



Reopening Your Workplace? Legal Consideration for Employers

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Reopening Your Workplace? Legal Considerations For Employers

- I. Workplace Safety and Health Concerns
- II. Discrimination/Accommodation Issues
- III. Federal Leave Law Considerations
- IV. Labor Unions and Collective Bargaining

Workplace Safety and Health Concerns

➤ CDC

- Can detain and can medically examine people entering country or travelling between states to prevent spread of disease. Otherwise, the agency's policies are non-mandatory guidance to federal, state, local health authorities.

➤ OSHA

- Sets and enforces health/safety rules for private employers.

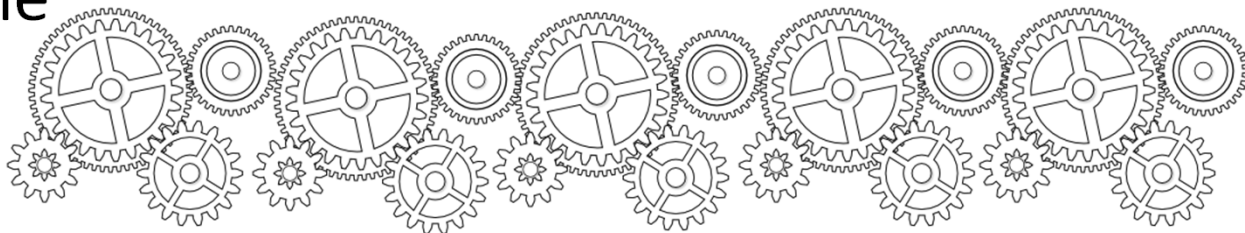
➤ State/Local Government

- States/localities have broad police power functions to protect the health, safety, and welfare of persons within their borders, including the right to isolate and quarantine.

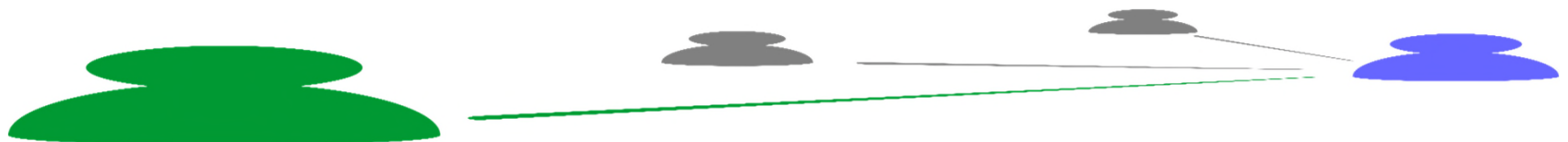
Employee Tests Positive for COVID-19?

- Immediately remove employee from workplace (if not already absent). Follow CDC guidance for employee return to work.
- Notify local health department and follow their guidance.
- Conduct tracing to identify and notify individuals in the workplace whom the infected individual had direct contact with. Consider requiring those with direct contact to stay home per CDC guidelines.
- Maintain confidentiality of employee identity.

- Configure areas so workers are at least six feet apart in all directions
- Physical barriers (strip curtains, plexiglass or similar materials)
- Increased ventilation – but no air from fans blowing from one worker directly at another worker, and no personal cooling fans
- Handwashing stations or hand sanitizers with at least 60% alcohol in multiple locations to encourage hand hygiene



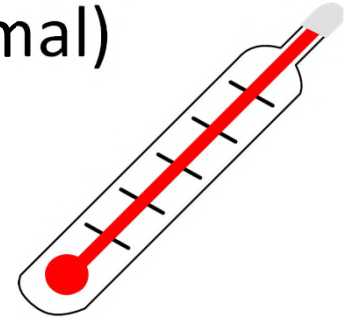
- Time-clock changes (increase number of clocks/touch-free/staggered arrival/departure)
- Redesign/reorganize break rooms and other common areas to increase worker separation
- Identify alternative areas to accommodate overflow volume such as training and conference rooms, or using outside tents for break and lunch areas



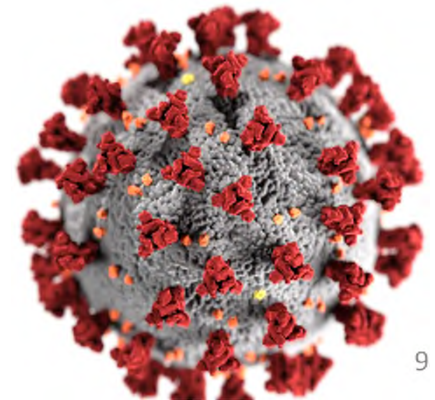
- Encourage single-file movement
- Stagger arrival/departure/breaks
- Discourage carpooling
- Training
- Evaluate sick leave/incentive pay
- Increased sanitation
- Strong, consistently enforced policy that no one can come to the work-site if sick or suspected sick.
- Signage on all doors reinforcing that someone cannot come in if sick or suspected sick.

Temperature Checks vs. Wellness Screenings

- Temperature checks (self, infrared, thermal)
 - Protect the checker with barriers/PPE
 - ADA/OSHA confidentiality concerns
 - Record retention concerns
- Wellness Screenings



Consider compensability of related waiting time



Masks and Other PPE

- Cloth masks
- N95 masks...OSHA fit testing required.
- ALL employers must conduct OSHA PPE hazard analysis –
 - Gowns/goggles/face shields/etc.



Discrimination/Accommodation Issues

EEO Laws Are Still In Effect

- EEO laws are in effect but do not interfere with compliance with CDC, State, and local health agency guidance
- Carefully consider your hiring/return to work selection criteria
- Be careful not to make decisions based on protected status
 - Cannot exclude certain more vulnerable classes from the workplace (*e.g.*, disabled, older, or pregnant workers)
 - Beware of *regarded as* discrimination; do not assume someone is in a protected class

- Do not retaliate against those who have been diagnosed with COVID-19
 - It is acceptable to exclude an employee who has COVID-19 from the workplace until they are no longer contagious
 - It is acceptable to delay the start date for someone who has COVID-19
 - It is acceptable to withdraw a job offer from someone with COVID-19 if you need to fill the position immediately



Continue To Engage In The Interactive Process

- Be flexible with accommodations: temporary job restructuring; temporary transfers to a different position; modifying a work schedule; plexiglass, tables, or other barriers to ensure minimum distance between customers and coworkers
 - Keep in mind that, depending on the nature of your business, you may already have a track record of employees working from home successfully.
- You may receive requests for accommodations related to PPE.

Federal Leave Law Considerations

Available Benefits For Employers With Fewer Than 500 Employees

- Effective for leave taken April 1 to December 31, 2020

Emergency Paid Sick Leave for 6 qualifying COVID-19 reasons

- Up to 80 hours (full-time EEs) or two week equivalent (part-time EEs)
- Full pay if leave involves self-care during quarantine or diagnosis
- 2/3 pay if leave involves child out of school/daycare or care for others, or other future “substantially similar” conditions specified by HHS
- Maximum of \$511 daily/\$5,110 total (or \$200 daily/\$2000 total for childcare)

Emergency Family and Medical Leave Act Expansion

- Up to 12 weeks/year (first 2 weeks unpaid, up to 10 more weeks paid)
- **Only permissible reason:** child out of school or childcare due to virus. Paid at 2/3 employee’s usual rate, job-protected
- Maximum of \$200 daily/\$12,000 total



Small Business Exemption (Fewer Than 50 Employees)

- Employee's leave is to care for his or her child whose school or place of care is closed (or child care provider is unavailable), but only if requirements of FFCRA jeopardize business viability
- No application process - exemption applies if ER determines:
 - Leave would result in financial obligations exceeding available revenues and cause company to cease operating at a minimal capacity; OR
 - Employee's absence would entail a substantial risk to the financial health or operational capabilities of the business because of the employee's specialized skills, knowledge of the business, or responsibilities; OR
 - Insufficient employees able, willing, and qualified at time and place needed to perform labor or services provided by the employee, and these labor or services are needed for business to operate at a minimal capacity.

Labor Unions and Collective Bargaining

- Protected Concerted Activity – Unionized employers and non-union employers will be the subject of Unfair Labor Practice Charges. Employers must move cautiously in addressing employee's activity and communication around COVID-related workplace changes and safety and health issues.

The NLRA and Collective Bargaining: Impact on COVID Workforce Management

- Collective Bargaining Agreements (CBAs) may impact or govern the employer's ability to unilaterally:
 - Change shifts and reduce hours
 - Suspend operations
 - Grant or deny certain types of leave
 - Adjust pay
 - Adjust benefits
 - Impose safety or medical testing conditions on working

- Default Rule: All of these must be bargained and/or agreed to by the union

Thank you!

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Labor and Employment Pandemic Resource Center:

<https://www.huntonak.com/en/coronavirus-resource-center/labor-and-employment-business-immigration.html>

Hunton Employment & Labor Perspectives Blog:

Analysis and Development in Employment & Labor Issues

<https://www.huntonlaborblog.com/>

Business Immigration Insights Blog:

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