

Labor & Employment Alert
March 10, 2020

Strategies for Dealing with COVID-19 in the Workplace
Installment 1 of the MHTL COVID-19 Client Alert

The coronavirus disease 2019 (COVID-19) is creating increasing concern in workplace communities and in our community at large. Each day infections spread to new parts of the world and the U.S. The number of cases and deaths continues to rise in the U.S. Johns Hopkins University, which tracks the number of cases and deaths globally, reports that the virus is in over half of the U.S. states, with 755 cases and 26 deaths.¹
<https://gisanddata.maps.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6>

The CDC observes that the fact that the disease has sustained person-to-person spread - - also known as “community spread” - - is concerning. As a result, the CDC is encouraging employers to develop and implement strategies that aim to both:

- (1) Limit the spread of COVID-19 by implementing steps to decrease workplace exposure to the virus; and
- (2) Lower the impact of COVID-19 on business operations.

To assist employers in planning and responding for COVID-19, the CDC has issued [Interim Guidance for Businesses and Employers, to Plan, Prepare and Respond to Coronavirus Disease 2019](https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html).

<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html> Admittedly, how fast and how far the virus will spread is uncertain, and at this point employers can only rely on the available information and will likely need to continuously review and update their policies. We will continue to update you as more information becomes available.

The Top 12 COVID-19 FAQ's

In determining what is necessary and appropriate for your workplace in order to balance containment of the disease with maintaining business operations, please consult the “Top 12” FAQ’s below. These “Top 12” represent a compilation of some of the more common questions we have received so far regarding COVID-19. The “Top 12” questions address the strategies you should consider and the legal parameters involved. Much of the content in these “Top 12” questions is derived from the EEOC guidance document entitled [Pandemic Preparedness in the Workplace and the Americans with Disabilities Act](https://www.eeoc.gov/facts/pandemic_flu.html).

https://www.eeoc.gov/facts/pandemic_flu.html **Caution:** Depending on the particulars of your workplace, these answers may be subject to other legal constraints such as collective bargaining agreements, individual contracts, and other statutory obligations.

¹ These statistics are as of Tuesday, March 10, 2020 at 6:53:03 a.m.

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Q1: Can an employer ask an employee to disclose if they have heart disease, lung disease, diabetes, or other chronic health conditions that the CDC says could make them more susceptible to complications of COVID-19 *before* a pandemic occurs?

A1: No. The response to a question asking an employee to disclose chronic health conditions is likely to disclose the existence of a disability. Such questions can only be asked when there is objective evidence that COVID-19 symptoms will cause a direct threat. Evidence that COVID-19 symptoms will cause a direct threat is absent before a pandemic occurs.

Q2: Can an employer identify which employees are more likely to be unavailable for work should a pandemic occur?

A2: Yes. Employers may ask questions that are not disability-related. For example, if a question is designed to identify both potential non-medical reasons and medical reasons for absence during a pandemic, it is not disability-related. Specifically, employers can list factors that may contribute to an employee being absent during a pandemic which include both medical and non-medical reasons, and then ask employees if any of the factors apply to them, with the caveat that employees do not specify which factors apply to them.

Q3: Can an employer ask an employee to disclose if they have heart disease, lung disease, diabetes, or other chronic health conditions that the CDC says could make them more susceptible to complications of COVID-19 *during* a pandemic?

A3: In some cases. In the event the COVID-19 pandemic becomes severe, the inquiry, even though disability-related, may be justified by a reasonable belief based on objective evidence that the severe form of COVID-19 poses a direct threat.

Q4: Can an employer ask an employee who reports feeling ill at work or who calls in sick whether they are experiencing COVID-19 symptoms?

A4: Yes. Caution: Employers must maintain any information about employee illness as a confidential medical record in a separate medical file.

Q5: Can an employer send an employee home who displays COVID-19 - like symptoms during a pandemic?

A5: Yes. The CDC advises that employees who become ill with symptoms of COVID-19 should leave the workplace.

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Q6: Can an employer ask an employee why they have been absent from work if the employer suspects it is for a medical reason during a pandemic?

A6: Yes. An employer is always entitled to know why an employee has not reported for work.

Q7: Can an employer require employees to disclose their personal travel destinations?

A7: Yes, subject to the caveat that employer inquiries cannot directly or indirectly target individuals based on race, ethnicity or national origin. In light of the public health threat created by COVID-19 and the declaration of COVID-19 as a public health emergency for the U.S., requiring employees to disclose personal travel destinations would not likely unreasonably interfere with any privacy concerns.

Q8: Can an employer require employees who have travelled to destinations where there is a COVID-19 outbreak to remain out of work until it is clear they do not have COVID-19 symptoms?

A8: Yes. When the CDC or state or local public health officials recommend people remain out of work for a specified period of time after visiting specific locations, employers can require employees who have travelled to those locations to remain out of work for the recommended time period.

Q9: If an employee contracts COVID-19, can an employer require the employee to use sick time and/or other paid time off?

A9: Perhaps. Whether an employer can require an employee to use sick time and/or other paid time off depends on your policies. For employers subject to the Family and Medical Leave Act of 1993 (FMLA), an employee suffering from COVID-19 is likely experiencing a serious health condition.² In this case, the FMLA policy would govern: if the FMLA policy requires employees to use paid time off for serious health conditions, the employer could require it. However, if the FMLA policy allows the employee to choose whether to use paid time off or unpaid leave for a serious health condition, the employee would be able to choose whether or not to use their paid time off or to take the leave unpaid.

For employers not subject to the FMLA, employer policies regarding sick time and/or paid time off will govern, including employer policies addressing MA Earned Sick Time.

² The FMLA defines a “serious health condition” as an illness that involves inpatient care in a hospital or a period of incapacity of more than 3 consecutive days and treatment 2 or more times by a health care provider within 30 days of the incapacity.

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Q10: If an employee is out of work caring for a family member suffering from COVID-19, can an employer require the employee to use sick time and/or other paid time off?

A10: Perhaps. Similar to the answer in *Q9*, this depends on employer policies. For employers subject to the FMLA, a family member suffering from COVID-19 is likely experiencing a serious health condition. In this case, the FMLA policy would govern: if the FMLA policy requires employees to use paid time off to care for a family member, the employer could require it. However, if the FMLA policy allows the employee to choose whether to use paid time off or unpaid leave to care for a family member, the employee would be able to choose whether or not to use their paid time off or to take the leave unpaid.

For employers not subject to the FMLA, employer policies regarding use of paid time off to care for a family member, if any, will govern. In the absence of a policy, employers could require employees to use paid time off to care for a family member. However, the CDC is suggesting that employers consider flexibility regarding paid time off policies, which could include making exceptions to existing policies by allowing employees to take unpaid leave before paid leave is exhausted and/or providing additional paid leave.

Q11: If an asymptomatic employee is quarantined because of exposure to COVID-19, can an employer require the employee to use sick time and/or other paid time off?

A11: Perhaps. Similar to the answers in *Q9* and *Q10*, while this depends on employer policies regarding time off, and while strictly speaking there is no law prohibiting an employer from requiring an employee to use paid time off in the case of quarantine, employers may want to consider relaxing policy requirements and allowing employees to elect to take unpaid leave. Though not required, some employers are considering not requiring employees to use paid time off and/or providing additional paid leave.

Q12: Can an employer require employees to adopt infection-control practices?

A12: Yes. Employers can require infection-control practices such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal. World Health Organization (WHO): How to handwash? With soap and water. <https://www.youtube.com/watch?v=3PmVJQUCm4E>

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Additional COVID-19 Strategies

In addition to the above strategies, news reports indicate that many employers are already developing and implementing various new policies in response to the crisis. Some of the policies implemented include:

- Limiting visitors in the workplace
- Limiting prolonged interaction with other people
- Dividing teams across locations to create redundancy, so if one team falls victim to the virus and has to self-quarantine, the work can still be performed by the other team
- Advising co-workers to stand at least 6 feet apart
- Directing employees to work from home
- Cross training employees who work from home so they can fill-in if employees who cannot work from home get ill
- Designating employees to work from home who can be “swapped” out when on-site workers get ill
- Limiting off-site client meetings
- Videoconferencing instead of on-site or face-to-face meetings
- Paying cash bonuses to employees and asking them to use the money to stock up on 2-3 weeks of food and water
- Encouraging workers to avoid public transportation and arranging carpools
- Restricting travel
- Requiring employees to register their personal travel plans
- Expanding leave and paid time off policies

Caution: We are not suggesting that any or all of these policies are appropriate for your particular workplace. Rather, we are providing them as examples to illustrate the breadth of strategies employers are considering as the COVID-19 crisis unfolds.

Before implementing any of these strategies, we advise you to consult with your legal counsel to determine if they are appropriate for your workplace. Importantly, depending on the nature of your business operations, there may be other legal concerns, such as whether you have a union bargaining obligation, and what impact OSHA has on the policies you institute. The impact of the National Labor Relations Act, OSHA and other legal and statutory provisions will be addressed in upcoming editions of the **MHTL COVID-19 Client Alert**. Please stay tuned for COVID-19 updates as we continue to compile questions and develop guidance.

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This Client Alert was prepared by Nan O'Neill and reviewed by Kier Wachterhauser, and Katherine Hesse. If you have any questions, please contact the above attorneys or the attorney responsible for your account, or call (617) 479-5000.

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