

# HR Heads-up

PERIODIC UPDATES ON IMPORTANT HR LEGAL ISSUES

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## ***Managing Employees' Return to the Workplace During the COVID-19 Pandemic***

The Boardman Clark Labor & Employment team has received many questions about how to navigate employees returning to the workplace as employers reopen operations during the COVID-19 pandemic. This article will address the following topics:

- Testing and screening employees for COVID-19
- Managing when employees get sick
- Responding when employees are potentially exposed to COVID-19
- Developing potential employee travel policies

### Testing and Screening Employees for COVID-19

#### *COVID-19 Testing*

The Americans with Disabilities Act (ADA) permits employers to administer COVID-19 tests to employees and conduct medical screenings to determine if employees have symptoms of COVID-19 or have potentially been exposed to COVID-19. The ADA requires that any mandatory medical test of employees be “job related and consistent with business necessity.” The Equal Employment Opportunities Commission (EEOC) has issued guidance stating that during the COVID-19 pandemic, employers may take steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others.

However, the EEOC has cautioned employers to ensure that the tests are accurate and reliable. Employers should consider the incidence of false-positives or false-negatives associated with a particular test. Finally, the EEOC explains that even accurate testing will only reveal if the virus is currently present in an employee; a negative test does not mean the employee will not acquire the virus later. From a practical perspective, COVID-19 tests are not yet available in sufficient quantities and cannot provide results quickly enough to be used on all employees on a daily basis.

#### *Taking Temperatures and Administering Symptom Screeners*

In lieu of COVID-19 tests, some employers are considering taking employees' temperatures and/or administering written questionnaires inquiring about employees' symptoms (commonly referred to as “symptom screeners” or “symptom screener questionnaires”) on a daily basis. EEOC guidance indicates that these actions are consistent with the requirements of the ADA. However, employers need to consider the practical and legal implications of these techniques. To take employees' temperatures each day, someone needs to be trained to accurately take temperatures and that person will need personal protective equipment (PPE) and other potential safety measures to limit potential exposure to COVID-19. Additionally, symptom screener questionnaires rely predominately on self-reporting, and employees are not always able to accurately

diagnosis their own symptoms. Symptom screener questionnaires will also need to be updated periodically to incorporate the most current symptoms of COVID-19 as designated by the Centers for Disease Control and Prevention (CDC) and other public health agencies.

Employers should be cautious regarding any type of medical testing or screening. The results of any medical inquiry must be treated confidentially. Such results need to be kept in a separate confidential medical information employment file (not a regular personnel file). Additionally, if the employer's policy is that every employee will be tested or screened, failure to test or screen an employee could increase the risk of liability if it results in someone being infected with COVID-19.

Employers will inevitably have to balance practicality and safety in considering testing and screening measures. Even a rigorous testing/screening policy is not a guarantee of workplace safety. Other safety measures will still be required such as social distancing, sanitation, etc. Employees with COVID-19 who are not showing symptoms of COVID-19 would pass a symptom screener, but could still spread the virus. Even a negative COVID-19 test is not a guarantee of safety as the CDC recommends that employees who were symptomatic or tested positive for COVID-19 receive two consecutive negative test results on tests given at least 24 hours apart before returning to work—an acknowledgement by the CDC of the limitations of a single test result. In certain industries, strong employment policies prohibiting sick employees from coming to work might be a viable alternative to daily testing and screening.

#### *Workplace Policies Prohibiting Sick Employees from Coming to Work*

In addition to or in place of extensive testing and screening procedures, employers should adopt and disseminate a policy stating that any employee exhibiting symptoms of COVID-19 is prohibited from coming into the workplace. The policy can list the symptoms of COVID-19 based on current guidance from the CDC and other public health agencies. Signs reiterating this policy and indicating the symptoms of COVID-19 can be placed on entrances to the workplace to remind employees. This approach requires employees to self-identify symptoms but avoids the need for employees to come to the workplace to do so. This policy will still need to be supplemented with other safety measures, but could eliminate the practical challenges of daily testing/screening of employees and decrease the risk of liability for the employer if an employee is not tested or screened on a given day. Employees who are prohibited from coming to work under such a policy can use any applicable paid leave such as employer-provided sick time, PTO, or vacation leave, FFCRA paid emergency leave (if eligible), or can be placed on an unpaid leave.

Having a strong employment policy prohibiting sick employees from coming to work doesn't eliminate an employer's obligation to be vigilant regarding the health of its employees because some employees might still report to the workplace with symptoms of COVID-19 and fail to disclose such symptoms. Employers should be prepared to discuss potential COVID-19 symptoms with such employees and, if appropriate, send them home immediately.

#### **What to Do When an Employee Gets Sick**

If an employee reports having symptoms of COVID-19, the employer should send the employee home immediately. It might be several days before the employer knows with certainty whether the employee had COVID-19. While awaiting the employee's diagnosis, the employer needs to determine which other employees might have been exposed to COVID-19 by the employee prior to the employee being sent home. To address this uncertainty, the employer should promptly contact its local public health agency to discuss whether the employee might have potentially exposed other employees to COVID-19 at the workplace and to discuss any additional steps the employer might need to take. Tracing with whom an exposed individual has been in contact is known as "contact tracing," and is an important public health technique for managing a pandemic. The employer can provide the sick employee's name and medical information to the local public health department. However, the employer should keep that information confidential in any communication from the employer to other employees.

The sick employee should not be permitted to return to work until cleared by a doctor or local public health agency. Current public health recommendations call for infected individuals to self-isolate for 14 days and

receive two consecutive negative COVID-19 test results on tests administered at least 24 hours apart before returning to work. During this time off of work, the employee can elect to use FFCRA emergency paid leave or any available and applicable employer-provided paid leave. Otherwise, the leave will be unpaid.

Per public health guidance, employers should close off any area used by the employee for prolonged periods of time if the employee has been diagnosed with COVID-19 and has used the area in the last six days. Employers should clean and disinfect any such area following CDC protocols. Disinfection might not be necessary if it has been more than seven days since the employee with suspected/confirmed COVID-19 visited or used such an area. Employers should wait 24 hours before cleaning and disinfecting any such area to minimize potential exposure, or if waiting 24 hours is not feasible, they should wait as long as possible.

### Sick Employees Should Be Cleared to Return to Work

An employee with a potential COVID-19 infection should not be permitted to return to the workplace until released to return to work by a health care provider or a public health agency. Public health agencies caution that health care providers might have difficulty providing return to work notes to employees due to the burden the pandemic is placing on health care providers. However, given the uncertainty of COVID-19 testing and the difficulty the employee will have determining if symptoms are still present, the safest approach is still to require a health care provider or a public health agency to clear the employee to return to work. Employers should strive to be flexible with health care providers and public health agencies that need additional time to provide such documentation. However, an employee who refuses to obtain such documentation should not be permitted to return to work, and could be subject to discipline up to and including termination for such a refusal (absent exceptional circumstances). Employers should consult with legal counsel before disciplining or terminating an employee in such a situation.

### What to Do When an Employee is Potentially Exposed to COVID-19

CDC guidance provides that individuals have been “exposed” to someone with COVID-19 when they are in “close contact (less than 6 feet)” with an infected person “for a prolonged period of time.” The CDC has stated that there is no scientific consensus as to what constitutes a “prolonged period of time,” but that “15 minutes can be used as an operational period of time.”

Using the CDC guidance, it is clear that employees could be exposed to COVID-19 in a variety of ways. An employee could be exposed at work if he/she works for longer than 15 minutes at less than 6 feet of distance from a coworker who is diagnosed with COVID-19. Additionally, an employee could be exposed if he/she is living with someone who has been diagnosed with COVID-19.

The CDC recommends that exposed employees who do not show symptoms of COVID-19 remain at home and practice social distancing for 14 days. If no symptoms develop during that time, the employees can return to work. Those employees who might have had contact with an individual diagnosed with COVID-19 but do not meet the CDC definition of “exposed” should self-monitor for symptoms but can go to work. If any such employee develops symptoms, he/she should notify his/her employer and stay home until released by a health care provider or public health agency. Any employee or employer who is uncertain if an employee meets the definition of “exposed” should consult with a health care provider or the local public health agency.

### Employee Travel and Returning to Work

Anyone who travels within the state, between states, or internationally must follow applicable local public health orders which might require someone to self-quarantine for 14 days upon his/her arrival or return home. The Wisconsin Department of Health Services (DHS) recommends that upon their return home all travelers check themselves for symptoms of COVID-19 for 14 days, and stay home as much as possible to stop the spread of COVID-19. An employer might choose to adopt an employment policy requiring employees who have traveled not to come into the workplace for 14 days consistent with these DHS guidelines. Employers should also check for any applicable local public health orders which should be reflected in such an employment policy. Employees who are required to stay home by their employers would not be eligible for FFCRA leave (absent a

doctor's recommendation or governmental order to self-quarantine), but might be eligible for unemployment benefits during any period of unpaid leave.

From a practical perspective, particularly given that the Wisconsin Supreme Court struck down the statewide "Safer at Home" order, it might be difficult for an employer to enforce such a travel policy, particularly with respect to short travel within the state of Wisconsin. An employer should make an individualized determination regarding a potential travel policy in light of the individual circumstances of the employer, based on the best available medical information, including guidance from DHS and any applicable local public health orders. For example, an assisted living facility might want to create a stricter travel policy for employees than a website design company whose employees have no face-to-face contact with customers or clients.

## Conclusion

In these unprecedented times, it is impossible for organizations to adopt policies and procedures that are 100% safe and avoid any potential liability. Instead, organizations will have to adopt policies and procedures that will be both effective and safe given for the unique circumstances of the organization. Effective policies and procedures balance practicality with potential liability. A rigorous policy will be ineffective if the organization cannot implement it on a practical level. Organizations are encouraged to check with their insurance carriers to verify comprehensive coverage for liability arising from COVID-19. In addition, the Boardman Clark Labor & Employment team is available to consult with employers on issues related to returning to work.

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