

**March 19, 2020**

## **CLIENT ALERT**

### **FAQ FOR EMPLOYERS RELATED TO COVID-19 ISSUES**

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#### **WORKPLACE SAFETY ISSUES**

##### ***What's the main workplace safety guidance we should follow?***

The Occupational Safety and Health Administration (OSHA) recently outlined steps employers should take to help protect their workforce. OSHA has divided workplaces and work operations into four risk zones according to the likelihood of employees' occupational exposure during a pandemic. These risk zones are useful in determining appropriate work practices and precautions. [Click here for OSHA guidance.](#)

##### ***Can we ask an employee to stay home or leave work if they exhibit symptoms of the COVID-19 coronavirus or the flu?***

Yes, you are permitted to ask them to seek medical attention and get tested for COVID-19. The CDC states that employees who exhibit symptoms of influenza-like illness at work during a pandemic should leave the workplace.

##### ***Can I take an employee's temperature at work?***

The ADA prohibits employers from requiring medical examinations and making disability-related inquiries unless (1) the employer can demonstrate the exam or inquiry is job-related and consistent with a business necessity, or (2) the employer has a reasonable belief that the employee represents a direct threat to the health and/or safety of others and such threat cannot be alleviated by reasonable accommodations.

The EEOC considers taking an employee's temperature a medical examination. On March 18, 2020, the EEOC issued new guidance on the ADA, the [Rehabilitation Act and COVID-19 \(click here to read this guidance\)](#) which provides that "because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature." Additionally, employers

may be obligated to provide personnel performing such checks with personal protective equipment and should be careful to take appropriate infection prevention precautions (such as disinfecting the thermometer after each use) while taking temperatures. Employers should perform such tests in a private area, such as an office, and must keep such information regarding an employee's temperature in a confidential medical file.

### ***What should an employer do if an employee tests positive for COVID-19?***

If an employee tests positive for COVID-19, an employer should take the following steps:

1. Ask the employee to identify all individuals (e.g., other employees, customers, and vendors) he or she has worked in close proximity to (within six feet) during the previous fourteen days.
2. Notify the individuals who may have come in contact with the employee; however, employers should not identify the employee who has tested positive for COVID-19 so as to avoid violating confidentiality laws.
3. Send home the employee that has tested positive and the individuals identified in Step 1 for no less than fourteen days.
4. Hire a cleaning service to undertake a thorough cleaning of your workplace.
5. Notify building management if you work in a shared office space.

### ***What should we do if an employee has a suspected but unconfirmed case of COVID-19?***

If an employee has a suspected but unconfirmed case of COVID-19, employers should err on the side of caution and take the same steps delineated above.

### ***An employee discloses that they came into contact with someone who had a presumptive positive case of COVID-19. What should we do?***

According to CDC guidance, individuals who have had close contact with a person diagnosed with COVID-19 should self-quarantine for 14 days. Employers can require an employee who has been exposed to the virus to stay at home.

### ***Can an employer require a doctor's note before allowing a sick employee to return to work?***

If doing so is part of an employer's consistent practice, an employer may require clearance from a healthcare provider to return to work. The CDC has suggested that employers remove such requirements during a health crisis as access to healthcare providers may be limited. Also, requiring a doctor's note could result in the employee being exposed to other sick persons at the doctor's office.

### ***Can an employee refuse to come to work out of a fear they'll become infected?***

Under the Occupation Safety and Health Act (OSHA), employees are only entitled to refuse to work if (1) they believe they are in imminent danger; (2) a reasonable person would agree that there is a real danger of death or serious injury; (3) the employer has been asked to eliminate the danger and has refused to do so; and (4) there is not enough time, due to the urgency of the situation to get it corrected through regular enforcement standard. The National Labor Relations

Act (NLRA) also extends protections to employees in some circumstances for “participating in a concerted refusal to work in unsafe conditions”. These determinations are very fact specific and would need to be analyzed on a case-by-case basis.

## **WAGE AND HOUR ISSUES**

### ***Must we keep paying employees who are not working?***

Generally no as to non-exempt employees under federal wage and hour laws (the Fair Labor Standards Act - FLSA), but see the Employee Leave/ADA section below. Under the FLSA, non-exempt employees who are not working are typically not entitled to the wages. However, they would be entitled to whatever paid leave company policies provide, and certain states and localities require paid leave for both non-exempt and exempt employees.

Exempt employees generally must receive their full weekly pay for any week in which they perform any work (although depending on the specific facts, state laws, and employment policies, it may be permissible to deduct paid time off for time not worked because of sickness). However, as a general rule, if an exempt employee has exhausted his or her PTO days, that employee’s pay cannot be docked unless the employee is absent for a full day because of illness, disability, or personal reasons. Moreover, an exempt employee need not be paid for a full week absence. For exempt employees paid on a salary basis, generally, if the employee performs some work during the workweek, the employer is required to pay the entire salary for that particular workweek. There are certain exceptions for certain types of absences and other circumstances.

At last check, Rhode Island, California, New Jersey, New York, Washington, Massachusetts, Connecticut, Oregon and the District of Columbia have some form of paid leave laws and the number may expand in the future.

### ***Do I have to pay nonexempt employees who are sent home from work because they are sick?***

Nonexempt employees who have exhausted paid leave are not required to be paid for such absences, subject to new leave laws recently enacted and state and local paid leave laws.

## **EMPLOYEE LEAVE/ADA**

### ***Does FMLA or other Paid Leave apply to this situation?***

Yes, for some employers and some employees. In addition to state paid leave laws, Congress recently passed the Families First Coronavirus Response Act to provide some workers impacted by COVID-19 with short-term additional FMLA benefits and paid leave. [Please refer to our recent client alert on this subject.](#)

### ***Does contraction of COVID-19 coronavirus implicate the ADA?***

Possibly, though it depends on the specific circumstance. Based on current medical guidance, COVID-19 may be considered a temporary condition that does not constitute a disability. However, someone with a preexisting medical condition who contracts COVID-19 may qualify as disabled or might qualify as being perceived to be disabled. If the virus substantially limits a major life activity, such as breathing, on more than a temporary basis ADA coverage could be triggered in some instances.

### **WORKERS' COMPENSATION**

#### ***My employee alleges that they contracted the coronavirus while at work. Will this result in a compensable workers' compensation claim?***

Whether an employee has a compensable workers' compensation claim depends on the employee's line of work and the particular circumstances of each case. For instance, a healthcare provider or first responder exposed to known or suspected pandemic patients are more likely to prove work-related exposure than other employees.

Employers need to be aware that states may act to ensure broader coverage for employees. For instance, Washington State Governor Jay Inslee recently announced that the state would take steps to ensure protections for healthcare workers and first responders who are on the front lines of the COVID-19 outbreak. If an employee claims they contracted COVID-19 at work, it is best to file a claim with your worker's compensation carrier and let the carrier sort out the coverage issue later.

### **SHELTER IN PLACE ORDERS**

#### ***What is a shelter in place order and how does it impact my business?***

Shelter in place orders are orders issued by a locale generally requiring individuals (including your employees) stay in their home and not leave unless necessary for one of the designated exceptions/exemptions listed in a particular order. These orders are meant to address the ongoing spread of the virus that causes COVID-19. As of March 18, 2020, several counties in California have been put under such orders. New York City is considering implementation of an order. As confirmed cases of COVID-19 increase, employers need to be prepared should their locale implement a shelter in place order

Though each locale's order would differ, based on orders currently in place, an order generally allows individuals to leave their homes only for "essential activities". Among other essential activities permitted, individuals are allowed to leave the home to work for an "essential business" -- a term defined by an enumerated list of business types or business activities (e.g. healthcare operations, grocery stores, gas stations, banks, shelters, social services). Essential businesses may keep their facilities/offices open (and are encouraged to do so) to continue

providing essential services and products to the public. Employees may leave home to go to these jobs. Conversely, employees must provide services for non-essential businesses remotely. Non-essential businesses generally may keep facilities open only to maintain minimum basic operations, such as maintaining the value of an inventory, keeping the site secure, or ensuring that employees are able to work remotely.

***What if some of the work my business does at its facility/office is essential and some is non-essential?***

Should your locale implement a shelter in place order, the specific restrictions in the order will govern. Generally, unless the order clearly permits certain non-essential functions in connection within an essential business, or in connection with certain essential activities, employers should consider requiring employees to perform non-essential functions at home. Failure to do so may subject an employer to fines under the order (if applicable), potential liability under OSHA, the NLRA, and other applicable workplace safety laws. Furthermore, if not clearly permitted by the order, employers may find employees reluctant to provide such non-essential functions because doing so may subject the employee to fines. The violation of the existing shelter in place orders in California is a crime subject to fines, imprisonment or both.

***Where else can I get more information and updated information?***

We encourage all employers to keep updated on the latest developments being provided by federal, state and local medical authorities including but not limited to the Centers for Disease Control and Prevention (CDC), the United States Department of State, the Missouri Department of Health and Senior Services, the Kansas Department of Health and Environment, and the Kansas City Missouri Department of Health.. **Regularly review the websites noted above and [cdc.gov](https://www.cdc.gov), [coronavirus.gov](https://www.coronavirus.gov) and the [CDC's Interim Guidance for Businesses and Employers](https://www.cdc.gov/media/releases/2020/s110320-cdc-business-employers.html). Another valuable resource is the National Governors Association website [nga.gov](https://www.nga.gov) which provides valuable resources from every state on CPVOD-19 and steps employers can and should take to deal with this pandemic.**

*This article is general in nature and does not constitute legal advice. Please note that new guidance is being provided by the CDC and other federal, state and local authorities on a daily basis so please monitor new developments and guidance. Readers with legal questions should consult the authors, Mark Opara ([MOpara@sb-kc.com](mailto:MOpara@sb-kc.com)), John Vering ([JVeirng@sb-kc.com](mailto:JVeirng@sb-kc.com)), Julie Parisi ([JParisi@sb-kc.com](mailto:JParisi@sb-kc.com)) or, or any other shareholders in Seigfreid Bingham's Employment Law Group, including: John Neyens, Brenda Hamilton, Shannon Johnson, or your regular contact at Seigfreid Bingham at 816-421-4460.*