

CDC's Advice on How to Handle Employment Issues

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, safety and health, and other employment issues.

Travel Restrictions

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. If an employee plans to travel to a high-risk area/country, 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. 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.

Discrimination

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." Employers should not 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.

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.

Safety and Health

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.

Business Expenses during Quarantine or Furlough

If an employer asks employees to work remotely due to COVID-19 concerns, employers should furnish and/or reimburse the employee for the tools necessary to work remotely. These tools may include: a laptop with camera for video meetings; monitor; docking station; high speed internet access; ergonomic work space tools, such as a mouse pad, keyboard, and desk; mobile phone; televideo conferencing software; headphones; and messaging, calendar, and timekeeping software. Messaging and calendar software can include status information so that employees can indicate availability for meetings and calls. Federal law does not require specific "item-by-item" reimbursement of tools and services incidental to carrying on the employer's business; however, the employer must reimburse the employee to the extent the incurrence of those expenses causes the employee's wages to dip below minimum wage. In addition, some states have laws or guidance addressing reimbursements and allowable deductions from wages. Often, these laws will allow deductions only when authorized in writing by the employee or will restrict the employer's right to take deductions that impact minimum wage. Over half of states and some local jurisdictions have laws or guidance impacting reimbursements and deductions.

Furloughs and Layoffs

Generally, short-term layoffs or furloughs are permitted as long as selections are not based on protected categories such as race, gender, national origin, etc. Care should be taken to avoid undermining the weekly salary of exempt employees, who generally should continue to receive their full salary for each workweek in which they perform any work (including work at home such as checking emails). Hourly workers do not have to be paid for time not worked. A short-term layoff or furlough of less than six months should not implicate notice obligations under the Federal Worker Adjustment and Retraining Notification (WARN) Act, but may require advance notice under some state WARN statutes such as the California WARN Act. (California WARN was recently

interpreted as having been triggered by certain short-term furloughs.) Employees may have rights to compensation under state law or employee benefit programs such as short-term disability.

Workers' Compensation and Unemployment

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. 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

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 (CMLA), may apply. 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.

Leave and Sick Pay Issues

If an employee is quarantined due to their own travel or exposure or to care for a family member for similar reasons, employers need to work through whether Family and Medical Leave Act (FMLA) or other leave laws apply to an employee's absence. If the employee has exhibited symptoms and is required to be away from work per the advice of a healthcare provider or is needed to care for a family member, leave laws may apply to the absence. In contrast, if it is the employer's implemented health and safety precautions that require the employee to be away from work, an employer should proceed with caution before designating any time away from work as leave under a specific leave law. Similarly, while multiple mandatory paid sick and safe time laws provide for paid time off benefits for situations involving illness and public health

emergencies, many of these laws do not allow an employer to mandate the use of such benefits. For example, the Washington State Department of Labor & Industries takes the position that an employee can never be required to use paid sick and safe time under Washington law; rather, the employee must be allowed to choose whether to use this benefit while absent from work. Further, employers should implement consistent protocols related to an employee's reentry to the workplace in terms of obtaining a release clearing the employee to return to work and ensuring that the employee does not pose a risk to the health and safety of themselves or others.

Coronavirus: Recommended Practices in the Workplace

Actively Encourage Sick Employees to Stay Home

The standard advice from public health agencies is to "encourage" sick employees to stay home. Sick employees may not feel that they can afford to stay home or that there will be adverse consequences for having a poor attendance record. To this end, employers should ensure their sick leave and attendance policies are flexible and consistent with public health guidance, modify them if appropriate, and communicate these policies and modifications to employees. Employers may still require compliance with time and attendance policies requiring healthcare provider notes for absences if an employee is calling in sick, subject to applicable law. Employers may also require a fitness-for-duty release in certain circumstances, when an employee has been absent due to illness or as a result of any incubation leave. Whether an employer may require a fitness-for-duty release depends on the particular facts of the situation and should be assessed on a case-by-case basis. As the CDC points out, healthcare provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely way. If you have an employee who refuses to follow your incubation leave policy or have questions regarding return-to-work documentation, please contact an employment attorney to discuss.

Separate Sick Employees

The CDC Interim Guidance recommends that employees who appear to have acute respiratory illness symptoms (e.g., cough, shortness of breath) upon arrival to work or develop such symptoms during the day should be asked to go home and if the employee is unable to work from home, an employee should be permitted to use their available sick time or PTO in accordance with the employer's sick time and leave policies. If additional questions arise, contact an employment attorney to assist with specific issues.

Emphasize Respiratory Etiquette and Hand Hygiene by All Employees

Place posters that encourage staying home when sick, cough and sneeze etiquette, and hand hygiene at the entrance to your workplace and in other workplace areas where they are likely to be seen.

Advise Employees Traveling to Take Certain Steps Before Traveling

Employees should check the CDC's Traveler's Health Notices for the latest guidance and recommendations for each country to which they will travel. Specific travel information for travelers going to and returning from various affected locations, and information for aircrew, can be found on the CDC website.

Important Considerations for Creating an Infectious Disease Outbreak Response Plan

All employers should be ready to implement strategies to protect their workforce from COVID-19 while ensuring continuity of operations. Steps for doing so include:

- Identify possible work-related exposure and health risks to your employees
- Review human resources policies to make sure that policies and practices are consistent with public health recommendations and are consistent with existing state and federal workplace laws.
- Explore whether you can establish policies and practices, such as flexible worksites (e.g., telecommuting) and flexible work hours (e.g., staggered shifts), to increase the physical distance between employees and between employees and others if state and local health authorities recommend the use of social distancing strategies. For employees who are able to telework, supervisors should encourage employees to telework instead of coming into the workplace until symptoms are completely resolved. Ensure that you have the information technology and infrastructure needed to support multiple employees who may be able to work from home.
- Identify essential business functions, essential jobs or roles, and critical elements required to maintain business operations. Plan for how your business will operate if there is increasing absenteeism or supply chains are interrupted.
- Set up authorities, triggers, and procedures for activating and terminating the company's infectious disease outbreak response plan, altering business operations (e.g., possibly changing or closing operations in affected areas), and transferring business knowledge to key employees. Work closely with your local health officials to identify these triggers.
- Establish a process to communicate information to employees and business partners on your infectious disease outbreak response plans and latest COVID-19 information. Anticipate employee fear, anxiety, rumors, and misinformation, and plan communications accordingly.
- In some communities, early childhood programs and K-12 schools may be dismissed, particularly if COVID-19 worsens. Determine how you will operate if absenteeism spikes from increases in sick employees, those who stay home to care for sick family members, and those who must stay home to watch their children if dismissed from school.
- Local conditions will influence the decisions that public health officials make regarding community-level strategies; employers should take the time now to learn about plans in place in each community where they have a business. Engage state and local health departments to confirm channels of communication and methods for dissemination of local outbreak information.

U.S. Jobs Went Up Before Spread of New Virus

For the second month in a row, the economy churned out a record blockbuster number of jobs, the government reported on March 6th, an impressive performance in an era of slow-and-steady employment growth. With the coronavirus outbreak shaking economic confidence, the solid showing in February may not be a harbinger of continued strength.

Still, the report from the Department of Labor offered a refreshing breath of positive economic news. Employers expanded payrolls by 273,000 jobs in February, while revisions to data from previous months added 85,000 more jobs to the tally. The jobless rate ticked down to 3.5 percent. Indeed, the report is evidence of just how much momentum the U.S. economy had going into the coronavirus crisis. Monthly payroll gains averaged 231,000 over the past six months. The average for the previous six months – March through August 2019 – was just 171,000. Every jobs report looks backward, but February's report captures a particularly unusual moment, before the market was gripped with anxiety about the global effect of a widening epidemic. "There is a red line in the calendar," said Ian Shepherdson, chief economist at Pantheon Macroeconomics. "The value of it is that this report gives us kind of a benchmark of where we were before things began to go wrong." The government's estimate of payroll increases is based on surveys of companies completed by the middle of the month, when the prevailing sentiment was that the United States would remain relatively unaffected. A picture of the effect should emerge over the next couple of months. There were scattered reports last week about a potential downturn in employment particularly in the most vulnerable sectors: transportation, hospitality, entertainment, and travel. Airlines are clearly feeling the squeeze. This week, United Airlines announced that it was imposing a hiring freeze through June, postponing scheduled merit raises, and inviting employees to apply for unpaid leave. The number of canceled or postponed conferences is racking up, which hurts not only hotels and convention centers but also restaurants and stores that cater to those visitors. The remarkable payroll gains last month were all the more surprising because cooling job creation is to be expected during the 11th year of an economic expansion. There were a few signs of weakness in the report. Wage growth, which was already slowing from last year's peak, was less impressive. Average hourly wages were up 0.2 percent, bringing down the year-over-year gains to 3 percent. Diane Lim, an economist at the Penn Wharton Budget Model, said the first impact from the coronavirus on the labor market was likely to show up in reduced hours for service workers. "Entertainment, hospitality, food and lodging, service jobs – they won't lose their jobs but will probably get a cut in hours," she said. So far, though, the average number of hours Americans work in a week has held up.

Sources: Littler Mendelson P.C.; Houston Chronicle