

Coronavirus: An Employer's Action Guide – Part III

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As the coronavirus continues to spread, employers should continually evaluate whether their prevention and response efforts are sufficient and appropriately tailored based on the latest information on the virus and their own business considerations. Here is our latest guidance, which may further inform your own response plan.

This is a follow up to our posts on [March 4, 2020](#) and [February 14, 2020](#). Our full Employer's Action Guide can be found [here](#).

What degree of coronavirus exposure should cause employers to send employees home or deny visitors access to our worksite, and for how long should site access restrictions remain in place?

This is very much a judgment call. The nearly limitless variety of scenarios that may occur makes it difficult to establish clear and objective rules to follow in assessing reported situations.

Exposure may occur due to personal contact or through surface contamination, although the CDC advises that close personal contact is the greatest risk. In either case, exposure may be firsthand or of a second or third degree — i.e., via contact with a person who had recent close personal contact with someone diagnosed with coronavirus, or with a person who has had recent contact with another person diagnosed with coronavirus, etc.

Some employers are requiring employees and visitors with up to second-degree exposures to remain offsite until the transmission threat is mitigated. We have seen few employers sending people home with lesser degrees of exposure. If the only known exposure is via potential surface contamination, employers often restrict worksite access only if the exposure was firsthand.

Much depends on how disruptive it is to operations if high numbers of employees may work only remotely, if at all. Some businesses can manage under such an arrangement, but others such as manufacturers, health care providers and warehouse operations require a mostly-onsite workforce to function. For them, the primary strategy is likely to be mitigation (reducing exposure risks for workers onsite) rather than containment (removing known and even potential exposure sources from the worksite).

Employers adopting a mitigation strategy for business reasons are focusing more and more on sending home only employees with symptoms consistent with coronavirus, such as fever of 100.4 degrees or more, coughing or shortness of breath, and possibly also those with recent Level 3 country or cruise ship travel.

As to the period of time to require someone to remain offsite, the latest Centers for Disease Control and Prevention (CDC) guidance indicates that symptoms may not appear for two to 14 days after exposure, so many employers are following the more conservative 14-day time frame.

Can a company ask its employees to submit health declaration forms that provide personal data — for instance, whether they are experiencing symptoms and have traveled to, or been in close contact with persons who have traveled to, regions affected by the novel coronavirus?

Yes, those specific questions are permissible given the level of threat (severity and apparent ease of transmission) of this particular virus. For symptoms, it should be limited to asking if they are experiencing any of the symptoms associated with COVID-19, i.e., coughing, fever of 100.4 degrees or above or shortness of breath. (That is based on the CDC's latest guidance, which should be monitored for potential updating). We recommend limiting the inquiry to activities or symptoms within the last 14 days, which seems to be the best available information about when transmission may occur. Medical inquiries that go beyond this should be further reviewed to determine whether they are permissible under the Americans with Disabilities Act (ADA). Under the California Consumer Privacy Act (CCPA), those employees residing in California should be provided notice, explaining the categories of personal information collected and the purposes for which the information was collected.

Can employers force employees to come to work, even if there is a known exposure-potential situation?

Currently, yes, employers can generally require employees to continue working their scheduled hours as assigned, onsite, as a condition of continued employment, with absences addressed under the applicable attendance policy. If the employee cites a medical impairment that could qualify as a disability as the reason for the reluctance to come to work, the employer should follow the ADA's interactive process to determine whether a remote work arrangement or some time off work in hopes that the risk level will soon be alleviated would be a reasonable form of accommodation.

Before issuing any ultimatum, however, we recommend communication to employees about what the employer is doing to mitigate the risk to the extent reasonably possible. This may allay fears enough that the employee will be willing to meet attendance expectations.

In situations of known potential exposure, can employers require employees to be tested for coronavirus?

No. Only health care providers can order testing, and with tests still in short supply, even individuals with symptoms consistent with coronavirus may not be tested if, based on age and medical condition, it is unlikely they would suffer severe effects even if infected.

Based on CDC advice that older people as well as those with serious chronic medical conditions stay home as much as possible if coronavirus is spreading in their communities, should employers require all employees age 60 or older to work remotely (if at all) in areas where coronavirus cases are being reported?

We do not recommend taking that action based on federal, state and local protections against age discrimination as well as disability discrimination laws intended to provide equal employment opportunities to the disabled. These disability discrimination laws generally do not allow employers to remove employees from situations based on a medical condition for preventive purposes unless and until the situation poses a direct threat to the employee's health and safety that cannot be effectively alleviated through other measures. Circumstances could conceivably rise to that level at some point, but as things stand now, presence in most workplaces would not rise to that "direct threat" standard.

May and should employers revise paid sick time policies to allow for "quarantine" situations?

Many employers are offering relaxed and/or additional paid leave benefits in response to the current situation. Most common is allowing use of paid sick time to cover time off work due to restrictions against coming onsite for coronavirus prevention purposes. Paid sick time may also be allowed for other coronavirus-related reasons for absence, such as the need to care for children whose schools are closed — and keep in mind that some states, such as New York, require a minimum amount of paid time off each year that may be used for such a purpose.

Some employers are simply paying for "quarantine time" separately from any existing paid time off policies, but that is not always feasible, especially given the uncertainty about the potential total cost at a time when revenues may be down. Some employers are considering adopting "leave-sharing" programs to allow employees to donate a portion of their paid time off to coworkers who are off work for extended periods due to the coronavirus. Because leave-sharing programs can be complex to administer, and if not properly designed, donor employees may be subject to payroll taxes on donated leave, we advise consulting benefits counsel before adopting such a program.

How may employers incentivize employees who are working long hours to cover for absent colleagues?

We are seeing a variety of incentives including some "bonus" paid time off to be used once the absence rate is back to normal, and monetary incentives such as a certain dollar amount or percent of pay for people working over a certain number of hours in a workweek. Do keep in mind that monetary incentives paid to non-exempt employees should be taken into account in calculating the regular rate for purposes of calculating overtime payments due, per requirements of the Fair Labor Standards Act. State law requirements may also apply.

If an employee contracts coronavirus through exposure at work, would that be treated as a workers' compensation claim?

Likely not. Typically, workers' compensation covers occupational diseases that are contracted or aggravated due to the nature of a particular kind of work — for example, a hospital worker who gets stuck by a needle and contracts a disease. Illnesses transmitted among workers would generally not be covered.

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