HEALTHY RETURN TO THE WORKPLACE
FREQUENTLY ASKED QUESTIONS (FAQs)

OVERVIEW

Nonprofits First and the Nonprofit Chamber of Palm Beach County are providing the following responses to Frequently Asked Questions for nonprofits considering issues around returning to the workplace. The questions and answers are not exhaustive and are not intended as legal advice.

Revised 6/11/2020

What’s the difference between PPE and cloth face coverings?
A cloth face covering is a simple facial mask, fitting snugly against the face and covering the mouth and nose. The face covering should generally be made of multiple layers of fabric yet allow comfortable breathing. In most workplaces, cloth face coverings are a simple and effective measure to minimize the risk of acquiring COVID-19.

PPE, or Personal Protective Equipment, is equipment worn to minimize exposure to hazards that cause serious workplace injuries and illnesses originating from chemical, radiological, physical, electrical, mechanical, or other workplace hazards. PPE can range from hearing protection or steel-toed boots to surgical or N95 masks. OSHA and other agencies regulate PPE, and if your organization DOES require PPE for respiratory protection, your organization must have a program in place (which must include respiratory health monitoring, fit testing, appropriate training, and documentation of the above).

Employers are also obligated to pay for most forms of PPE.

OSHA revised their guidance on June 10, including the following statements:
OSHA’s PPE standards do not require employers to provide [cloth face coverings].

The General Duty Clause, Section 5(a)(1) of the Occupational Safety and Health Act, requires each employer to furnish to each of his employees 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. Control measures may include a combination of engineering and administrative controls, safe work practices like social distancing, and PPE.
However, employers may choose to ensure that cloth face coverings are worn as a feasible means of abatement in a control plan designed to address hazards from SARS-CoV-2, the virus that causes COVID-19. Employers may choose to use cloth face coverings as a means of source control, such as because of transmission risk that cannot be controlled through engineering or administrative controls, including social distancing.

If I find out that one of my employees in the workplace is diagnosed with COVID-19, what steps do I need to take?

The response to this FAQ is in three parts, one regarding the ill employee, the second regarding the workplace, and the third regarding investigative duties of the employer.

**Ill Employee:**
An ill or potentially ill employee should be separated from other employees and removed from the workplace as soon as possible. The employee should follow CDC-recommended steps. The employee should not return to work until they have met the criteria to discontinue home isolation and have consulted with a healthcare provider and state or local health department. If your organization has established specific testing criteria for a safe return, the employee must meet that criteria.

Your organization must inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (ADA). Fellow employees who are considered “exposed” (if they were in “close contact” - within approximately 6 feet / 2 meters - of the sick employee for a period of time > 15 min or have other direct exposure) should use the CDC guidance and follow CDC-recommended steps. Employees not considered exposed should self-monitor for symptoms such as fever, cough, or shortness of breath and follow your organization’s protocols for notifying a supervisor and staying home if symptoms are detected.

**Workplace:**
Close off any areas used for prolonged periods of time by the sick person. If possible, close or cover any air vents (especially intake vents) to minimize pulling droplets into your HVAC system from those areas (vent to outdoors if possible by opening a window, etc.). Wait 24 hours (or, if not feasible, as long as possible) before first cleaning and then disinfecting those areas according to CDC guidelines.

**Employer:** (new as of May 26, 2020)
COVID-19 is now a recordable illness. Employers with 10 or more full-time employees are expected to determine whether employees who have COVID-19 contracted it at work. They are permitted to inquire and research to determine the cause of an employee's infection but must also respect the worker's privacy. If the employer determines that the employee caught COVID-19 at work or while performing work-related activities, the employer must record the illness on the OSHA Form 300 if the illness resulted in death, days away from work, restricted work or a transfer to another job, medical treatment beyond first aid, or the loss of consciousness.

The employer must make a reasonable effort of investigating the source of the illness, which may include:

- Asking the employee limited questions about how he or she believes COVID-19 was contracted. For example, the employer may ask how the employee thinks he or she got the virus and whether it was away from work. If the employee responds that someone in his or her household contracted it recently, the employee's coronavirus likely is not work-related.
- Making inquiries about the employee's work and non-work activities, and possible exposure, leading up to the diagnosis.

* Employers should avoid extensive medical inquiries that might violate employee privacy rights and ADA or other laws.
• Investigating the employee’s work environment to determine whether exposure was possible (e.g. whether other employees in the work area have tested positive, the employee’s job duties and work-related exposure to the public, and whether the work areas do not permit social distancing.

Employers should generally not conduct extensive investigations into non-work activities, other than asking these questions and considering readily available evidence.

What can I do to control exposure in the workplace?

There are numerous steps you can take to control exposure in the workplace. Among the most important are to maintain physical distancing (minimum of 6’ between employees) and to have employees wear cloth face coverings (“masks”) for as much of the workday as possible. Maptician Care (https://maptician.com/care) may be helpful when maximizing distancing in the available space within your facilities.

Other steps to consider:
• Use staggered shifts and expanded workplace hours to decrease the total number of individuals on premises at one time
• Provide physical shields between staff and/or clients
• Use HEPA air filters in your HVAC system
• Maintain humidity in your facility between 40% and 60%
• Increase cleaning schedule and ensure appropriate disinfectants are used
• Install additional sanitizer dispensers
• Have hallways or walkways be one-way, so physical distancing can be maintained
• Consider banning break-room usage and/or shared food preparation machines (coffee pot or k-cup machine, communal microwave / fridge, etc.) and areas

As an employer, what options are available to me if an employee is in fear of returning to the workplace?

The best response to an employee who is afraid of returning to the office is to work with the employee. OSHA requires that an employer maintain a work environment that is free from hazards and threats, so any employer who is reopening should make sure that they are in compliance with OSHA. An employee may temporarily be able to use PTO or sick time, or go on unpaid leave. Upon expiration of those options, an employer should seriously consider requests for accommodation which address the fear (such as those outlined in the prior FAQ). Ultimately, and out of business necessity, if the accommodations and PTO are not enough, an employer may decide to terminate the employee.

How does FMLA expansion affect returning to the workplace?

An employer may see a decrease in the workplace if EFMLA is being utilized by many employees. Remember, EFMLA is not available if the employee is able to telework unless the employer and employee agree to an intermittent use of EFMLA.
Is it OK to take employees’ temperatures? If yes, what laws govern the process and the information gathered?

Pre-COVID this practice would generally not be acceptable. However, the EEOC released guidance in March that permits temperature taking. In fact, in order to comply with OSHA, it probably is a good idea to have some sort of temperature system. ADA requires that an employee’s health information be kept confidential. Further reading is available: https://www.natlawreview.com/article/temperature-screening-new-guidance-cdc-faqs-and-best-practices

If you establish a temperature system, you should consider the following best practices:

Establish your acceptable temperature range, based on CDC guidance and the accuracy and precision of the device(s) used to evaluate temperature. The CDC considers a person to have a fever when he or she has a measured temperature of 100.4° F (38° C) or greater, or feels warm to the touch, or gives a history of feeling feverish. Antipyretic drugs (aspirin, ibuprofen, acetaminophen, etc.) and ambient temperature can alter the results.

Only record abnormal temperatures, do not record temperatures if they are within your acceptable ranges.

The temperature-taking process must be confidential. Many agencies are advising employees to take their own temps at home prior to coming to work; if there is an abnormal temperature to report to supervisor and not go to the office.

Can an employee make a workers’ comp claim if working from home? What are my obligations around providing a safe workplace if the workplace is the employee’s home?

Workers’ compensation applies to both the physical work location and to work being done in the course and scope of employment. This is why a slip-and-fall in the office is covered but also a slip-and-fall while doing an outreach is covered. This means that yes, it is possible to have a valid claim while working from home, but it would be difficult. Imagine a scenario where a company-provided computer explodes while an employee is working at home. This is likely covered. However, if an employee temporarily stops work to get up and get a glass of water and then slips and falls, this is not covered as the employee was not acting in the course and scope of employment when the injury occurs.

What are the laws and employer options around requests for accommodations when employees are returning to work?

The ADA has always required employers to consider all reasonable accommodations. This remains true now. However, more accommodations may now be made. The new normal workplace should include serious evaluation of whether the office or workplace is an essential function for the job. Accommodations should be granted if possible and reasons for granting or denying should always be documented.
Accommodations that are generally made for a class of people could be discriminatory so accommodations should be assessed on an individual basis. Further reading is available: https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act

Can I be sued if my employee or one of our clients get coronavirus and believe they contracted it through our physical site?

It is possible. Businesses have a duty to anyone that is invited inside to warn them of any potential harm. Many businesses are requiring entrants to sign a waiver and release of liability from any coronavirus infection or harm. If it’s an employee who gets sick, they should go through the workers’ comp process. In that scenario, an employee would prevail in a workers’ comp claim if 1) The illness arose from the course and scope of employment; AND 2) The illness arose out of or was caused by conditions particular to the work and not to an ordinary disease of life to which the general public is exposed.