issue with caregiving responsibilities due to schools and day cares remaining closed. What are our options?

School and day care closings can put both employers and caregivers in a difficult situation since schools and day cares allow for many caregivers to go to work. Generally, employers aren't required to oblige to requests regarding caregiving, and likely won't be able to help the employee address the situation. An employee may request an unpaid leave of absence.

If an employee refuses to return to work, employers generally won't be required to hold their job should they not return. According to the EEOC, employers may choose to provide flexibility if not treating employees differently on the basis of sex or other EEO-protected characteristics.

We have employees who have been working from home and would like them to come back to the workplace as we reopen. Can we require employees to come back to work at a physical location?

Generally, if employees are offered work and are being asked to come back into the workplace, they are required to return as there are little protections at the federal level. However, under the Americans with Disabilities Act (ADA), some employees may be entitled to continue teleworking as a reasonable accommodation. As well, under the Families First Coronavirus Response Act, some employees may qualify for paid family medical leave or paid sick leave under certain conditions related directly to COVID-19.

An employee used some time off. Are we allowed to ask where they went?

Employers may ask if an employee has visited certain high-risk locations during the coronavirus pandemic if consistent with business necessity. However, employers are unable to ask for general details about their time off. When health officials have recommended that people who visit certain locations remain at home for several days once they return, an employer may ask whether an employee is returning from those places, even if the travel was personal.

If an employee has traveled internationally, the US Department of Homeland Security (DHS) may ask an employee where they went and could ask that employee to self-quarantine. As some states have specific laws related to an employee's personal travel, employers should consult their local government's laws and guidelines.

Though our workplace follows safety guidelines, an employee is concerned about exposure on their commute. What are our options?

If an employee doesn't qualify under for reasonable accommodation under the ADA, an employer won't always be required to grant permission for the employee to work remotely. While many employers continue to expand remote work practices, telecommuting isn't always feasible. Employers can also consider unpaid leave, depending on the feasibility of the situation.

COVID-19 Symptoms

About which symptoms can we ask employees who report feeling ill or call in sick?

According to the EEOC, an ADA-covered employer may ask employees if they have specific symptoms related to the coronavirus under pandemic conditions. All medical information should be protected as confidential under the ADA and be stored separately from the employee's personnel file.

Can we require employees who have COVID-19-related symptoms to stay home?

According to the EEOC, employers are allowed to keep employees with COVID-19-related symptoms separate from others and keep them at home, if feasible, given the situation.

Employee Testing

Can we take temperatures of employees?

Taking an employee's temperature would typically be considered a medical examination, which could be a violation of the ADA if not "job related and consistent with business necessity." However, because the CDC and health authorities have acknowledged community spread of the coronavirus, employers may take employees' temperatures, according to EEOC guidance. Employers should note that many individuals with COVID-19 will not have a fever.

Employers will continue to be able to take temperatures, only for as long as the EEOC and CDC deem these otherwise prohibited medical examinations as necessary to prevent the spread of COVID-19. Additionally, the ADA requires that all medical information and files for a particular employee be stored separately from that employee's personnel file.

Can we require employees to take a COVID-19 test in order to work?

According to EEOC guidelines, to prevent COVID-19 from spreading in a workplace, organizations can typically require an employee to take a test to check whether they currently have an active case of COVID-19, which is considered a viral test.

While employers are allowed to require viral COVID-19 tests, an employer cannot require an employee to take a test to determine whether they have antibodies for the coronavirus. The antibody tests determine whether an individual has had COVID-19 in the past. According to the EEOC, an antibody test may violate the ADA because it would be a medical examination that is not "job related and consistent with business necessity."

Masks and Face Coverings

If any employees find a mask uncomfortable, can we require them to wear it?

According to the EEOC, an employer may require employees to wear masks. As a form of personal protective equipment (PPE), masks and other PPE can be required if management considers it necessary.

However, an employee may be eligible for reasonable accommodation under the ADA or a religious accommodation under Title VII. If a request is presented, an organization can review the request and discuss an accommodation if not an undue hardship under the ADA.

Health Conditions

Are we allowed to ask employees if they have underlying health conditions that may put them in a high-risk category?

According to the EEOC, it is up to an employee to disclose any underlying health conditions that put them in a COVID-19 high-risk category. These protections are covered under the ADA.

When employees return to work after being sick with COVID-19, can we require they provide a doctor's note clarifying they are safe to work?

In certain circumstances, employers may be able to require a doctor's note during a pandemic, according to the EEOC. A request for a doctor's note won't necessarily violate the ADA, as such inquiries are permitted under the ADA when not disability related. Employers may consider that many doctors and other health care professionals may be busy during and immediately after a pandemic such as COVID-19.

If an employee has an underlying health condition, can we require they return to work?

Under the ADA, an employee or a third party, such as the employees' doctor, can request a reasonable accommodation related to a medical condition. An organization may be required to provide reasonable accommodation if it would not provide undue hardship.

Are pregnant employees identified as high-risk for COVID-19?

According to CDC guidelines, pregnant women aren't identified as high-risk. However, some states have specific laws and guidelines regarding pregnancy and COVID-19. Check with local guidance for specifics.

Workers' Compensation and Hazard Pay

If an employee contracts COVID-19 in our workplace, are they eligible for workers' compensation?

Workers' compensation may be filed; however, infectious diseases such as the flu have generally not resulted in entitlements to workers' compensation. But this can vary. According to the DOL, it can often be challenging to prove that an employee contracted a virus or disease, such as COVID-19, at a work location. However, some states do have orders or bills addressing eligibility for workers' compensation. Employers should monitor ongoing guidance and consult with local legal counsel.

Are independent contractors who contract COVID-19 eligible for workers' compensation?

If an independent contractor believes they contracted COVID-19 while at work, they may file a lawsuit. Generally, these cases are challenging to prove. However, an independent contractor may make a claim for negligent behavior and safety hazards that put them at risk of contracting COVID-19.

An employee has contracted COVID-19 and believes they got it at work. What will likely be the result if they sue our organization?

According to the DOL, it can often be challenging to prove that an employee contracted a virus or disease at a workplace, although the employee may choose to file a lawsuit. However, an employee may also make a claim for negligent behavior or safety hazards that put them at risk of contracting COVID-19.

Are our employees entitled to hazard pay if their job puts them at risk of exposure to COVID-19?

The FLSA does not require hazard pay for those working during the coronavirus pandemic. Hazard pay is typically a private transaction and not required under the FLSA. However, some state or local laws may vary, and employers should consult with local legal counsel.

Federal Guidance

What should our organization do if an employee claims our workplace is not following CDC guidelines for a coronavirus-safe workplace?

Employees are entitled to file a complaint with OSHA. As employers address an employee's concerns, the proper response will vary based on local orders and unique circumstances within an organization. Some state or local laws may vary, and employers should consult with local legal counsel.

If an employee addresses safety practices, is our organization required to respond?

According to the DOL, whistleblower laws protect employees and are enforced by OSHA. Retaliatory actions are illegal, and employees do have the right to file a complaint with OSHA. Also, workers may request a reasonable accommodation, and they do have some protections if they refuse to work in a situation when workplace conditions could put their safety in danger.

If a COVID-19 vaccine is developed, can we require our employees to get it?

Employers generally can require vaccinations during pandemic situations. However, an employee may be entitled to an exemption should the vaccine interfere with a medical condition or be in violation of an individual's religious beliefs.

Return-to-Work Guidance

Many of these common concerns won't always have the same solution, and employers should continue to monitor ongoing guidance from federal agencies such as the CDC, EEOC and OSHA, as well as updates from local officials. Current guidance is changing rapidly, so ensure your organization is staying up to date with current requirements, recommendations and best practices.

The guidelines discussed in this article are not legal advice. Employers should consult with local legal counsel for legal advice. For addition return-to-work resources, contact Woodruff Sawyer.