



Coronavirus (COVID-19): Eight Practical Considerations for Employers

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With the continued spread of COVID-19, including to the United States, employers are seeking practical advice about how they should respond to the workplace issues this presents. The Occupational Health and Safety Administration (OSHA), the Centers for Disease Control and Prevention (CDC), and the Equal Employment Opportunity Commission (EEOC) have all issued COVID-19-related guidance.

[The CDC guidance](#) emphasizes preventive measures and strategies employers can take to limit the workplace exposure to COVID-19. The EEOC has referred employers to [its guidance, *Pandemic Preparedness in the Workplace*](#). The EEOC guidance provides technical assistance regarding Americans with Disabilities Act (ADA)-compliant practices for pandemic preparedness.

On its website, [OSHA provides industry-specific guidance](#) to those industries with an increased risk of exposure to COVID-19, including healthcare, deathcare, solid waste and wastewater management, airlines, and laboratories. Additionally, OSHA's general duty clause, which states that employers are obligated to provide employees with a safe workplace that is free from recognized hazards which are likely to cause physical harm or death, is broad enough that it could apply to COVID-19 exposure in the workplace.

Below are eight considerations employers should keep in mind as they navigate the workplace issues that arise from the spread of COVID-19, from remote work to absenteeism to employee travel.

1. Employers should prepare for a period of increased absenteeism if COVID-19 continues to spread. We advise employers to review existing paid-time off (PTO) and sick leave policies. It is likely that employers will face unique circumstances that were not anticipated when these policies were established. Employers may need to be prepared to temporarily relax these policies, particularly if there are school closings or similar directives from public officials. For example, the CDC is urging employers not to require a healthcare provider's note to validate illness of employees who are sick with acute respiratory illness. Currently, no federal law exists that requires employers to provide paid sick leave. There is, however, a growing trend at the state and local levels to pass such laws. Moreover, the spread of COVID-19 is increasing calls for such legislation at the federal level.

2. You must comply with OSHA regulations regarding the health and safety of your workplace. Depending on your business, you may be able to do this in part by providing hand sanitizer, ensuring that public areas are cleaned and disinfected regularly, and having and enforcing policies requiring those exhibiting symptoms to stay at home until cleared.
3. Know whether the Family and Medical Leave Act (FMLA) applies to you and, if so, understand the FMLA eligibility criteria and be prepared to handle these leave requests. FMLA covers employers with fifty or more employees, as well as public employers regardless of the number of employees. Generally, FMLA leave does not cover illness from a common cold or the flu unless the illness otherwise meets the definition of a serious health condition under the FMLA. FMLA would likely cover actual illness from COVID-19 as a serious health condition. A serious health condition is a condition that lasts for three or more days with either a follow-up visit to a healthcare provider or some other type of treatment (such as prescription medication). FMLA coverage generally does not extend to leave where the employee or a family member is not ill (for example, if a parent needs to be absent from work to care for a healthy child due to school closings).
4. Employers are asking about the circumstances under which they can require employees to stay home from work because of COVID-19-related concerns. The CDC guidance recommends that employees who have symptoms of acute respiratory illness (e.g., cough, shortness of breath) to stay home and not come to work until they are free of a fever (100.4° F), signs of a fever, and any other symptoms (without the use of fever-reducing or symptom-altering medications) for at least twenty-four hours. We advise that employers not institute measures such as taking employees' temperature. The EEOC guidance advises that it considers such measures to be a "medical examination" under the ADA, which may be required under limited circumstances only. Based on EEOC guidance in connection with the H1N1 influenza pandemic, this could change if federal, state, or local health authorities determine that such measures are necessary.
5. Employers are asking whether employees may refuse to travel. To date, employees may not refuse to travel domestically (or demand first or business class upgrades) due to fears of COVID-19 infection. However, employees who are required to travel to regions under travel restrictions or warnings due to COVID-19, especially if they are older, immunocompromised, or pregnant, may have a right under OSHA to avoid such travel. This will depend on the employee, the then-effective positions of the CDC, Homeland Security, public health agencies in the region, and the status of the COVID-19 outbreak and will be a case-by-case analysis. Do not rely on rumor, social media, or generalized concerns in making these decisions.
6. Any information that you do acquire from employees relating to whether they have COVID-19 symptoms or are infected may be protected by the ADA; therefore, you should maintain that information as confidential, under lock and key, and in a separate file from the employee's personnel file.
7. Many employers are preparing to expand their capacity to offer remote work to their employees. Employers who permit employees to work remotely should be aware of the Fair Labor Standards Act (FLSA) implications, particularly for its non-exempt employees.

Employers are not required to pay its non-exempt employees who do not report for work (unless an employee uses some type of PTO), but they must pay them for all time worked from home. This will require having procedures in place for tracking non-exempt employees' time worked from home. The rule for exempt employees is different. Exempt employees generally must be paid their full salary for any week in which they do any work. Additionally, employers should follow their remote work policy or consider adopting such a policy if they do not already have one.

8. Employers should refrain from making assumptions about COVID-19 exposure or illness based on an individual's country of origin. Such assumptions run afoul of laws against national origin discrimination. However, per CDC guidance, individuals returning from certain high-risk areas with widespread and ongoing transmission of COVID-19 (those under a Level 3 Travel Health Notice) are being asked to stay home for a period of fourteen days from the time they left the area and to practice social distancing. We believe it is defensible to ask such individuals not to report to work. Employers should continue to consult the CDC website for up-to-date travel notices concerning COVID-19 risk. We advise seeking the advice of counsel when making determinations with respect to countries subject to a Level 2 Health Notice.

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The Wisler Pearlstine team of employment attorneys is ready to address your COVID-19 questions and concerns. Please contact any of us if you have concerns about the impact of COVID-19 in the workplace.

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