

March 17, 2020

## **CLIENT ALERT: COVID-19 – Proactive Protocols, Programs and Policies**

Many of you have contacted me with questions about how to administer various employment policies, programs and practices in light of COVID-19. Here are some of your and others' FAQ's and some resources. This information is frequently changing. All information and resources provided in this Client Alert are as of March 16, 2020.

As you know, this landscape is changing at a *frenetic* pace. I started drafting this alert about 24 hours ago and just 12 hours later the landscape had again changed significantly. Please use the links and resources provided throughout this document to monitor updates and new information as it is made available. To facilitate your use of the alert, I have tried to provide information sorted as follows:

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### Q & A

How do we determine if an employee is at risk and should stay home? First, the CDC recommends we encourage all employees who are sick for *any* reason to stay home. We should give our employees information as to how they can conduct their own COVID-19 self-assessment. See the charts and resources on the last three (3) pages of this alert for assessing a person's risk and symptoms.

Can we require an employee to stay home if we think the employee is sick? The CDC recommends we (1) urge our employees who are sick to stay home; and (2) isolate employees who come to work sick (if possible, have them work in an office or location with a door that will close).

If you are going to require an employee to go home and then stay home, consider in advance what your policy will be. What symptoms or assessment will trigger your policy? Will the time off be with or without pay? For how long will you require the employee to stay home?

Can we require an employee who recently traveled to stay home? If you are going to ask or require employees to stay home after they return from travel, consult the [Department of State's](#) travel advisories and please tell your employees *in advance*. Help reduce the element of surprise in these trying times. You can help your employees plan by letting them know what the consequences of travel will or may be upon their return. If the employee recently traveled to a location on the Department of State's list, the employee should be encouraged to stay home for at least 14 days. If you require the employee to stay home, provide the employee with paid leave if you can.

Can we take employees' temperatures? As of this writing, I recommend you not do so. The CDC recommends *not* monitoring people who are asymptomatic, "CDC does not recommend testing, symptom monitoring or special management for people exposed to asymptomatic people with potential exposures to SARS-CoV-2." In addition, remember, this *is* flu season. Simply having a fever is not necessarily indicative of having COVID-19. Maybe I have periodic fever syndrome (yep, that's a real thing) and now you have information about my disability. On the flip side, one may also have COVID-19 and be asymptomatic. So, taking employee's temperatures may not provide all the information you need to make a proper assessment. It may also give you information that is related to a person's disability and, now you land in an ADA pitfall. SHRM was kind enough to recently interview me on this topic. The related [article is here](#).

If an employee is assessed as being at risk, due to a recent exposure, should we tell our workforce? Customers or clients? At this time, I find no guidance that requires or recommends you report this. I suspect this may just lead to increased and unnecessary concern, absenteeism, etc. As above, if an employee is assessed as being at risk, urge the employee to stay home. If you want to require the employee to stay home, provide the employee with paid leave if you can.

If an employee is diagnosed with COVID-19, should we tell our workforce? Customers or clients? You should inform your workforce that an employee has tested positive. If you are a multi-site employer, you may also want to tell employees the location where the employee worked. In no instance, should you divulge any personally identifiable information (PII), except as required or permitted to public health officials. It is most likely they will notify you before you need to notify them. You should contact and work closely with your local health department to coordinate communication with your customers and clients.

If I have to reduce the hours worked by one or more full-time employees to a part-time schedule, how will this affect their eligibility for health care coverage as a full-time employee? This is a question that you should run by your health insurance carrier/provider for guidance under your contract and plan documents.

If I have to reduce the hours worked by two or more employees, can I start with workers age 60 and above, since they seem to be a greatest risk? I recommend you *not* take any employment action based on an individual's age (see section on Legal Issues). Work reductions or furloughs

may be implemented based on factors that are job related and consistent with business necessity. Where possible, first ask for volunteers to reduce hours. If further reduction is needed, you might consider a rotating basis or a concurrent, partial reduction e.g., ten employees take a 10% reduction rather than one employee being 100% laid off. Where that is not feasible, then factors such as length of service or seniority might be used.

May we have employees sign an affidavit attesting that they will not hold us liable if they contract COVID-19 in the course of their work? May you? I suppose. I suspect it might not be enforceable even if an employee did sign. *Why* would you want to? I hope we treat our employees in challenging times *at least* as well as we treat them in good times. Instead, how about this? Consider giving an affidavit to your employees expressing *your* commitment to consider current guidance, employ reasonable standards of care to keep them safe AND asking that they join you in this effort, share honest information about their own health, and stay home if they don't feel well. And, if you want to remain focused solely on risk reduction, that strategy could show due diligence to comply with OSHA's General Duty Clause (see section on Legal Issues).

#### Proactive Practices:

Some of you have shared with me that you or other employers have:

- purchased more laptops so more employees may work remotely;
- let employees take unearned paid time off (negative leave banks);
- let employees work remotely outside of normal work hours (evenings/weekends) to accommodate the need to stay home and care for children who are home from school;
- split or modified shifts to reduce the number of employees working on site at the same time (social distancing); and
- shared jobs where hours in one business line have to be reduced, hours may be picked up by sharing increased workload in another line or to cover absences.

#### Legal Issues (not all inclusive):

- Age Discrimination in Employment Act (ADEA) – avoid treating older workers differently from younger workers. Examples might be giving them different job tasks, requiring them to telework before others or reducing their hours before others. Your actions may be well-intended and borne out of a desire to protect those who may be more at risk. But the risk may end up being yours for discriminating against workers age 40 or above in violation of the ADEA.
- Americans with Disabilities Act (ADA) – The U.S. EEOC published a [brief statement](#) last week about COVID-19. That guidance refers to its [2009 guidance](#) for employers related to pandemic preparedness. Avoid treating people with chronic conditions, like asthma, as if they are COVID-19 symptomatic. Another example of why we do not want to assume that just because someone has a fever means they have COVID-19.

- Fair Labor Standards Act (FLSA) / Wage and hour issues – remember exempt employees must be paid their full day’s salary even if they work only a partial day. They *may* also have to be paid on any day we have no work for them, if they performed any work in that work week.
  - Furloughs, such as requiring an exempt employee to work four rather than five days a week and pro-rating the employee’s guaranteed, minimum weekly salary *may be* permissible. The DOL has noted, “a fixed reduction in salary effective during a period when a company operates a shortened workweek due to economic conditions would be a bona fide reduction not designed to circumvent the salary basis payment.”
  
- Family and Medical Leave Act – if an employee is staying home because of his or her illness or to care for an immediate family member who is ill, the absence may be FMLA-qualifying. If you are an FMLA-covered employer, remember to give or sent to the employee the FMLA Notice of Rights & Eligibility, *indicating if the employee is / not eligible*, along with the appropriate medical certification form. The U.S. Department of Labor has a [web page](#) with some reminders and tips.
  - The U.S. House of Representatives has passed [H.R. 6201](#), which if enacted may provide employees who have worked for you for at least 30 days with job-protected FMLA leave for select reasons related to COVID-19. The proposal would cover ONLY employers with fewer than 500 employees and potentially those with fewer than 50 employees as well. As of this writing, there are two version of the bill being considered. The Senate has the next move.
  
- OSHA’s General Duty clause - requires employers to furnish to each worker “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.”
  
- OSHA’s Recordkeeping requirements – an employee who is diagnosed with COVID-19 may be a reportable, occupational illness. [Click here](#) for a list of factors to make that determination (see the blue box on the right).
  
- State paid leave laws – if you are going to require an employee to use paid sick leave that is provided under a state leave law, ensure the absence is for a qualifying reason. For example, if an employee is asymptomatic but calls out because s/he does not want to come in and cannot work from home, requiring the employee to use paid sick leave may run afoul of your state or local jurisdiction’s sick leave law.
  
- Title VII – avoid making assessments based on the national origin or race of any individual or associated country, other than as listed on the Department of State’s [travel advisories](#).

- Workers' compensation – ask your carrier for any recommendations they have for avoiding compensable illness, injury and how to facilitate claims administration if an employee does file a related claim.

**TIPS:**

1. Use of paid leave. If an employee wants or needs to stay home, consider letting the employee choose whether to use paid leave or be absence without pay. With at least 37 states and the District of Columbia closing public schools, employees will need time off from work for personal reasons as well as those related to any illness. This may mean granting an exception to your current policies if they require employees to exhaust all paid leave before being absent without pay. Give your employees as much flexibility as possible. We are all in a bit of turmoil. The more control we have over what happens to us, the less stress we may feel.
2. Unpaid leave. Consider advancing paid leave for those employees who have none, including those who usually are not eligible for leave under your current program, such as part-time employees. They can earn the leave back, when they return to work. Other wage supplements may be available:
  - a. Unemployment insurance - The U.S. Department of Labor [published a notice](#) earlier this month reminding us that employees may be eligible for unemployment insurance benefits if temporarily out of work due to COVID19. [Click here](#) to find your state's local office and encourage any employees whose work schedules are reduced to contact the local office.
  - b. Partial wage supplements - Congress also included in [H.R. 6201](#), a “paid leave benefit,” which would provide temporary, partial wage replacement up to 2/3's of an employee's wage, not to exceed \$4,000 after the first two weeks of the employee's absence.
  - c. Paid Sick Leave – H.R. 6201 has a third provision, that would require employers to provide up to 80 hours of paid sick leave (full or partial, depending upon the reason for the leave), in addition to the leave you already provide. Employers may then be fully or partially reimbursed through a tax credit. There is also [S. 3415](#), which is another paid sick leave proposal. Stay tuned.
3. Length of Time Off – if you are going to require an employee to stay off from work, consider policy language that indicates the period of time will be determined in consideration of CDC and other regulatory guidance, rather than setting a firm number of days, such as 14.
4. Doctors' notes. The CDC recommends employers *not* require a doctor's note upon an employee's return to work after being out sick. The doctor's offices are inundated as it is. In lieu of that, you might have employees sign a form by which they (1) understand that you are relying on their honest response to help ensure the health and safety of the workplace and (2) attest that they have had no risk exposure in the last 14 days (see #10

below and CDC Table 2 at the end of this alert) and no symptoms in the last five days (CDC [recommendation](#) for standard flu protocol).

5. In consideration of, rather than following, CDC guidance. In your communications to clients, customers and employees, explain that you are taking actions in *consideration of* CDC, WHO, NIH and other, related guidance. This may give you more flexibility to impose stricter or more relaxed standards than if you state that you are *following* CDC or other agency guidance.
6. Talk to your vendors and service providers. Ask for their assurance that they are taking measures to avoid sending any of their staff who may be symptomatic to your worksite.
7. Business travel. If you require an employee to travel for business, require them to use a designated travel agent who can provide consistent guidance based on your industry and business needs.
8. OSHA guidance reminds us to look at our engineering and administrative controls and safe work practices:
  - a. Assess your current ventilation rates and the efficiency of air filters
  - b. Stay in regular and frequent communication with all employees, consider a daily link or message
  - c. Provides employees with cleaners, wipes and hand sanitizers (should be at least 60% alcohol)
9. I agree with this CDC statement, ” Informed workers who feel safe at work are less likely to be unnecessarily absent.” Let your employees know not just what you are doing but *why* you are doing it. The more they understand the safeguards you have in place and how you anticipate they will protect your employees *and* your business operations, the more likely they will feel comfortable coming to work.
10. The CDC provides this summary for asymptomatic people. Sharing this with your employee may help encourage them to come to work:

*WORKPLACES: People with low-risk exposures to SARS-CoV-2 are not restricted from public places, including workplaces, as long as they remain asymptomatic. Asymptomatic people with low-risk exposures are advised to self-observe until 14 days after their last potential exposure. Employers may choose to recommend that employees with low-risk exposures check their temperature to ensure they are still asymptomatic before arriving at the workplace.*

*Asymptomatic people with medium-risk exposures are recommended to avoid congregate settings, limit public activities, and practice social distancing. Employers may consider on a case-by-case basis, after consultation with state or local public health authorities,*

*whether asymptomatic employees with medium-risk exposures may be able to work onsite. These decisions should take into account whether individual employees' work responsibilities and locations allow them to remain separate from others during the entire workday. Asymptomatic employees with medium-risk exposures who are permitted to work onsite should not enter crowded workplace locations such as meeting spaces or cafeterias."*

### Upcoming Events

In light of the above, Five's annual seminar will be held this year as web-based program. Bookmark [this page](#) and stay tuned for registration information.

FiveL will be hosting a webcast next week that will review the above information and provide opportunity for interactive Q & A. Bookmark [this page](#) and stay tuned for more information. Both events are just pending the set-up of a larger, virtual room.

### Other Resources

I have found some of these resources helpful. You may want to make them available to your employees, too. The listings below are *not* endorsements.

- [ABC News](#) hosts a daily podcast with COVID19 updates.
- OSHA [Guidance on Preparing Workplaces for COVID-19](#).
- I4CP (this company provides research findings, information and *not* consulting services) has a [dedicated webpage](#) with COVID-19 resource page for employers.
- NIH's [Guidance for Businesses and Employers](#) (scroll down and click on "Businesses and Employers" on the right; *very* similar, if not identical, to CDC's)
- Small Business Administration ([SBA](#)) Small Business Guidance and Loan Resources
- SHRM has [a page](#) dedicated to related resources and information, including sample memo's and policies (SHRM membership required for some).

### Closing Remarks

Please Practice Patience. Use critical listening skills. Many people are rushing to judgment, jumping to conclusions and making less-than-flattering comments about what others say or do. Lead by example. If you don't know, it's OK to say so. If you really do know, calmly and respectfully explain your position. Explain *why* you are doing *what* you are doing. That can go a long way in helping employees understand the purpose behind our actions, even if they don't agree.

Great example. Shortly after Maryland's Governor Hogan held his March 16<sup>th</sup> press conference – in three blinks of an eye I read a report that announced Maryland restaurants had to "close their doors" by 5:00 p.m. That was not accurate. The [executive order](#) expressly permits food service to continue where it is "promptly taken from the premises i.e., on a carry-out or drive-through basis." The doors are open, we just can't sit down. 😊

We really are all in this together. That sounds rather trite to me, but I am struck by the truth of it.

1. Employees are worrying about losing income if they are temporarily furloughed or their hours are cut.
2. Employers are worrying about losing revenue as clients and customers slow, discontinue, postpone and cancel services.
3. Our governments are worrying about losing tax revenue from reduced personal income and business revenue.

As you create your employee and customer communications, let's keep this in mind. Let's each help each other and we just might come out of this reasonably intact, fiscally and personally.

Stay well, be safe.

*Yours in proactive service,*

*Christine V. Walters*

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First, assess an employee’s risk using the following:

**CDC Table 1. Risk Categories for Exposures Associated with International Travel or Identified during Contact Investigations of Laboratory-confirmed Cases**

Risk	Geographic (Travel-associated) Exposures*	Exposures Identified through Contact Investigation
<b>High</b>	Travel from Hubei Province, China	Living in the same household as, being an intimate partner of, or providing care in a nonhealthcare setting (such as a home) for a person with symptomatic laboratory-confirmed COVID-19 infection <i>without using recommended precautions</i> for <a href="#">home care</a> and <a href="#">home isolation</a>
<b>Medium</b> (assumes no exposures in the high-risk category)	<ul style="list-style-type: none"> <li>• Travel from mainland China outside Hubei Province or Iran</li> <li>• Travel from a country with widespread sustained transmission, other than China or Iran</li> <li>• Travel from a country with sustained community transmission</li> </ul>	<ul style="list-style-type: none"> <li>• Close contact with a person with symptomatic laboratory-confirmed COVID-19</li> <li>• On an aircraft, being seated within 6 feet (two meters) of a traveler with symptomatic laboratory-confirmed COVID-19 infection; this distance correlates approximately with 2 seats in each direct</li> <li>• Living in the same household as, an intimate partner of, or caring for a person in a nonhealthcare setting (such as a home) to a person with symptomatic laboratory-confirmed COVID-19 infection <i>while consistently using recommended precautions</i> for <a href="#">home care</a> and <a href="#">home isolation</a></li> </ul>
<b>Low</b> (assumes no exposures in the high-risk category)	Travel from any other country	Being in the same indoor environment (e.g., a classroom, a hospital waiting room) as a person with symptomatic laboratory-confirmed COVID-19 for a prolonged period of time but not meeting the definition of close contact
<b>No identifiable risk</b>	Not applicable	Interactions with a person with symptomatic laboratory-confirmed COVID-19 infection that do not meet any of the high-, medium- or low-risk conditions above, such as walking by the person or being briefly in the same room.

\*In general, geographic exposure categories do not apply to travelers who only transit through an airport. All exposures apply to the 14 days prior to assessment.  
<https://www.cdc.gov/coronavirus/2019-ncov/php/risk-assessment.html>

Once risk is assessed, use the CDC’s Table 2 on the next page for recommended management, if any and depending upon whether the employee is asymptomatic or symptomatic.

**CDC Table 2. Summary of CDC Recommendations for Management of Exposed Persons with by Risk Level and Presence of Symptoms**

Risk Level	Management if Asymptomatic	Management if Symptomatic <sup>1</sup>
<b>High risk</b>	<ul style="list-style-type: none"> <li>• Quarantine (voluntary or under public health orders) in a location to be determined by public health authorities.</li> <li>• No public activities.</li> <li>• Daily active monitoring, if possible based on local priorities</li> <li>• Controlled travel</li> </ul>	<ul style="list-style-type: none"> <li>• Immediate isolation with consideration of public health orders</li> <li>• Public health assessment to determine the need for medical evaluation; if medical evaluation warranted, diagnostic testing should be guided by CDC’s <a href="#">PUI definition</a></li> <li>• If medical evaluation is needed, it should occur with pre-notification to the receiving HCF and EMS, if EMS transport indicated, and with all recommended <a href="#">infection control precautions</a> in place.</li> <li>• Controlled travel: Air travel only via air medical transport. Local travel is only allowed by medical transport (e.g., ambulance) or private vehicle while symptomatic person is wearing a face mask.</li> </ul>
<b>Medium risk</b>	<p><b>Close contacts in this category:</b></p> <ul style="list-style-type: none"> <li>• Recommendation to remain at home or in a comparable setting</li> <li>• Practice social distancing</li> <li>• Active monitoring as determined by local priorities</li> <li>• Recommendation to postpone long-distance travel on commercial conveyances</li> </ul> <p><b>Travelers from mainland China (outside Hubei Province) or Iran</b></p> <ul style="list-style-type: none"> <li>• Recommendation to remain at home or in a comparable setting</li> <li>• Practice social distancing</li> <li>• Self-monitoring with public health supervision as determined by local priorities</li> <li>• Recommendation to postpone additional long-distance travel on commercial conveyances</li> </ul>	<ul style="list-style-type: none"> <li>• Self-isolation</li> <li>• Public health assessment to determine the need for medical evaluation; if medical evaluation warranted, diagnostic testing should be guided by CDC’s <a href="#">PUI definition</a></li> <li>• If medical evaluation is needed, it should ideally occur with pre-notification to the receiving HCF and EMS, if EMS transport indicated, and with all recommended <a href="#">infection control precautions</a> in place.</li> <li>• Controlled travel: Air travel only via air medical transport. Local travel is only allowed by medical transport (e.g., ambulance) or private vehicle while symptomatic person is wearing a face mask.</li> </ul>

Risk Level	Management if Asymptomatic	Management if Symptomatic <sup>1</sup>
	<p style="text-align: center;">after they reach their final destination</p> <hr/> <p><b>Travelers from other country with widespread transmission</b></p> <ul style="list-style-type: none"> <li>• Recommendation to remain at home or in a comparable setting,</li> <li>• Practice social distancing</li> <li>• Self-monitoring</li> <li>• Recommendation to postpone additional long-distance travel on commercial conveyances after they reach their final destination</li> </ul> <hr/> <p><b>Travelers from country with sustained community transmission</b></p> <ul style="list-style-type: none"> <li>• Practice social distancing</li> <li>• Self-observation</li> </ul>	
Low risk	<ul style="list-style-type: none"> <li>• No restriction on movement</li> <li>• Self-observation</li> </ul>	<ul style="list-style-type: none"> <li>• Self-isolation, social distancing</li> <li>• Person should seek health advice to determine if medical evaluation is needed.</li> <li>• If sought, medical evaluation and care should be guided by clinical presentation; diagnostic testing for COVID-19 should be guided by CDC’s <a href="#">PUI definition</a>.</li> <li>• Travel on commercial conveyances should be postponed until no longer symptomatic.</li> </ul>
No identifiable risk	None	<ul style="list-style-type: none"> <li>• Self-isolation, social distancing</li> <li>• Person should seek health advice to determine if medical evaluation is needed.</li> <li>• If sought, medical evaluation and care should be guided by clinical presentation; diagnostic testing for COVID-19 should be guided by CDC’s <a href="#">PUI definition</a>.</li> <li>• Travel on commercial conveyances should be postponed until no longer symptomatic.</li> </ul>

<sup>1</sup>Symptomatic - subjective or measured fever, cough, or difficulty breathing.