Employers' Most Common COVID-19 Coronavirus Questions Answered

What can an employer do if an employee reports to work with flu-like symptoms?

If any employee presents themselves at work with a fever or difficulty breathing, 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 Americans with Disabilities Act (ADA). If an employee is experiencing these symptoms, the employee should be directed to seek medical evaluation. It is also recommended that employers train supervisors on how to recognize these symptoms, while stressing the importance of not overreacting to situations in the workplace potentially related to COVID-19 Coronavirus in order to prevent panic among the workforce.

Can an employer ask an employee to stay home or leave work if they exhibit symptoms of COVID-19 Coronavirus or the flu?

Yes. The Center for Disease Control (CDC) has made it clear that employees who exhibit influenza-like symptoms at work during a pandemic should leave the workplace and be asked to stay home. Employees who have symptoms of acute respiratory illness are recommended to stay home until they are free of a fever (100.4º F), signs of a fever, or any other symptoms for at least 24 hours, without the use of fever-reducing or other symptom altering medicines. Now that the COVID-19 Coronavirus has been declared a pandemic by the WHO, the Equal Employment Opportunity Commission (EEOC) has stated that advising workers to go home is not disability-related if the symptoms presented are akin to the seasonal influenza. An employer may therefore require workers to go home if they exhibit symptoms of the COVID-19 Coronavirus or the flu without running afoul of the EEOC's interpretation of the ADA.

If an employee calls in sick, how much information can an employer ask them about?

An employer may ask employees if they are experiencing flu-like symptoms. Employers must maintain the confidentiality about employee illness as a confidential medical record in compliance with the ADA.

What should an employer do if an employee tests positive for COVID-19 Coronavirus?

In addition to sending the employee with the positive test home, you should send all employees who worked closely with that employee home for a 14-day period of time to ensure the virus does not spread. Make sure the affected employee identifies all individuals who worked in close proximity (within six feet) with them in the previous 14 days to ensure you have a full list of those who should be sent home. When sending the employees home, do not identify by name the infected employee or you could risk a violation of the ADA. You may also want to consider asking a cleaning / remediation company to undertake a deep cleaning of your affected workspaces. If you work in a shared office building or area, you should inform building management so they can take whatever precautions they deem necessary.

Can an employee refuse to come to work because of fear of COVID-19 Coronavirus?

At present, employees are only entitled to refuse to report to work if they believe they are in imminent danger. Section 13(a) of the Occupational Safety and Health Act (OSH Act) defines "imminent danger" to include "any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act." This is a relatively high standard that requires a "threat of death or serious physical harm," or "a reasonable expectation that toxic substances or other health hazards are present, and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency."

For an employee to refuse to report for work, the threat must be immediate or imminent, which means that an employee must believe that death or serious physical harm could occur within a short period of time. Requiring travel to certain areas of the world or requiring employees to work with patients in a medical setting without personal protective equipment at this time may rise to this threshold. Most work conditions in the United States, however, would not presently meet this threshold. Each case must be evaluated on its own merits and employers should seek to determine whether their workplace creates imminent danger to employees.

Does the FMLA require an employer to allow leave to an employee who is concerned about exposure in the workplace?

No. The FMLA does not provide leave for avoiding the workplace out of fear of contracting a disease. ***However, see discussion regarding the Coronavirus Act, which becomes effective April 2, 2020.***

May an employer require its employees to adopt infection-control practices, such as regular hand washing, in 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. The message employers should be giving to its employees are:

• Wash your hands often with soap and water for at least 20 seconds. If soap and water are not available, use an alcohol-based hand sanitizer.
• Avoid touching your eyes, nose, and mouth with unwashed hands.
• Avoid close contact with others, especially those who are sick.
• Refrain from shaking hands with others for the time being.
• Cover your cough or sneeze with a tissue, then throw the tissue in the trash.
• Clean and disinfect frequently touched objects and surfaces.
• And, perhaps most importantly, tell employees to stay home if they are sick.

If an employer temporarily closes due to COVID-19 Coronavirus, does it have to pay its employees?

This week, the Department of Labor clarified the compensation requirements for employers who have shut down due to COVID-19 Coronavirus. Salaried workers exempt from overtime, if mandated by their employer to stay home, must be paid in full during any week in which they perform *any* work. This means if the employer shuts down mid-week, the salaried workers must be paid for an entire week. An employer is not required to compensate a salaried employee during a week in which he or she performs no work. Non-exempt workers are not similarly protected. Under the FLSA, employers need only pay non-exempt employees for hours worked, regardless of whether they were scheduled to work additional time. ***However, see discussion regarding the Coronavirus Act, which becomes effective April 2, 2020.***

Can an employer require employees who are sent home or are told not to report for work to use accrued PTO time?

Likely yes, unless prohibited by state law. If an employer's internal policy provides, an employer may require employees to use accrued PTO time if they are unable or unwilling to report to work – this is the case even if the employer shuts down a facility and the employee is therefore unable to work. ***However, see discussion regarding the Coronavirus Act, which becomes effective April 2, 2020.***

May an employer require employees to telecommute?

Yes. Telecommuting is an effective infection control strategy that is also familiar to ADA-covered employers as a reasonable accommodation. In addition, employees with disabilities that put them at high risk for complications of pandemic influenza may request to "work from home" as a reasonable accommodation to reduce their chances of infection during a pandemic. An employer is not required to provide telecommuting as an option to *all* employees, but it is recommended that if the opportunity is presented to a certain classification of employees, all other employees in that job classification should similarly be permitted to telecommute.

How will HB 6201, the "Families First Coronavirus Response Act" ("Coronavirus Act"), impact employers?

House Bill 6201, known as the Coronavirus Act, which passed the House and Senate, and was signed into law by President Trump on March 18, 2020, is designed to provide affected workers expanded FMLA protections, expansion of food assistance, unemployment benefits, sick leave and other relief. It also contains further guidance on cost-sharing requirements for COVID-19 Coronavirus for health plans.

Specifically, the Emergency FMLA Expansion Act will require employers with fewer than 500 employees to provide employees (who have worked at least 30 calendar days) with up to 12 weeks of job-protected leave if the employee has a "qualifying need related to a public health emergency."

A "qualifying need related to a public health emergency" means an employee who is unable to work (or telework) due to a need for leave to care for a son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable due to a public health emergency. If the need for such leave is foreseeable, the employer must provide notice of leave as soon as practical.

The first 10 days of leave would be unpaid. Employees may elect (but employers cannot require) to substitute accrued paid leave during this time. After expiration of the 10 days of unpaid leave, an employer will be required to provide paid leave of an amount equal to at least two-thirds of the employee's regular rate of pay multiplied by the number of hours the employee would otherwise normally work. However, in no event shall the paid leave exceed $200 per day, or $10,000 in the aggregate.

The Act includes language allowing the Secretary of Labor to exclude healthcare providers and emergency responders from the definition of employees who are allowed to take such leave, and to exempt small businesses with fewer than 50 employees if the required leave would jeopardize the viability of their business. Should an employee take FMLA leave under this Act, he or she must be restored to their prior position before the leave, subject to certain conditions and limitations.

HB 6201 also includes the Emergency Paid Sick Leave Act, which would require employers with fewer than 500 employees to provide up to 80 hours of paid sick leave to employees who are unable to work (or telework) due to a need for leave because:

1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID19;
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4. The employee is caring for an individual with is subject to an order described in Paragraph 1, or has been advised as described in Paragraph 2;
5. The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care of such son or daughter is unavailable due to COVID-19 precautions; and/or
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

For full-time employees, the leave would be up to 80 hours. For part-time employees, the leave would be equal to the number of hours that such employee worked, on average, over a 2-week period. The sick leave is paid at the employee's regular rate of pay for qualifying leave under Paragraph (1), (2), or (3), but only 2/3 of the employee's regular rate for qualifying reasons under Paragraph (4), (5), and (6). However, in no event shall the paid sick leave exceed $511 per day, or $5,100 in the aggregate for Paragraphs (1), (2), and (3) and no more than $200 per day, or $2,000 in the aggregate for Paragraphs (4), (5), and (6) listed above.

This emergency leave is in addition to other leave in which the employer may already provide. Employers may not require employees to first exhaust other available paid leave before providing emergency leave under this Act.

This portion of the Act does not include a requirement that the employee be employed for at least 30 days in order to be eligible for leave. Paid sick leave under this Act does not carry over and is any unused time under this Act is not required to be paid out to the employee upon termination or separation of employment.

For both the Emergency FMLA Expansion Act and the Emergency Paid Sick Leave Act, employers would be entitled to certain tax credits for their employer's portion of payroll taxes for qualified sick leave wages paid to employees, subject to certain limitations.

Finally, self-funded employers should be aware of the Act's requirement regarding coverage for COVID-19 testing and treatment. Under the Act, group health plans shall provide coverage, and shall not impose any cost sharing (including deductibles, copayments, and coinsurance) requirements or prior authorization or other medical management requirements, for the following items and services:

(1) In vitro diagnostic products for the detection of SARS–CoV–2 or the diagnosis of the virus that causes COVID–19 that are approved, cleared, or authorized under section 510(k), 513, 515 or 564 of the Federal Food, Drug, and Cosmetic Act, and the administration of such in vitro diagnostic products.

(2) Items and services furnished to an individual during health care provider office visits (which term in this paragraph includes in-person visits and telehealth visits), urgent care center visits, and emergency room visits that result in an order for or administration of an in vitro diagnostic product described in paragraph (1), but only to the extent such items and services relate to the furnishing or administration of such product or to the evaluation of such individual for purposes of determining the need of such individual for such product.

This Act, and all of its provisions, takes effect on April 2, 2020 and expire on December 31, 2020. Also, a model notice that employers will need to post, should be available from the Secretary of Labor, within a week.

Finally, in addition to this Federal Act, states are enacting their own legislation and the federal government is considering additional stimulus bills to provide relief to Americans impacted by COVID-19 Coronavirus.

What questions can an employer ask about employee's personal vacation? Can an employer limit personal vacations for its employees?

An employer can ask its employees whether they have traveled to any locations (or a cruise ship) the CDC or state health officials have indicated are destinations with a risk of community-spread COVID-19 Coronavirus—Check the CDC website for a list of current locations (https://wwwnc.cdc.gov/travel). The CDC recommends that anyone traveling to these locations should stay home for 14 days and to practice social distancing.

While an employer cannot likely prohibit an employee from taking a personal vacation, an employer can initiate a mandatory time away from work policy if an employee takes a personal vacation. This would typically include a period (usually 14 days) away from work, where the employee can either use PTO or take unpaid leave. ***However, this mandatory time away from work policy would have to comply with the Coronavirus Act, beginning April 2, 2020.***

These issues are continually changing in a time of uncertainty and it important to be mindful of what is occurring at the federal level as well as the state and local level that may impact you as an Employer and your Employees. It is also important to seek legal and tax advice if you have specific questions or concerns as this document is for informational purposes only and it not intended to constitute legal or tax advice.

This information was prepared by Fiduciary Risk Management (FRM). Should you have any questions about its content, please contact us at (406) 647-3715 or cori@the-frm.com.

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