

CORONAVIRUS UPDATE FOR EMPLOYERS



LISTEN. SOLVE. EMPOWER.

**The key point for Employers to remember:
It will be difficult for Employers to make a
wrong decision.**

The Coronavirus/COVID-19 is a “pandemic,” which means that there is sustained human-to-human transmission which is not geographically contained. It also means that Employers are given leeway in their workforce decisions.

“During a pandemic, employers should rely on the latest CDC and state or local public health assessments.” – EEOC

Employers are expected to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location, and to make reasonable assessments of conditions in their workplace based on this information.

WHAT ARE THE SOURCES FOR RELIABLE INFORMATION?

- Centers of Disease Control and Prevention – www.cdc.gov
 - Updated almost daily
 - Information for United States
- World Health Organization – www.who.int
 - Updated daily
 - Focus is international
- State Public Health Agencies
 - Ohio Department of Health – www.odh.ohio.gov

WHAT ARE THE LEGAL CONSIDERATIONS?

Workers’ Compensation

- *I became sick at work because you made me work with sick co-employees.*
- Not an issue
- Must be “occupational” meaning that it arose out of and in the course and scope of employment, and it must arise out of or be caused by conditions “peculiar” to the work. (e.g., black lung from coal mining; asbestosis from asbestos removal)

Intentional Tort and Third-Party Negligence Claims

- *I became sick because you failed to train, let in sick customers, or didn’t provide equipment.*
- Not an issue of concern
- These claims require either the intent to injure, or the belief that the injury was substantially certain to occur
- **Solution:** Post a Caution Sign at the entrance requiring anyone experiencing flu symptoms (fever, cough, shortness of breath) to not enter or to call before entering so that they may be greeted by someone who has taken precautionary measures

Americans with Disabilities Act (ADA)

- *I’m at-risk of getting sick and I want a disability accommodation, such as the right to work from home.*
- Not an issue of concern because temporary conditions, which do not substantially limit a major life activity, are not disabilities (i.e., the flu)
- **Caution:** It may become an issue if the Employer treats those with coronavirus or those at-risk of coronavirus as having a disability because ADA prohibits discrimination against those with actual and “regarded as” disabilities

National Labor Relations Act (NLRA)

- *My coworkers and I are banding together and not coming to work because you are letting a sick person sit in a common area without any protective measures or equipment.*
- Employees, union and non-union, have a protected right to raise concerns about terms and conditions of work, including safety
- A refusal to work may be deemed a concerted protected activity for which employers must comply with NLRA
- **Caution:** Employers cannot discipline employees who are engaging in a concerted protected activity

Occupational Safety & Health Administration (OSHA)

- *If we are coming to work, what are you doing to protect us?*
- All employers are subject to the General Duty Clause to provide a place of employment that is free from recognized hazards that cause or are likely to cause death or serious physical harm
- There is no universal standard for coronavirus, yet
- OSHA is creating and updating steps to reduce risks of exposure, including low, medium, and high/very high-risk level jobs:
- <https://www.osha.gov/Publications/OSHA3990.pdf>
- Be sure to also check on:
 - Requirements for specific industries
 - PPE requirements
 - Required reporting of recordable illnesses for infection on the job

Family and Medical Leave Act (FMLA)

- *I'm sick and I should get paid leave.*
- Coronavirus may not be technically FMLA-eligible without incapacitation and either ongoing physician visits or regimen of continuing treatment
- Rest and OTC pain relief is not a regimen of treatment
- FMLA provides unpaid leave for employees who worked 1,250 hours at a workplace with 50 or more employees

BUT WAIT...

Families First Coronavirus Response Act

- Amends and expands FMLA for 2020
- Covers workplaces with fewer than 500 employees
- Lowers hours of work to only 30 days prior to leave
- The first 14 days are unpaid, but employee can use accrued paid time off

- After 14-days, employees receive two-thirds the regular rate for normal schedule
- Expands the definition of "parent"
- If the FFCRA passes, it will go into effect by the end of March 2020 and remain in effect until the end of 2020

*We will provide a supplemental update

Fair Labor Standards Act (FLSA)

- *If you send me home, you still have to pay me.*
- Employers must pay hourly employees for hours actually worked
- Employers must pay salaried employees for the full week in which the employee performed any work or used any accumulated paid leave
- Employers do not need to pay salaried employees for days they miss on their own volition

Ohio Unemployment

- *Once you send me home without pay, I'm entitled to unemployment benefits.*
- If an employer shuts down operations or lays off employees due to loss of production due to coronavirus, employees may be eligible for immediate unemployment benefits
- If an employee is in mandatory quarantine because of coronavirus or *suspicion* of having the coronavirus, the employee is considered unemployed and may be eligible for immediate unemployment benefits
- If an employee is asymptomatic and self-quarantines, the employee is choosing not to work and not eligible for unemployment benefits
- Rules are continuing to update throughout the day <http://jfs.ohio.gov/ouio/CoronavirusAndUI.stm>

WHAT SHOULD EMPLOYERS DO NOW?

- Prepare for work disruptions with the attached survey to determine who may need to work remotely
- Start a Coronavirus Workforce File. For any workforce decision, look to the CDC, WHO, or Public Health for justification because... "During a pandemic, employers should rely on the latest CDC and state or local public health assessments." – EEOC
- Print out the page from the website that supports the decision; type or write your workforce decision; staple the decision to the webpage guidance; and, place it in the Coronavirus Workforce File

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FREQUENTLY ASKED QUESTIONS

- Can we send employees for testing/medical examinations? Yes, if employer has a reasonable belief that either an employee's ability to perform will be impaired by a medical condition; or, an employee will pose a direct threat due to a medical condition
 - A direct threat is based on objective, factual information *such as the latest CDC and state or local public health assessments*
 - Can we send employees home? Yes
 - Even salaried employees? Yes
 - Can we ask employees about symptoms?
Yes, related to disease (fever, cough, shortness of breath)
 - Can we take their temperature? Yes, but be careful to protect privacy, and be careful of asymptomatic employees
 - Can we inquire about exposure (travel, intimacy, family care)? Yes
 - Can we enforce measures to prevent the spread? Yes. Including distancing, telework, hand washing, coughing etiquette; required PPE, offer vaccine (but be careful of ADA and religion issues)
 - Can we allow telework? Yes
 - Do we have to allow telework? No
 - Can we ask why employees missed work? Yes
 - Can we require employees who miss work to use accrued paid leave? Yes
 - Can we require a fitness for return to work?
Yes
 - Can we continue to pay employees even though our office is closed? Yes, but if the employees are in a union, it must be negotiated with the union
- Do we have to give time off? No, subject to the following exceptions:
 - Implementation of FFCRA
 - Federal contractors complying with paid sick leave
 - Paid sick leave by state and local laws
 - Collective bargaining agreements
 - Employee contracts

EMPLOYER CONCERNS

- Consistency of decisions
- Requiring employees who are on leave to continue to work remotely
- Failing to pay employees for all hours worked while working remotely
- Allow essential employees to work remotely at full productivity
- Paying attention to CDC, OSHA, and FFCRA

EMPLOYEE SURVEY

In the event that the coronavirus (COVID-19) causes a public health concern throughout part or all of the United States, we will need to take measures for the business. Please answer the following survey.

Directions: Answer "yes" to the whole question without specifying the factor that applies to you. Simply check "yes" or "no" at the bottom of the page.

In the event of a pandemic, would you be unable to come to work because of any one of the following reasons:

1. If schools or day-care centers were closed, you would need to care for a child;
2. If other services were unavailable, you would need to care for other dependents;
3. If public transport were sporadic or unavailable, you would be unable to travel to work; and/or;
4. If you or a member of your household fall into one of the categories identified by the CDC as being at high risk for serious complications from the coronavirus (COVID-19), you would be advised by public health authorities not to come to work (*e.g., persons with compromised immune systems from cancer treatment; persons less than 65 years of age with underlying chronic conditions such as chronic lung or cardiac disease, or diabetes; or persons over 65*).

Answer: YES _____ , NO _____

Employee: _____