



CORONAVIRUS RESPONSE FOR EMPLOYERS

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The following is based on information known as of March 11, 2020 related to COVID-19. It is subject to change based on further developments, such as announcements by the U.S. Centers for Disease Control and Prevention (the “CDC”) and other federal, state, or local government agencies. It also is intended to generally apply to employers within the United States in the construction industry. Employers located or working in one of the areas in the U.S. that have been identified as having a significant amount of confirmed COVID-19 cases, or even deaths, should consult labor and employment counsel for advice specific to their location and situation.

Additionally, as this information was being prepared on March 11, the World Health Organization (the “WHO”) declared COVID-19 a “pandemic.” The U.S. Equal Employment Opportunity Commission (the “EEOC”) is the federal agency that enforces federal anti-discrimination laws, including the laws that prohibit disability-related discrimination and impose restrictions on employers regarding employees’ medical information. Even according to the EEOC, in its “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act” guidance dated October 9, 2009 (the “Guidance”), employers have more rights and are subject to fewer restrictions when doing business amidst a pandemic. The Guidance concerned pandemic influenza, but there is no reason to believe that the EEOC’s positions would be substantially different as to a COVID-19 pandemic in 2020. Note, however, that several of the opinions below would be different if not for the WHO having declared a pandemic. Also note that as of this writing, the CDC has not yet declared a pandemic.

With that, here are common COVID-19 questions we are getting, and our opinions based on the current status of the situation and information currently available:

1. Can employers send home employees who exhibit signs of illness, including signs that are also symptoms of COVID-19?

Yes.

2. What questions can employers ask employees who report feeling ill at work or who call in sick?

Employers may ask if an employee is experiencing specific symptoms associated with COVID-19. However, employers still must maintain all information about employee illness as a confidential medical record in compliance with the Americans with Disabilities Act (“ADA”).

3. Can employers tell sick employees to stay home, and to not return to work unless they can provide a doctor's note confirming they are not contagious?

Yes, as to telling sick employees to stay home. Yes, as to a doctor's note, unless doing so is prohibited by a collective bargaining agreement, a specific policy, or state or local law.

4. Can employers require employees to adopt infection-control practices, such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal, at the workplace?

Yes. Practices specific to jobsites and other work locations outside of a business office should be fine as well. Employers generally should feel free to instruct employees consistent with guidance from the CDC and other federal, state, or local government agencies, if the instructions are provided uniformly to avoid allegations of discrimination.

5. Can employers require employees to wear personal protective equipment designed to reduce the transmission of infection?

In the case of a pandemic, yes. However, employees who need a related reasonable accommodation under the ADA (such as non-latex gloves, etc.) should be given the accommodation absent undue hardship. On the other side of the coin, employers are not required to allow employees to wear masks, gloves, or other items in the workplace out of general fear of being exposed to COVID-19. (Employers can say no to that to avoid inciting panic among co-workers, customers, clients, etc.) One caveat is that this article focuses on employment law issues; workplace safety issues concerning personal protective equipment that are regulated by OSHA, and similar such issues, are being addressed by our firm under a separate publication that you also should review.

6. Can employers take employees' temperatures as they come into work to determine whether they have a fever?

No . . . at least not yet. Measuring an employee's body temperature is a medical examination under the ADA. However, the EEOC's position under the Guidance is that employers may measure employees' body temperatures if (a) symptoms of an illness that has reached pandemic status become more severe than the seasonal flu or the H1N1 virus from spring/summer 2009, or (b) the illness becomes widespread in the community as assessed by state or local health authorities or the CDC. We would not advise employers to start checking temperatures at this time, and labor and employment counsel should be consulted before this practice is officially implemented in your company.

7. What information can employers disclose if an employee has a confirmed case of COVID-19?

Employers can tell employees that one of their co-workers has a confirmed case of COVID-19, and that they may want to see a doctor themselves. But employers should not identify the employee by name;

employee medical information still must be treated as confidential. Even if employees may be able to connect the dots based on who is absent from the workforce, employers and supervisory personnel should still refrain from confirming the employee's identity. If employers become aware of an employee not abiding by government-issued quarantine recommendations or requirements, employers likely can report that to appropriate authorities. We have not yet heard of any requirement that employees notify their employers if they are diagnosed with COVID-19.

8. Can employers ask an employee why he has been absent from work if the employer suspects it is for a medical reason?

Yes. An employer is always entitled to know why an employee has not reported for work.

9. Can employers require employees to get tested for COVID-19?

As a threshold issue, this does not seem to be viable right now even for employees who go out sick. The availability of official COVID-19 tests is limited, and the reality is that tests generally are being administered only to symptomatic people. Beyond that, for right now the best practices would be to proceed within the limits mentioned above, and not demand testing that seeks a medical diagnosis and may disclose other restricted medical information.

10. Can employers impose travel restrictions on employees?

Generally, yes. Employers can restrict travel if the rules apply company-wide, and if they are not attempting to restrict only personal travel while requiring employees to travel to the same area(s) for business reasons. However, some states, such as Illinois, make it unlawful to discipline an employee for lawful behavior that occurs on personal time. As of now, there have been government recommendations not to travel, but that is not the same as travel being made illegal. To best address this issue, employers could implement a policy that: recommends against travel; requires employees to notify the employer in advance of any planned travel; provides a mechanism for exceptions to be made in appropriate cases for either business or personal travel; and provides for discipline up to and including termination for failure to abide by the policy. In this way, an employee who travels in violation of the policy could be disciplined for a policy violation, not for the travel itself. (We advise that you consult with labor and employment counsel prior to any decisions regarding discipline for such an employee.) We would not anticipate problems if an employer requires an employee to abide by government recommended or required quarantine periods, related to travel to specific areas, before returning to work.

11. Can employers terminate the employment of someone who has a confirmed case of COVID-19?

We would not recommend terminating an employee for that reason alone. That said, an employer can apply its existing attendance and leave policies to an employee who misses work with a

case of COVID-19. (Additionally, healthy employees do not have a right to call off and not come to work simply out of COVID-19 fear.) However, any federal, state, and local leave laws that cover the employer normally are still going to cover the employer in this situation. Additional leave as a reasonable accommodation under the ADA also can be a particularly tricky issue. Therefore, you should consult labor and employment counsel if you are considering terminating someone diagnosed with COVID-19, even if you believe there has been a violation of one or more of your policies. While we are on the topic of the ADA, COVID-19 by itself probably will not be considered a disability under the ADA if an employee's symptoms are temporary and like a bout with the flu. However, if an employee's illness lasts longer and becomes more severe because of his underlying medical condition(s), it could rise to the level of a disability under the ADA. In that case, all rules and requirements of the ADA would have to be considered in dealing with the employee.

12. What questions can employers ask of applicants related to COVID-19?

Employers could ask pre-offer questions about recent travel to affected areas, if the questions are asked of all applicants. Employers could then defer decision on an application during any applicable quarantine period. Pre-offer inquiries are limited. According to the EEOC Guidance, depending on specific circumstances, some employers may be able to require post-offer medical examinations to determine an applicant's general health status, if all applicants in the same job category are required to undergo the examination and if the information collected is maintained confidentially in the manner required by law. In limited specific situations, the EEOC Guidance even contemplates rescinding a job offer based on the results of a post-offer medical examination, if the applicant poses a direct threat within the specific meaning of the ADA. The path of post-employment medical testing aimed at COVID-19-related matters is a difficult and risky one that should not be taken without consulting with labor and employment counsel.

13. Are employees who are diagnosed with COVID-19 entitled to pay while not at work?

Employers should apply their existing policies, which typically will determine whether an absence is paid or unpaid. Some employers may want to proactively institute additional policies that provide for pay and/or do not require use of accrued leave under these unusual circumstances, but they are not required to do so. Additionally, doing so could create other legal issues down the line if other employees are treated differently. (No good deed goes unpunished, as they say.) An important point also is that if an employee is on unpaid leave, they cannot be asked to do work. If they are asked to do work, they will have to be paid under wage-hour laws. For a salaried exempt employee, even a small bit of work performed while on unpaid leave could mean the difference between owing the employee either (a) nothing for a pay period or (b) his entire salary for that same pay period! With the prevalence of emails,

text messages, and other communications between supervisors and employees these days, this is an easy issue to overlook. Supervisors should be cautioned accordingly.

In closing, employers should continue to monitor the CDC's website for updates and announcements. Employers also should consult labor and employment counsel as specific issues and concerns arise within their company. This is especially true for issues that arise involving employees who are also within protected classes under federal, state, and/or local employment laws.

For your convenience and as a benefit of your membership, the association's legal services plan is available to assist you on questions related to COVID-19 and other labor and employment law issues that you encounter in your business. In addition to the free calls your plan already offers, Auman Mahan & Furry has agreed to provide association members with one (1) additional free, 30-minute call on the topic of COVID-19 between now and April 24, 2020. During that same time period, our firm will also provide the same free COVID-19 call to any company that contacts us and lets us know they were referred by an association member. To take advantage of this, please contact Matthew Bakota or any other member of Auman Mahan & Furry's Labor and Employment group, or Gary Auman, at 937-223-6003.

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