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FORCE MAJEURE AND CORONAVIRUS (COVID-19): SEVEN CRITICAL LESSONS

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Best Practices for Preventing and Responding to **Flu/Coronavirus** Outbreaks in the Workplace

Although the Occupational Safety and Health Administration (OSHA) has not adopted a standard addressing employers' obligations to safeguard employees during a pandemic, OSHA has issued general guidance for employers as a direct result of the COVID-19 outbreak in the United States.¹

BELOW WE SUMMARIZE KEY OSHA PANDEMIC AND coronavirus recommendations and provide guidance on handling health and safety issues during pandemics and COVID-19.

Assessment of Risk

Employers should determine the exposure their employees may have to a pandemic disease. The exposure risk per employee will vary based on the nature of the disease, as well as the responsibilities of the employee. Even if employers determine that risk of infection during the course of employment is low, all employers should consider implementing a policy, customized to their work environment, with the goal of protecting employees (as well as visitors to the employers' facilities) from contracting and spreading a pandemic disease.

The best way to lessen the risk of exposure is to follow the latest guidance from federal, state, and local governmental health authorities (Health Authorities), including, but not limited to, the Centers for Disease Control and Prevention



(CDC). Conflicting guidance provided by Health Authorities should supersede guidance that employers issue.

¹ See COVID-19 (OSHA) at <https://www.osha.gov/SLTC/covid-19/>; Prevent Worker Exposure to Coronavirus (COVID-19) at <https://www.osha.gov/Publications/OSHA3989.pdf>, and Guidance on Preparing Workplaces for COVID-19 at <https://www.osha.gov/Publications/OSHA3990.pdf>.



Prevention and Flexible Work Arrangements

In most pandemic situations, good hygiene and infection control habits can help minimize the risk of exposure. Based on the latest guidance from the CDC for COVID-19, employers should consider observing the following practices:

- **Wash hands.** Require employees to wash hands frequently and thoroughly.
 - Employers should, to the extent possible, make soap and hand sanitizer available to all employees.
- **Employees who display symptoms.** Require employees who feel ill or display symptoms associated with a pandemic disease to stay home or, if at work when symptoms arise, notify their manager and leave work immediately.
- **Coughs and sneezes.** Require employees to cover their mouths when coughing and their noses when sneezing.
- **Clean office equipment.** Prohibit the sharing of phones, desks, offices, or work tools and equipment used by other employees without appropriate cleaning measures.
- **Enforce good housekeeping practices.** Emphasize and require good housekeeping practices in all work areas, including cleaning and disinfecting surfaces, equipment, and other elements of the work environment (as recommended by Health Authorities).
- **Enforce travel restrictions.** Require employees to follow the recommendations issued by Health Authorities regarding travel, such as limiting personal travel or avoiding certain geographic areas.
- **Implement social distancing.** Require social distancing recommended by Health Authorities.

Based upon guidance provided by Health Authorities, employers also should consider allowing employees to work from home as feasible, provide flexible schedules, and/or reduce work hours.

If an employee cannot work from home and cannot attend work due to being quarantined (whether required by law or as a best practice), employers may allow employees to use paid time off benefits to reduce the financial impact.

No two pandemic diseases are identical or call for the same protective measures. As such, employers should consider the Health Authorities' guidelines and periodically update their policies consistent with those guidelines.

Identification and Isolation of Infected Individuals

Another priority during a pandemic is to identify employees, customers, visitors, or others at the employer's facilities who may have contracted a pandemic disease. Employers may address this issue by observing the following CDC recommendations:

- **Employee self-monitoring of symptoms.** Employers should require employees to self-monitor for signs and symptoms of the disease (flu, COVID-19, etc.) if the employees suspect possible exposure or infection.
- **Report exposure to Human Resources (HR).** Employers should require employees who suspect exposure or infection to report their symptoms to a designated management or HR representative. However, employers also should consider and address the following issues:
 - **Keep medical information confidential.** Information that the employee provides should remain confidential; the employer should only disclose or share it with the employee's written consent or as applicable law permits.
 - **Determine the need to isolate the employee.** The employer should immediately determine whether to isolate the employee and move him or her to a location distant from other employees, customers, and visitors.
 - **Designate an isolation space.** When isolating an employee, the employer should designate a room or other space where it can potentially isolate an infected employee.
 - **Ensure privacy in an isolation space.** To protect the employee's confidentiality, a designated isolation space should, if feasible, have closeable doors and be as far away as possible from areas where other employees, customers, and visitors may congregate.
 - **Train management personnel on pandemic issues.** Employers also should train management personnel designated to address pandemic issues so that they understand precautions to take, both to ensure their own safety and to account for confidentiality concerns.
- **Consider the need for face masks.** The employer should determine whether to provide and require employees to wear face masks (if available).
- **Assess the need to restrict access to isolation areas.** The employer should think about whether to restrict access to isolation areas and require authorized individuals to maintain at least six feet of space (or follow more stringent social distancing recommendations made by Health Authorities) between themselves and the isolated employee.
- **Identify those exposed to the isolated employee.** An employer's designated management or HR representative should identify other employees, customers, or visitors who may have come into close contact (within six feet or less stringently than as recommended by Health Authorities) of the isolated employee and take steps to inform those individuals of potential exposure.
 - **Maintain privacy of an isolated employee.** Employers should avoid revealing the isolated employee's identity.
 - **Determine the need for more employees to isolate.** Depending on the circumstances, employers may require additional employees to isolate until further notice or they obtain appropriate documentation indicating they are able to return to work.

Controlling the Work Environment

No two pandemic diseases are identical or call for the same protective measures. As such, employers should consider the Health Authorities' guidelines and periodically update their policies consistent with those guidelines. For example, if a Health Authority recommends increasing airflow in an indoor facility or the use of personal protective equipment (PPE) (e.g., gloves, face masks, or goggles) in certain industries, then employers should consider implementing those measures.

Employers should communicate to employees any additional or revised and implemented environmental controls, requirements, or recommendations.



Compliance with Existing OSHA Standards

Employers should continue to comply with all applicable OSHA standards. For example, healthcare employers should continue to enforce policies addressing bloodborne pathogens and required PPE, just as manufacturing employers should continue to observe lockout/tagout and guarding requirements. All employers should also consider implementing additional measures to maintain a clean and sanitary workplace and should continue to comply with OSHA's recordkeeping requirements (e.g., OSHA 300 log), especially now for workplace exposures to COVID-19.²

OSHA also provides posters stating how employers can reduce the risk of exposure to coronavirus.³

COVID-19 Exposure Issues and Temporary Suspension of Recording Requirements for Most Employers and Subsequent Rescission of This Temporary Suspension

A COVID-19 exposure may be a recordable illness if the employee contracted the infection as a result of performing his or her work-related duties. Employers should analyze each exposure in light of the impacted employees' job duties and the resulting effects of the infection (e.g., medical treatment received, days away from work, and restrictions posed by the infection). In many cases, it will not be possible to determine where an employee contracted COVID-19.

Recognizing that it is difficult for employers to determine whether an employee's exposure to COVID-19 occurred at

work and is thus recordable, OSHA suspended enforcement of its recordkeeping requirements for COVID-19 cases for most employers until May 26, 2020.⁴ However, employers must still record COVID 19 cases if (1) they have objective evidence that a COVID-19 case may be work-related and (2) the evidence was reasonably available to the employer.

This temporary suspension of recording requirements was not applicable to (1) healthcare employers; (2) emergency response organizations (e.g., emergency medical, firefighting and law enforcement services); and (3) correctional institutions. Employers in these industries must make work-relatedness determinations pursuant to 29 C.F.R. Pt. 1904.

Rescinding of Suspension of Recordkeeping Standard

OSHA rescinded the suspension of the recordkeeping standard as summarized above effective May 26, 2020.⁵ Under the new guidance, "OSHA is exercising discretion to assess employers' efforts in making work-related determinations." As part of this analysis, OSHA will consider the following issues:

- **The reasonableness of the employer's investigation into work-relatedness.** OSHA does not expect employers, especially small employers, to undertake extensive medical inquiries, given employee privacy concerns and most employers' lack of expertise in this area. In most circumstances, OSHA will consider it sufficient for the employer to do the following when it learns of an employee's COVID-19 illness:

² For a detailed summary of existing OSHA standards that may be directly relevant to COVID-19, visit OSHA's COVID-19 Standards website at <https://www.osha.gov/SLTC/covid-19/standards.html>. See also OSHA Guidance on Preparing Workplaces for COVID-19 at <https://www.osha.gov/Publications/OSHA3990.pdf> and Prevent Worker Exposure to Coronavirus (COVID-19) at <https://www.osha.gov/Publications/OSHA3989.pdf>. ³ See Ten Steps All Workplaces Can Take to Reduce Risk of Exposure to Coronavirus (English Version) at <https://www.osha.gov/Publications/OSHA3994.pdf> and Ten Steps All Workplaces Can Take to Reduce Risk of Exposure to Coronavirus (Spanish Version) at <https://www.osha.gov/Publications/OSHA3995.pdf>. ⁴ See Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19), Occ. Safety & Health Admin. (Apr. 10, 2020) at <https://www.osha.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19>. See Updated Enforcement Guidance for Recording Cases of Coronavirus Disease (COVID-19) on May 19, 2020 at <https://www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19>. ⁵ See Updated Enforcement Guidance for Recording Cases of Coronavirus Disease (COVID-19) on May 19, 2020 at <https://www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19>.

- Ask the employee how he or she believes he or she contracted COVID-19
- Discuss (taking into account privacy considerations) with the employee his or her work and out-of-work activities that may have led to contracting COVID-19 –and–
- Review the employee’s work environment for potential virus exposure, which review should be informed by any other instances of workers in that environment contracting COVID-19

■ **The evidence available to the employer.** Employers should consider the evidence that a COVID-19 illness was work-related based on the information reasonably available to the employer at the time it made its work-relatedness determination. If the employer later learns more information related to an employee’s COVID-19 illness, then the employer should take that information into account as well in determining whether an employer made a reasonable work-relatedness determination.

■ **The evidence that a COVID-19 illness was contracted at work.** OSHA has directed its compliance officers to take into account all reasonably available evidence, in the manner described above, to determine whether an employer has complied with its recording obligation. This cannot be reduced to a ready formula, but certain types of evidence may weigh in favor of or against work-relatedness. OSHA provides the following example:

- COVID-19 illnesses are likely work-related when several cases develop among workers who work closely together and there is no alternative explanation.
- An employee’s COVID-19 illness is likely work-related if it is contracted shortly after lengthy, close exposure to a particular customer or co-worker who has a confirmed case of COVID-19 and there is no alternative explanation.
- An employee’s COVID-19 illness is likely work-related if his/her job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation.
- An employee’s COVID-19 illness is likely not work-related if he/she is the only worker to contract COVID-19 in his or her vicinity and his or her job duties do not include having frequent contact with the general public, regardless of the rate of community spread.
- An employee’s COVID-19 illness is likely not work-related if he or she, outside the workplace, closely and frequently

associates with someone (e.g., a family member, significant other, or close friend) who:

- Has COVID-19
 - Is not a co-worker –and–
 - Exposes the employee during the period in which the individual is likely infectious.
- OSHA has directed its compliance officers to give due weight to any evidence of causation, pertaining to the employee illness, at issue provided by medical providers, public health authorities, or the employee him or herself.

Updated Interim Enforcement Response Plan

Also effective May 26, 2020 and pursuant to its May 19, 2020 Updated Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19),⁶ OSHA will operate under the following framework:

- In geographic areas where community spread of COVID-19 has significantly decreased, OSHA will return to the inspection planning policy that OSHA relied on prior to the start of the COVID-19 health crises, as outlined in the OSHA Field Operations Manual (FOM), CPL 02-00-164, Chapter 2, when prioritizing reported events for inspections. However, OSHA will continue to prioritize COVID-19 cases.
- In geographic areas experiencing either sustained elevated community transmission or a resurgence in community transmission of COVID-19, Area Directors will exercise discretion, including consideration of available resources, to prioritize COVID-19 fatalities and imminent danger exposures for inspection (e.g., limit on-site inspections to high-risk workplaces, such as hospitals and other healthcare providers treating patients with COVID-19 and workplaces with high numbers of complaints or known COVID-19 cases).

In either circumstance, OSHA will:

- Use informal phone/fax investigations or rapid response investigations in circumstances where OSHA has historically performed such inspections or where doing so can address the relevant hazard(s) –and–
- Ensure (though Area Directors) that compliance officers use the appropriate precautions and personal protective equipment (PPE) when performing inspections related to COVID-19
- Because OSHA is continuing to revise its guidance based on the developing circumstances, employers should monitor OSHA’s website regularly to stay abreast of the latest developments.

6. See <https://www.osha.gov/memos/2020-05-19/updated-interim-enforcement-response-plan-coronavirus-disease-2019-covid-19>.



Retaliation Prohibition

Employers should bear in mind that section 11(c) of the Occupational Safety and Health Act of 1970,⁷ prohibits employers from retaliating against workers for raising concerns about safety and health conditions. OSHA’s Whistleblower Protection Program protects employees from retaliation for raising or reporting concerns about violations of certain industry-specific federal laws, including those relating to airlines, commercial motor carriers, consumer products, environmental hazards, financial reforms, food safety, health insurance reforms, motor vehicle safety, nuclear facilities, pipeline companies, public transportation agencies, railroads, maritime businesses, securities, and tax laws.

On April 8, 2020, the Department of Labor issued a news release reminding employers that “[e]mployees have the right to safe and healthy workplaces,” and encouraging employees to contact OSHA if they “believe[] that their employer is retaliating against them for reporting unsafe working

conditions[.]”⁸ Employers should carefully consider the risks of an adverse employment action against an employee who has raised health and safety concerns related to coronavirus, including concerns over work-related travel requirements.

Key Health and Safety-Related and Return to Work Employer Questions and Answers re: COVID-19 and Pandemics

This section addresses additional health and safety-related and return to work questions that employers may have.

What if Employees Are Hesitant to Come to or Return to Work during COVID-19 or Another Pandemic?

Employers should anticipate that, under certain circumstances, employees may refuse to work based on concerns over COVID-19 or other pandemic conditions. As explained above in the subsection entitled Retaliation Prohibition, if the employee’s concern for his or her safety or well-being is reasonable and raised in good faith, the Occupational Health

⁷ 29 U.S.C.S. § 660(c). ⁸ See U.S. Dep’t of Lab. Reminds Employers that they Cannot Retaliate Against Workers Reporting Unsafe Conditions During Coronavirus Pandemic (Apr. 8, 2020) at <https://content.govdelivery.com/accounts/USDOL/bulletins/2858415>.

and Safety Act protects the employee from retaliatory actions. Determining whether the employee's concern is reasonable will require careful consideration of the circumstances of his or her job requirements. For example, if the employee will need to travel by airplane or other mass transit for work or if the work would require working in large groups, then his or her fear of contracting the virus might be reasonable based on the latest CDC guidance. Employers should consider alternatives and any administrative or engineering controls that may reduce or eliminate the risk altogether. For more information related to this question, see the question directly below.

If an Employee Does Not Qualify for Leave under the FFCRA, but Is Concerned about Returning to Work due to Safety Concerns (Precautions at Workplace / Possible Sick Employees), Can the Employer Require the Employee to Use Vacation Time/PTO for Missing Workdays?

Even if the FFCRA does not apply, there may be other protections for employees who are scared to return to work. As stated above, the OSH Act allows employees to refuse to work if they reasonably believe there is a threat of death or serious physical harm likely to occur immediately or within a short period. The National Labor Relations Act grants employees the right to join together to engage in protected concerted activity, including joining together to refuse to work in unsafe conditions. Additionally, the ADA may permit an employee to request an accommodation that includes changes to the work environment to reduce contact with others. There may be additional local or state protections for employees, as well. In many states, an employer's PTO/vacation policy will govern and whether the employer may force the employee to use vacation time or PTO may depend on the language of the employer's policy. Note that the FFCRA generally prohibits employers from requiring that employees use employer-provided vacation time, sick time, or other paid time off before using leave under the Act.

Can an Employer Tell Employees that if They Come to or Return to Work Sick, or with Knowledge that They Might Be Sick and/or Contagious (e.g., They Live with Someone Who Is Sick or Tested Positive), that They Will Be Subject to Disciplinary Action and/or Termination?

There may be certain state and local laws and guidance that impact an employer's ability to take the disciplinary action that this question suggests. In general, however, EEOC guidance suggests that an employer can send a sick employee home.⁹ Additionally, employers can require employees to report their symptoms to HR or another member of management before

coming to work, especially where the employee or employer suspects there has been COVID-19 exposure or infection.

As for employees with knowledge that they might be sick and/or contagious (e.g., they live with someone who is sick or tested positive), disciplining or terminating them is generally risky. The employer may instead want to use a health questionnaire to determine whether the employee has knowledge he or she is sick or a risk to the workplace. If the employee lies on the health questionnaire then it would be less risky for the employer to discipline or terminate the employee. Otherwise, the employer should be the one monitoring the responses to the health questionnaire and determining if an employee should stay home.

Related Content

For a discussion on the impact of the Occupational Safety and Health Act on an employer's maintenance of a safe workplace in view of the COVID-19 pandemic, see

> **COVID-19 AND OSHA**



RESEARCH PATH: [Labor & Employment > Wage and Hour > Compensation > Articles](#)

For assistance in complying with Occupational Safety and Health Act requirements and inspections, see

> **OSH ACT REQUIREMENTS, INSPECTIONS, CITATIONS, AND DEFENSES**



RESEARCH PATH: [Labor & Employment > Workplace Safety and Health > Occupational Safety and Health Act > Practice Notes](#)

For an analysis of health and safety considerations related to business travel, see

> **CORONAVIRUS (COVID-19) CONSIDERATIONS FOR TRAVELING EMPLOYEES**



RESEARCH PATH: [Labor & Employment > Workplace Safety and Health > Policies and Procedures > Articles](#)

For an outline of the various legal and practical issues facing employers with respect to telecommuting, see

> **TELECOMMUTING EMPLOYEES: BEST PRACTICES CHECKLIST**



RESEARCH PATH: [Labor & Employment > Employment Policies > Safety and Health > Checklists](#)

⁹ See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (Question A.4.) at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

It is necessary to check applicable state law to determine whether an employee who rejects an offer to return to his or her previous job would still be eligible for unemployment benefits.

What If an Employee Declines to Come Back to Work Because He or She Is Making More Money in Unemployment While the Extra CARES Act Unemployment Benefits Are Available?

The Federal Pandemic Unemployment Compensation (FPUC) part of the CARES Act provides that employees who are eligible for unemployment benefits will receive an additional \$600 per week during unemployment between April 5, 2020 and July 31, 2020. Generally speaking, an employee is not eligible for unemployment benefits if an employer offers his or her job back. Most states require employees receiving unemployment benefits to search for “suitable employment” while receiving benefits and to indicate periodically that they have been doing so. If an employee declines to return to work because he or she is receiving unemployment compensation in excess of his or her compensation when previously employed, his or her employer should inform the employee in writing that his or her job is available again and confirm that the employee has declined to accept it. The offer of the employee’s job back likely would amount to “suitable employment.” Having said that, state law governs and some states have diminished the job search requirement during the COVID-19 pandemic. It is therefore necessary to check applicable state law to determine whether an employee who rejects an offer to return to his or her previous job would still be eligible for unemployment benefits.

What Questions Should Employers Ask Employees Suspected of Being Sick with COVID-19 or the Flu?

Just as employees may have concerns about continuing to work or a return to work during a pandemic, employers also may have concerns about employees at work who may be sick with a pandemic disease. When addressing these situations,

employers should balance the need to take measures that keep employees safe with employment laws their actions may implicate. Employers should review the latest guidance provided by OSHA, the Equal Employment Opportunity Commission (EEOC), the CDC, and any other government agencies addressing a pandemic or a local or regional health concern.¹⁰

For purposes of combatting COVID-19, the EEOC has given employers leeway to make medical inquiries that the Americans with Disabilities Act (ADA) otherwise might prohibit.¹¹

Below is a list of questions employers should consider asking employees suspected of having COVID-19:

- Are you experiencing symptoms associated with COVID-19, including fever (over 100.4°F), chills, cough, shortness of breath, sore throat, loss of smell or taste, or gastrointestinal problems, such as nausea, diarrhea, or vomiting?
- Have you tested positive for or been diagnosed with COVID-19?
- Have you been in close contact (i.e., within six feet or a recommended distance as updated by the CDC) with any person who has tested positive for, or been diagnosed with, COVID-19 within the past 14 days?
- Has your doctor, other medical professional, or health official asked you to self-quarantine within the past 14 days?
- Have you recently traveled to or been in any location for which the CDC has issued a Level 3 travel health notice?¹²
- Do you require an accommodation due to an existing condition that may put you at high risk for COVID-19, as per the CDC’s guidance?¹³

Can Employers Prevent Employees from Coming to or Returning to Work during COVID-19 or Another Pandemic?

Absent an agreement with an employee or a collective bargaining agreement that restricts the employer’s authority to dictate hours of work, levels of production, or similar issues, an employer is typically free to send employees home from work. To the extent that employees can work remotely, OSHA encourages employers to allow telecommuting, working from home, alternating schedules, reducing work hours, or similar measures to reduce the risk of spreading COVID-19 or a flu.

¹⁰ For COVID-19 guidance from these agencies, see COVID-19 (OSHA) at <https://www.osha.gov/SLTC/covid-19/>, Coronavirus and COVID-19 (EEOC) at <https://www.eeoc.gov/coronavirus/>, and Interim Guidance for Businesses and Employers (CDC) at <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>. Also see CDC: COVID-19 Employer Information for Office Buildings, which includes a section with guidance on employees returning to work called “Administrative controls: Change the way people work” at <https://www.cdc.gov/coronavirus/2019-ncov/community/office-buildings.html>, CDC Activities and Initiatives Supporting the COVID-19 Response and the President’s Plan for Opening America Up Again at <https://www.cdc.gov/coronavirus/2019-ncov/downloads/php/CDC-Activities-Initiatives-for-COVID-19-Response.pdf>, CDC: When You Can be Around Others After You Had or Likely Had COVID-19 at https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/end-home-isolation.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprevent-getting-sick%2Fwhen-its-safe.html, and CDC: Criteria for Return to Work for Healthcare Personnel with Suspected or Confirmed COVID-19 (Interim Guidance) at <https://www.cdc.gov/coronavirus/2019-ncov/hcp/return-to-work.html>. ¹¹ See What You Should Know About the ADA, the Rehabilitation Act and the Coronavirus at https://www1.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitation_act_coronavirus.cfm?renderforprint=1. ¹² See CDC’s Coronavirus Disease 2019 Travel Health Notices at <https://www.cdc.gov/coronavirus/2019-ncov/travelers/map-and-travel-notices.html>. ¹³ See CDC’s Coronavirus Disease 2019 People Who are at Higher Risk at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>.



If an employee is diagnosed with COVID-19, an employer should prohibit that employee from coming into the workplace, consistent with the latest guidelines from public health authorities like the CDC. If the employee can work remotely, the employer should allow the employee to do so. Moreover, for employees who may display symptoms of COVID-19, employers should consider taking similar actions, provided that they account for other employment laws, including the ADA. To the extent an employee who is confirmed or presumptively diagnosed with COVID-19 has been in close contact with co-workers, the employer may inform those co-workers of their potential exposure, but the employer must not disclose the employee's identity without his or her written consent.

What Steps Should Employers Take before Allowing a Previously Infected Employee to Return to Work?

Before allowing employees who test positive for COVID-19 or another pandemic disease or who displayed symptoms associated with a pandemic disease to return to work, employers may require employees to:

- Provide a doctor's note clearing the employee to return to the workplace
- Submit to a medical examination
- Remain symptom-free for a specific period of time (as recommended by Health Authorities) before returning to work¹⁴

Pursuant to CDC guidelines, employers should advise sick employees that they should not leave home and return to work until:

- An untested employee has no fever for three days or more (without medicine), other symptoms improved (cough, etc.), and at least 10 days have passed since he or she first had symptoms
- A tested employee has no fever (without medicine), other symptoms improved, and two tests 24 hours apart are both negative¹⁵

Can Employers Administer Mandatory COVID-19 Testing for Their Employees before They Return to Work or Enter the Workplace?

Yes. On April 23, 2020, the EEOC stated employers can test their employees to determine if they have COVID-19 before they enter the workplace because employees who have the coronavirus will pose a direct threat to the health of others.¹⁶ The EEOC will not deem such testing by employers to be a violation of the Americans with Disabilities Act (ADA).¹⁷ The EEOC also added that employers should (1) ensure the reliability and accuracy of the tests, (2) consider potential false-positives or false-negatives, and (3) understand testing can only show whether the employee has the virus at the time of the test and cannot predict whether the employee will be susceptible to the virus at a later time.¹⁸

¹⁴ Also see CDC: Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19 at <https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html> and CDC: Return to Work for Healthcare Personnel with Confirmed or Suspected COVID-19 at <https://www.cdc.gov/coronavirus/2019-ncov/hcp/return-to-work.html>. ¹⁵ See CDC: When You Can be Around Others After You Had or Likely Had COVID-19 at https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/end-home-isolation.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprevent-getting-sick%2Fwhen-its-safe.html and CDC: Criteria for Return to Work for Healthcare Personnel with Suspected or Confirmed COVID-19 (Interim Guidance) at <https://www.cdc.gov/coronavirus/2019-ncov/hcp/return-to-work.html>. Also see CDC: COVID-19 Employer Information for Office Buildings, which includes a section with guidance on employees returning to work called "Administrative controls: Change the way people work" at <https://www.cdc.gov/coronavirus/2019-ncov/community/office-buildings.html>, CDC Activities and Initiatives Supporting the COVID-19 Response and the President's Plan for Opening America Up Again at <https://www.cdc.gov/coronavirus/2019-ncov/downloads/php/CDC-Activities-Initiatives-for-COVID-19-Response.pdf> and CDC: Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19 at <https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html>. ¹⁶ See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (Question A.6.) at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>. ¹⁷ *Id.* ¹⁸ *Id.*



The EEOC does well to caution employers about the reliability and accuracy of tests currently available in the United States, especially because the Food and Drug Administration (FDA) has yet to approve or clear a test for COVID-19.¹⁹ However, the FDA believes that the molecular tests for which it has issued Emergency Use Authorizations are highly accurate.²⁰ On the other hand, the FDA states that COVID-19 antibody tests should not be used alone to diagnose COVID-19 due to their potential for false negative and false positive results.²¹

Even if accurate tests become widely available, employers will need to consider both the costs associated with and the practical limitations of such tests. As the EEOC indicates, a negative test result for an employee in the morning means nothing by lunchtime. To rely on testing effectively, employers would need to consider the frequency of such tests, the costs of which could easily become prohibitive and their implementation disruptive. Health questionnaires and vigilant monitoring for symptoms associated with COVID-19 may serve as useful, cost-effective, and less disruptive alternatives

to testing. For additional guidance, see the subsection above entitled “What Questions Should Employers Ask Employees Suspected of Being Sick with COVID-19 or the Flu?”

As tests become more widely available both to employers and employees, employers will need to consider additional issues, which neither the EEOC, FDA, OSHA, nor any other federal agency have explicitly addressed as of May, 2020, including:

- Who are qualified testing vendors
- Whether antibody testing is reliable, permissible, or useful
- Potential employer liability for failure to test
- Whether employers can decide not to administer tests and instead require employees to get their own tests before coming back to work
- Who bears the costs for the tests that employees obtain themselves
- Whether time spent getting tested is compensable

¹⁹. See Coronavirus Disease 2019 (COVID-19) Frequently Asked Questions (FDA) at <https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/coronavirus-disease-2019-covid-19-frequently-asked-questions#devices>. ²⁰. *Id.* ²¹. *Id.*


Is It Recommended to Obtain Any Form of Release before an Employer Requests Medical Information, Including a Health Questionnaire?

The enforceability of a release may be governed by state law, so their effectiveness could vary by state (and there are open questions about their enforceability under various federal statutes). However, given the EEOC's latest guidance permitting employers to use health questionnaires and perform testing, a release is not necessary, particularly if employers are taking steps to ensure that all medical information is kept confidential.

In Certain States the State OSHA Has Not Made a Specific Finding as to Whether Cloth Face Masks are PPE. What Considerations Should an Employer Make before Adopting a Policy Requiring Face Masks Versus Providing Masks and Strongly Encouraging Employees to Use Masks?

As of May 20, 2020, Federal OSHA has also not taken a position on this issue yet. In general, cloth face masks may be considered PPE because of how OSHA views PPE (e.g., anything that provides protection to employees). The issue is whether an employer must pay for the PPE (in this case masks) or if it falls into an exempt category (e.g., ordinary clothing). There is no definitive answer yet on this issue (but if your state or local government require employers to provide masks, then at least this part is clear).

Employers should certainly consider permitting employees to wear masks voluntarily, as the latest CDC guidance indicates this to be the best practice, particularly when social distancing (keeping at least six feet apart) is not feasible. In light of the CDC guidance, however, employers may be in the best position (from a safety compliance standpoint) if they require the use of masks in the workplace and also provide employees masks (or allow employees to wear their own if they prefer). There are obvious considerations regarding such a policy, including costs and the availability of masks generally.

This article is current as of May 28, 2020. 

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> [PANDEMIC FLU/INFLUENZA/CORONAVIRUS \(COVID-19\) PREVENTION AND RESPONSE CHECKLIST \(BEST PRACTICES FOR EMPLOYERS\)](#)

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For a review of paid vacation and paid time off laws across the United States, see

> [PAID VACATION AND PTO STATE LAW SURVEY](#)

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For an examination of the requirements that employers need to know to comply with the Americans with Disabilities Act, see

> [AMERICANS WITH DISABILITIES ACT: GUIDANCE FOR EMPLOYERS](#)

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