



IN-DEPTH DISCUSSION

## Coronavirus (COVID-19) Employer FAQs

By Brad Hammock on March 5, 2020

The spread of the novel coronavirus (COVID-19) across the globe remains a significant concern in the workplace. Employers are confronting difficult questions regarding how to handle leave and accommodation, immigration, safety and health, and other employment issues. The following Frequently Asked Questions (FAQs) are designed to address some of the more common questions that employers currently face. Employers are also encouraged to consult relevant FAQs put forth by the [Centers for Disease Control](#) (CDC) and the [Equal Employment Opportunity Commission](#) (EEOC). Please keep in mind that different or additional facts can impact how the situation should be handled.

### Travel Restrictions

#### 1. **Can an employer restrict travel to all locations under a CDC travel advisory?**

An employer may restrict business travel. Employers should continue to consult the CDC's website: "[Coronavirus Disease 2019 Information for Travel](#)" for up-to-date travel notices concerning risk. The CDC advises that employers restrict *all nonessential travel* to areas with a Warning Level 3, and to exercise caution regarding travel to Warning Level 2 areas.

#### 2. **What if employees share that they plan to travel to a high-risk area/country?**

In this situation, an employer may advise the employee about the risks of travel, including quarantine thereafter, and should avoid any action that could result in a claim of national origin discrimination. An employer may deny time off for an employee's personal travel, as long as such a denial is based on the destination, the business cost of a resulting quarantine, or other legitimate business-driven interest, not the national origin of the employee. An employer that has a reasonable belief an employee has travelled to a high-risk country or area and either has acquired COVID-19 or been exposed may ask that the employee not return to work for 14 days (per CDC recommendations) or may send the person home. In these instances, the employer should consult various leave and wage and hour laws to determine entitlement to leave and pay.

#### 3. **What if the employee has family members who have traveled to affected areas?**

Employers may request that employees advise them of any family members with whom they have close contact who have traveled to high-risk areas, in order to determine if the exposure has resulted in the employee posing a direct threat to the health and safety of others. The CDC advises that employees who are well, but who have family members that develop the illness, notify their supervisor and refer to CDC guidance on how to conduct a risk assessment of potential exposure.

#### **4. *Can we prevent employees from traveling to affected areas for personal reasons?***

Employers cannot prevent employees from traveling to affected areas for personal reasons, but may deny time off if the denial is based on the destination, business cost of a resulting quarantine, or other legitimate business-driven reasons, not the national origin of the employee. Employers should also advise employees that such travel may result in quarantine or self-monitoring (including work from home, if applicable), possibly for a prolonged period. However, employers should also remain aware of their obligations under leave laws to allow employees leave to care for others who are ill, including persons in affected areas, as well as their obligations to avoid national origin discrimination. Moreover, several states have off-duty discrimination laws that provide blanket protections to prohibit discrimination against employees who participate in legal activities outside the workplace, such as personal travel.

### **Discrimination**

#### **5. *What national origin/race discrimination issues should employers be aware of?***

Title VII and state law prohibit discrimination based on race, color, national origin, and other protected classifications. The CDC has advised in this context: "To prevent stigma and discrimination in the workplace, use only the guidance described below [provided by the CDC] to determine risk of COVID-19. Do not make determinations of risk based on race or country of origin, and be sure to maintain confidentiality of people with confirmed COVID-19." CDC, [Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 \(COVID-19\)](#), February 2020. Employers should be careful not to exclude any person from work or work-related activities, as well as from any type of customer or client interaction, based purely on race or national origin, without evidence of illness or recent travel to a high-risk area. Finally, employers should ensure that any communicable disease or travel policies do not implicate anti-discrimination laws, not only based on race, color, age, pregnancy, or national origin, but also on disability or other prohibited bases.

Any communicable illness policy should address all communicable illnesses and not just one that disproportionately affects a particular protected class of individuals. Similarly, employers should be sure that any travel restrictions and other employer-mandated policies are imposed impartially.

#### **6. *What are the employer's obligations to prevent harassment of those suspected of being infected?***

Employers must take steps to prevent discrimination and harassment against individuals who are disabled or perceived as disabled because they are exhibiting symptoms suggestive of having contracted coronavirus. In order to accomplish this, employers should ensure the confidentiality of all employees' medical information and leave details to prevent harassment. Employers should consider reminding employees of anti-harassment and discrimination company policies. Employers should also work to tamp down rumors about employees related to employee health or travel. Employers must be vigilant about promptly responding to and investigating any complaints of harassment or bullying in the workplace.

## **ADA Considerations**

### **7. *Can employers take the temperature of U.S. employees who are coming to work?***

Generally, no. Normally, requiring employees to submit to temperature checks would be considered an overly broad medical examination/inquiry in violation of the ADA. However, based on guidance the EEOC issued in 2009 in connection with the H1N1 influenza virus pandemic, this possibly could be permissible under the ADA where COVID-19 is widespread in the community or when symptoms become more severe than those experienced during the seasonal flu or the H1N1 virus in the spring/summer of 2009, as assessed by state or local health authorities, or by the CDC. In sum, such checks should not be required unless guidance or directives from the applicable local, state or federal public health authorities mandate or recommend temperature checks of current employees specifically with regard to COVID-19. However, employers may choose to recommend that employees with low-risk exposure check their own temperature as part of an effort to ensure they are still asymptomatic before arriving at the workplace.

### **8. *Can employers with Canadian operations take the temperature of employees coming to work?***

In Canada, medical examinations or health-related tests are acceptable for potential employees only if the testing or examination is reasonably necessary to confirm the potential employees' ability to perform a *bona fide* occupational requirement of the role. It is generally impermissible for Canadian employers to mandatorily require employees to undergo a health-related test such as taking temperatures at Canadian worksites. Such testing may be permissible, however, if COVID-19 becomes widespread in Canada or if Canada's public health agencies announce that the coronavirus outbreak has reached pandemic proportions.

If mandatory employee temperature testing becomes justified in Canada, the dignity of employees should be ensured throughout the process. Results of employees' tests should be kept in the strictest of confidence; they should not be shared with other employees, except on a "need to know" basis. Employees with whom the information has been shared because they "need to know" should be reminded that they are prohibited from disclosing it for unauthorized purposes.

Even without COVID-19 becoming widespread or reaching epidemic proportions, Canadian employers may be entitled to engage in an individualized assessment of whether they have reasonable cause to require mandatory temperature testing in a specific employee's circumstances. For example, even when an employee fails to disclose it or even denies it, an employer may have reasonable cause to believe that the employee is infected with COVID-19, has been exposed to someone who is infected, recently returned from a high-risk country, or has been exposed to someone who has recently returned from a high-risk country. In such circumstances, the employer may have reasonable cause to require the employee to test their temperature on a mandatory basis.

## **Safety and Health**

### **9. *Does OSHA require non-healthcare employees to wear respirators?***

At this time, there is no general requirement for non-healthcare employees to wear respirators or other types of personal protective equipment (PPE). The CDC has issued [guidance](#) regarding the use of PPE only for healthcare personnel caring for patients with confirmed or possible COVID-19. The CDC stresses: "This guidance is not intended for non-healthcare settings (e.g., schools) OR to persons outside of healthcare settings." At this time, the CDC is not recommending use of facemasks or any other protective equipment by the general public.

### **10. *Can an employer with a public-facing business prevent employees from wearing a surgical mask or respirator?***

Many workers are understandably concerned about transmission of the virus. However, employers certainly have an interest in limiting fear and not causing client or customer alarm. Under OSHA's rule regarding personal protective equipment, "A respirator shall be provided to each employee when such equipment is necessary to protect the health of such employee . . . . An employer may provide respirators at the request of employees or permit employees to use their own respirators, if the employer determines that such respirator use will not in itself create a hazard." 29 C.F.R. § 1910.134. At this time, the CDC is NOT recommending use of surgical masks or respirators by the general public, except as recommended by a healthcare professional or by persons infected with COVID-19 or caring for someone who is infected or suspected to be infected. As this PPE has not been deemed necessary to protect health and safety at this time, employers have discretion as to whether to allow their usage.

### **11. *What if an employee requests to wear some type of mask as an accommodation?***

The CDC does not recommend that people who are well wear some type of mask to protect themselves from respiratory disease, including COVID-19. The CDC does recommend that surgical masks should be used by people who show symptoms of COVID-19. If an employee shows symptoms or has been diagnosed with COVID-19, however, the CDC recommends that the employee be separated from other employees and be sent home immediately, thus negating the need for a mask as an accommodation.

**12. For employers that have conferences scheduled, should they cancel them?**

Several countries, including France and Italy, have banned large gatherings. At this time, no such bans have been enacted in the United States, but employers should continue to monitor the news and local health official sources about any restrictions in states with COVID-19 cases. If an employer decides to hold the conference, the employer should encourage healthy practices, such as limiting handshaking and providing adequate handwashing stations. The CDC has provided [specific guidance on mass gatherings](#) that employers should review before making any decisions.

**Immigration****13. An employee recently traveled to China and is now unable to return on his H-1B visa, and does not have a green card. Is there a way an employer can get the employee back to the United States?**

Unless they are a U.S. citizen or lawful permanent resident spouse or child under 21, they are not permitted to enter the United States at the moment. Some employers have suggested trying to send the individual to a third-party country, wait 14 days, and then enter the United States. This may be a solution if there is a third-party country they are eligible to enter and that country is not also facing travel restrictions to the United States.

**14. How will CDC travel advisories affect an employer's ability to get employees on H-1B visas?**

Not all H-1B workers need to travel and come back in order to be able to be in H-1B status. If they were/are already in the United States on an H-1B visa or are in any status that allows them to change to H-1B, then they are not forced to travel and return to get an H-1B stamp in order to be able to be in H-1B status.

**Workers' Compensation and Unemployment****15. Do employer-instituted quarantines or temporary shutdowns or mass layoffs entitle workers to unemployment benefits?**

Yes, workers are generally entitled to unemployment insurance if they are furloughed when a business temporarily shuts down and all other unemployment requirements are met. Depending on the size and length of the temporary shutdown, the jurisdiction may require notification to the applicable unemployment department as a mass separation.

**16. What are an employer's workers' compensation obligations if an employee traveled to an affected area for work and contracted COVID-19?**

Generally speaking, any illness or injury arising out of or in the course of employment is an industrial injury. Any contagious disease contracted at work or while traveling for work would be industrial. The problem with such illnesses is whether we know for sure where the worker contracted it, so as to prove that work is more likely than not the cause.

If the worker travels from a place with little or no contagion to a place with some or a lot of contagion and is diagnosed within the incubation period, then chances are that the injury will be deemed industrial. Many states have statutory provisions that indicate that when in doubt, disputes should be resolved in favor of providing benefits. So where it may be impossible to know for sure when or where the worker contracted the illness, the worker may prevail.

Most states' workers' compensation laws require that the workplace present an "increased risk" or "risks peculiar" to the workplace as well. So, a healthcare worker who contracts a contagious disease (other than common cold or flu) would be more likely to have a compensable claim than an office or factory worker – particularly in areas where community spread is occurring.

## **Privacy**

### ***17. If one of our employees is quarantined, what information can we share with our employees? Who can we share it with?***

If an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace. Employers should not, however, disclose to co-workers the identity of the quarantined employee because confidentiality requirements under federal law, such as the Americans with Disabilities Act (ADA), or state law, such as California's Confidentiality of Medical Information Act (CMIA), may apply.

### ***18. What privacy concerns do we need to be aware of when we are asking for the health information of our employees in order to evaluate whether they need to be quarantined?***

Employers may ask employees if they are experiencing COVID-19 symptoms such as fever, tiredness, cough, and shortness of breath. Federal or state law may require the employer to handle the employee's response as a confidential medical record. To help mitigate this risk, employers should maintain the information in a separate, confidential medical file and limit access to those with a business need to know.

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