



Key Business FAQs in View of the Pandemic Declaration

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Now that the coronavirus is officially a pandemic, and now that state and local governments have issued business closure and self-quarantine recommendations (in some cases, orders), many of the answers to the business community's most frequently asked questions have changed. Below are our current, updated answers to some of the most important FAQs we have been confronting.

Q: Can I send employees home if they display flu-like/COVID-19 symptoms?

A: Yes, and you should do so, or risk potential liability if these employees test positive and infect others. It is also important not to overreact - train your supervisors on the symptoms to watch for and when to send an employee home.

Q: How much information can I request from employees who report feeling ill at work or who call in sick?

A: You may ask employees if they are experiencing COVID-19-like symptoms. Ordinarily, this might not be permitted under the ADA, but in the midst of a pandemic, you may ask these questions to the extent reasonably necessary to limit the risk of infection in the workplace. You must keep all information about employee illness confidential and separate from the employee's regular personnel file.

Q: May I take my employees' temperatures to determine whether they have a fever?

A: In more ordinary circumstances, the ADA would prohibit taking employee temperatures. In the current circumstances, you may do so if an employee's temperature would be pertinent to the effort to limit the spread of COVID-19. For instance, there might be no basis to test an employee who works in isolation. If you choose to take employee temperatures, do so in the least invasive manner possible and keep the results confidential, as noted above.

Q: Am I permitted to ask if an employee has been exposed to someone who has tested positive for COVID-19?

A: Yes, and you should do so both to minimize liability risks and limit the spread of the infection. Depending on the circumstances (the nature and frequency of the contact), you should err on the side of caution in determining whether to require self-quarantine.

Q: Am I permitted to ask if an employee has traveled to a COVID-19 affected region?

A: Yes, and, again, you should do so. The CDC recommends that people who visit Level 2 or 3 Travel Health Notice countries (as published by the CDC) remain in self-quarantine for 14 days after they return, and you should enforce that recommendation in your workplace.

Q: Can I require employees who have exhibited flu-like/COVID-19 symptoms or otherwise been quarantined to provide a doctor's note certifying their fitness to return to work?

A: Yes. You should confirm that employees who have been quarantined do not suffer from COVID-19 before allowing them to re-enter the workplace. Be aware that due to pressure on the health system, obtaining a doctor's fitness for duty certification in the usual form may be delayed, or may not be feasible. Employees may be able to offer other forms of reasonable confirmation, such as a copy of their test report (assuming testing becomes more available).

Q: Do I have to pay employees who are in self-quarantine? What about employees who contract the virus?

A: There is no simple answer. It depends on the location of your business (different states and cities have different paid sick leave requirements), your policies, and the terms of any employment agreements or collective bargaining agreements that may be in effect. Whether or not required, we recommend continuing to pay employees who are in self-quarantine. Otherwise, they may conceal their condition or exposure. State and federal governments are actively considering mandatory paid sick leave legislation, and we will keep you posted about that. Let us know if we can assist you to implement a compliant plan.

Q: Suppose I need to lay people off because of the effects this is having on my business?

A: You generally have that right but, again, you must consider your policies, and the terms of any employment agreements or collective bargaining agreements that may be in effect.

In addition, there are certain legal requirements depending on, for example, the scope of the layoff (certain state or federal statutes that apply to mass layoffs may be implicated), how you determine who is laid off and who is not (improper selection criteria and documentation could lead to discrimination claims), and how you deal with nonexempt and exempt employees (the rules pertaining to exempt employees, in particular, are fraught with non-commonsensical pitfalls). Bottom line: a layoff may be required, and it can be done, but there are some devils in the details.

This is a rapidly evolving situation from both a legal and public health standpoint. Wisler Pearlstine is committed to providing up to date, practical legal advice to our clients on how to manage the legal implications arising from the COVID 19 virus.

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