



Our Updated COVID-19 Guidance

Antonio Caldarone

03.22.2020

Employers are grappling with how to respond to the novel Coronavirus (COVID-19) pandemic. This provides employers with guidance on how to address the impact of COVID-19 on the workplace and what employers can and cannot do. This is a rapidly developing issue, and this guidance should be reconsidered and/or modified as circumstances change.

The Latest

- California, Connecticut, Illinois, Ohio and New York have issued stay-at-home orders requiring residents to stay home, with exceptions for health and safety; obtaining necessary supplies and services; outdoor activities; and to perform work for an essential business.
- The Families First Coronavirus Response Act (FFCRA) was enacted to provide, among other things, paid sick leave and expands both the employee eligibility requirements under the Family and Medical Leave Act (FMLA) and the reasons an employee can take FMLA.
- Illinois is allowing employees to receive unemployment compensation if they cannot work due to: (1) a temporary layoff due to COVID-19; (2) a diagnosis of COVID-19; (3) care for a spouse, parent or child diagnosed with COVID-19; or (4) a government-imposed or recommended quarantine. This does not apply to employees who cannot work because of a school closing or who chose to stay home because they are concerned.
- Chicago Public Schools are closed through April 20, 2020

Attorneys

Antonio Caldarone

Practice Areas

Business Immigration

Counseling and
Transactional

Employee Benefits and
Executive Compensation

Labor Management
Relations

Public Sector



Our Updated COVID-19 Guidance

- All other Illinois private and public schools are closed through at least March 30, 2020.
- All dine-in restaurants and bars are closed through March 31, 2020.
- On March 15, 2020, the CDC recommended banning all mass gatherings and events of 50 people or more for eight (8) weeks, excluding schools and workplaces.

What You Should Be Doing Now

Resist Overacting – Employees and employers are rightly concerned about COVID-19. However, do not overact. An overreactive response by an employer could spark unnecessary panic in the workplace, disrupting operations.

Have A Plan and Coordinate Efforts – Assemble a taskforce that meets daily and involves all necessary stakeholders (i.e., HR, operations, legal, IT, facility/maintenance, etc.) to monitor the situation and adjust policies and procedures as needed. You should create a preparedness plan that consolidates decision making to address COVID-19-related issues. At a minimum, the plan should:

- have a process in place of how to address various scenarios, such as the impact of government orders, when an employee is diagnosed with COVID-19, when an employee has symptoms of COVID-19, or when an employee may have been or has been exposed to someone diagnosed with COVID-19.
- identify who will make the decision of sending an employee home or prohibiting the employee from working.
- contain a communications protocol to notify employees of possible exposure or closures, including who will communicate, the method and where employees can get more information.
- have a communication strategy to handle press inquiries or customer/client inquiries.
- address whether to limit business travel or cancel any upcoming conferences or large gatherings (consider phone or video conferences in lieu of in person meetings, even if individuals are in the building). The CDC considers 250 persons or more as large gatherings.
- identify how to handle increased employee absences due to illness (or suspected illness), school closings, disruptions in mass transit or employees who refuse to work because they are scared.
- identify positions that are eligible for work-from-home arrangements on either a temporary or permanent basis.
- determine whether furloughs or temporary layoffs may be necessary in the event of a reduction in business, supply, etc., and how will they be implemented.



Our Updated COVID-19 Guidance

- you are not required to report actual or possible infections to public health officials; however, state and local public health agencies have hotlines to make inquiries or voluntarily disclose infections at work. Have this information handy.
- OSHA does not require you to take more than reasonable steps to protect employees, and you do not have to provide face masks or gloves. If you do, you must meet OSHA requirements. OSHA is very industry-specific, so you may have obligations that others do not depending on your industry. You should consult with legal counsel to advise whether any OSHA requirements apply to your business.
- determine whether exposure at work or an infection from an employee is reportable to your workers' compensation carrier.

Be Proactive – Strongly encourage employees to take proactive measures to prevent infection:

- make hand sanitizer and tissues available.
- inform employees of the recommendations of health care professionals, such as:
- washing hands often with soap and water for at least 20 seconds or use an alcohol-based hand sanitizer if soap and water are not available.
- avoid touching eyes, nose, and mouth with unwashed hands.
- covering your mouth and nose when sneezing or coughing, but not with your hands. Discard tissues after each use.
- cleaning and disinfecting frequently touched objects and surfaces with recommended products. Work with your building's facilities department to confirm that they are taking appropriate steps to adequately clean and disinfect frequently touched objects, such as door handles, bathrooms and kitchen areas.

What You Can and Cannot Do

According to the Center for Disease Control and Prevention (CDC), the symptoms of COVID-19 are a fever of 100.4 degrees or higher, cough and shortness of breath.

When You Can Prohibit An Employee From Working And For How Long – you can send an employee home and prohibit the employee from working if the employee:

- exhibits symptoms of COVID-19;
- has been exposed to someone confirmed to have COVID-19; or



Our Updated COVID-19 Guidance

- has COVID-19.

You can prohibit an employee from working for:

- 72-hours after the employee is symptom-free without the use of fever reducing medicine like Advil or Tylenol (not everyone with a fever or cough has COVID-19) *and* seven (7) days has passed since the symptoms first appeared.
- 14 days after an employee has been exposed to someone confirmed to have COVID-19.
- 14 days after an employee has returned from travel to an area with an outbreak, such as Italy, China, or Washington state.
- until an employee confirmed to have COVID-19 is cleared to work by the employee's health care provider.

When you can ask for a doctor's note before allowing an employee to return to work – For employees confirmed to have COVID-19, employers should ask for a doctor's note clearing the employee to return to work and/or confirming that the employee no longer contagious. Employers can ask for a doctor's note if the employee has been exposed to someone diagnosed with COVID-19.

Although an employer may ask for a doctor's note for employees with symptoms (but no other risk factor) or employees who self-quarantine following travel, you are discouraged from doing so. As a practical matter, an employee may not be able to get a doctor's note at all because the health care system is overwhelmed or because a doctor will not provide one unless the employee has been tested for COVID-19. The problem is that there may not be enough test kits and public health officials have issued criteria on those who can be tested. Persons who merely traveled or have symptoms with no other risk factors are unlikely to be tested at this time.

Other Things You CAN Do:

- ask if the employee has symptoms, such as a fever, cough or shortness of breath.
- inform employees that there is a risk they have been exposed to COVID-19 in the workplace, but maintain confidentiality as to the person who may have exposed them.
- require employees to inform you if they are a confirmed COVID-19 case, exposed to a person with COVID-19 and have traveled to an area with an outbreak.
- require employees to inform you of their out-of-state travel plans.



Our Updated COVID-19 Guidance

- encourage employees to go to a health care provider to be tested for COVID-19.

If an employee cannot work:

- consider whether the absence may be covered by the Family and Medical Leave Act, (FMLA) especially if the employee is hospitalized or absent for three days or more. Remember, the standard is reasonable notice, so you should send the eligibility and notice of rights and responsibilities if there is a possibility that the FMLA may apply.
- consider whether any other paid or unpaid leave policies apply, such as sick, vacation/PTO or personal leave (for employees not eligible for FMLA) and whether you will require employees to use paid sick or vacation/PTO while not working. Effective April 2, 2020, many employees become eligible for paid sick leave under the Families First Coronavirus Response Act (FFCRA), so you should determine if the employee is eligible.
- discuss possible accommodations with the employee, such as working from home, a leave of absence, etc., especially for employees with disabilities.
- review legal requirements regarding whether exempt employees must be paid their salary. For example, an exempt employee must be paid his/her salary for working a partial workweek, but not if the exempt employee performs no work for an entire workweek. In many cases, you may be able to require exempt employees to use vacation/PTO.
- if an employee loses health insurance eligibility and coverage terminates due to a reduction in hours or temporary layoff, COBRA continuation rights are generally available. You will need to ensure that COBRA election notices are sent. Note that if such individuals are not terminated and an employer utilizes a “look back” measurement method for purposes of the Affordable Care Act’s employer mandate rules, eligibility and coverage may need to be maintained until the end of the then-current “stability period.”

For employers of unionized employees – engage the union now by proactively informing the union of how you intend to handle sending employees home, paying them while home, possible reduction in operations or layoffs. Review your collective bargaining agreement on issues relating to furloughs, layoffs, and temporary shutdowns and the application of seniority and bumping rights, leaves of absence, attendance and other related clauses. Discuss these issues with union representatives now.

You CANNOT:



Our Updated COVID-19 Guidance

Discriminate or Allow Harassment – Do not single out employees based on national origin, race, ancestry or citizenship status. Enforce harassment policies where other employees may make comments or jokes about an individual's national origin, race, ancestry or citizenship status.

You cannot prohibit employees from traveling to destinations for non-business reasons, but you may encourage them to check the Centers for Disease Control's Traveler's Health Notices before making travel decisions.

Make disability-related inquiries – You cannot make medical inquiries of disabled employees about their medical condition. However, you may inquire why an employee has called off from work. You can ask non-disability-related questions, such as if school closures will impact their attendance, if they need to care for parents or spouses

Now that a pandemic has been declared, employers can take an employee's temperature. Based on current guidance, we caution that employers should consider whether this step would be effective, as employees can take fever-reducing over-the-counter medications, the accuracy of temperature readings can be questionable, and because asymptomatic employees may actually be contagious as well. Employers that take this approach should make sure that employees understand that the system is not fool-proof and that employees should continue to take recommended precautions to reduce the risk of transmission. Additionally, if you decide to take employee temperature, then you should consider taking the temperature of anyone who enters your facility or office.

If an employee with a disability voluntary discloses their disability because they are concerned that they are susceptible, you must engage in the interactive process (determine what if any accommodation is appropriate under the circumstances) and keep this information confidential.

Require employees to take certain actions – You may not require that your employees get a COVID-19 test or a flu shot.

Sources of Information

Reliable Sources – There is a lot of misinformation out there and assumptions being made. You should make decisions based on reliable sources and follow recommendations from public health professionals. These government agencies have created guides with helpful information on these issues:

- **Equal Employment Opportunity Commission: PANDEMIC PREPAREDNESS IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT**



Our Updated COVID-19 Guidance

- **Centers for Disease Control and Prevention:** Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19), February 2020
- **Centers for Disease Control and Prevention:** Environmental Cleaning and Disinfection Recommendations
- **Centers for Disease Control and Prevention:** What to do if you are sick
- **State of Illinois:** Coronavirus Disease 2019 (COVID-19)
- **City of Chicago:** COVID-19: Guidance for Businesses and Employers
- **Occupational Safety and Health Administration:** COVID-19
- **Occupational Safety and Health Administration:** Guidance on Preparing Workplaces for COVID-19
- **U.S. Department of Labor:** COVID-19 or Other Public Health Emergencies and the Family and Medical Leave Act Questions and Answers
- **U.S. Department of Labor:** COVID-19 or Other Public Health Emergencies and the Fair Labor Standards Act Questions and Answers

This Guidance is not legal or medical advice and should not be relied upon as legal or medical advice. You should contact an attorney or medical professional before taking action on the information contained in this Guidance.