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## **ALERT – COVID-19 PREPAREDNESS: BASIC EMPLOYMENT LAW QUESTIONS ANSWERED**

By: Mark Ventola and Brian Bouchard

As more and more cases of COVID-19 appear across the United States, employers should begin preparing for COVID-19 and how it may affect their workforce. This Client Alert answers basic employment law questions for responding to COVID-19 and provides general guidance to employers on managing COVID-19 plan in workplace.

To start, employers should regularly monitor the CDC’s website for updates on COVID-19 and current exposure levels. An employers’ response to COVID-19 may change with exposure levels. For example, with more heightened exposure levels, employers have greater latitude to send potentially affected employees home and to ask more direct questions about an employee’s medical history.

### **What can we ask employees about their symptoms and/or medical history?**

The fundamentals of the Americans with Disabilities Act (“ADA”), and similar state and federal laws, still apply. Employers must tread carefully when inquiring about an employee’s medical conditions or when asking an employee to sit for a medical exam.

Any inquiry that is likely to elicit information about a disability is not allowed. For example, employers cannot ask whether an employee has a chronic condition or a compromised immune system that would make him/her more susceptible to COVID-19. These questions may reveal information about an associated disability, such as cancer and HIV.

Employers should instead ask questions directly associated with COVID-19 symptoms, such as:

- > Do you have a fever?
- > How long have you had fever?
- > Have you had shortness of breath?
- > Have you had a cough?
- > Have you seen a doctor [about your cold-like symptoms]?
- > Are you feeling well?

Remember that any medical information obtained from these inquiries must be kept confidential and maintained in a separate medical folder.

### **Can we force symptomatic employees or potentially exposed employees to stay home?**

Generally, yes; circumstances may warrant employees being sent home from work who are sick or who have been exposed to COVID-19. Before doing so, employers should assess current exposure levels and follow CDC guidelines. Quarantined employees may still be required to “telecommute” or

work remotely, unless they are using leave. Consult with legal counsel if you have any questions about leave requirements or about paying exempt and non-exempt employees who have been sent home, and remember that many states require an employer to pay employees for a certain, minimum number of hours if they “show up” at work and are sent home.

### **Can we take an employee’s temperature?**

Generally, no. Taking an employee’s body temperature is a medical exam, which are permitted in limited circumstances only. If the CDC were to declare a high exposure level, however, obtaining this type of objective information may be permitted, as the employee could pose a “direct threat” to the workforce.

### **Can employees self-quarantine or stop coming into work?**

This depends on the circumstances. Certainly, if an employee has a preexisting disability that makes him/her more susceptible to COVID-19, working from home or taking a leave of absence *could be* an appropriate accommodation. Employers presented with that situation should engage in an interactive dialogue.

A COVID-19 outbreak may also implicate an employer’s obligation under OSHA to provide “employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.” Employers should handle these requests on a case by case basis and should consult current CDC exposure levels to determine whether they can provide such an environment.

### **Can we ask employees if they have traveled outside of the country in the last month?**

Yes. Be sure to avoid eliciting information about an employee’s potential ethnicity or national origin. You don’t need to know the reason for any international travel.

### **Can we ask employees if they traveled outside of the state in the last month?**

Yes.

### **Can we conduct a pre-pandemic survey?**

Many employers understandably want to know how COVID-19 could affect their workforce. Pre-pandemic surveys are allowed, but employers should avoid any questions that would tend to elicit information about a disability, such as questions related to an employee’s susceptibility. Survey questions should be narrowly tailored to elicit non-medical information only and in a “yes” or “no” format, such as “if schools or day-care centers close to close as a result of COVID-19, would you need to care for a child?”

### **Can we require employees to adopt infection-control practices in the workplace?**

Yes. Hygienic protocols, such as handwashing, sanitizer use, and sneeze etiquette, are encouraged by health officials and do not implicate federal and state laws.

## Can we encourage employees to self-report?

Yes. Employers should create a self-reporting system for potentially infected or exposed individuals. While the employee's identity must remain confidential, employers should inform affected staff that a co-worker has been diagnosed with a *suspected* or *verified* case of COVID-19 or exposed to COVID-19.

## Should we update our Employee handbooks?

Updating handbook policies is probably not necessary. This is a specific event. Employers should not re-write their handbooks because of it. Employers should instead issue an *Employee Advisory* that emphasizes existing policies (e.g. sick time, PTO, remote working) and how those policies will look under the company's COVID-19 response plan.

## What about FMLA leave?

FMLA eligibility requirements still apply. Given the reported symptoms of COVID-19, the virus likely qualifies as a serious medical condition under the FMLA. Thus, any person who has contracted the virus or who is caring for a family member with the virus will be entitled to protected FMLA leave (if they are otherwise eligible). On the other hand, any person fearful of contracting the virus from coming to work will not be eligible for protected FMLA leave.

## Can we require employees returning from FMLA leave to submit a health certificate?

Yes. Employers may require infected employees or potentially exposed caregivers to provide a fitness-for-duty certification upon returning from FMLA leave.

## What should do we now?

- > Update emergency contingencies and response plans
- > Publish an Employee Advisory
- > Assess essential and non-essential business travel
- > Develop a remote working plan. Larger tech companies (e.g., Microsoft and Google) are offering free video conference services until mid-Summer
- > Establish hygiene stations throughout the workplace
- > Inform employees about good hygiene in accordance with CDC and other official guidance

## CONCLUSION

Information on COVID-19 and appropriate response procedures are changing quickly. If you have questions about this Client Alert or about responding to COVID-19 in the workplace, please contact a member of our Labor and Employment group.

*This article is intended to serve as a summary of the issues outlined herein. While it may include some general guidance, it is not intended as, nor is it a substitute for, legal advice.*



Mark Ventola  
[mventola@sheehan.com](mailto:mventola@sheehan.com)  
617-897-5630



Brian Bouchard  
[bbouchard@sheehan.com](mailto:bbouchard@sheehan.com)  
603-627-8118