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# Navigating Coronavirus in the Workplace

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# Overview

- The 2019 Coronavirus outbreak continues to evolve.
- CDC Guidance
- Risk Assessment
- Frequently Asked Questions
- Advance Planning

# COVID-19

- History
- Current Data
- CDC Recommendations
- JL COVID 19 Resource Link

<https://www.jacksonlewis.com/practice/coronaviruscovid-19>

# What Are the Symptoms of COVID-19?

- The most common symptoms of COVID-19 are fever, cough, shortness of breath.
- Primarily targets lungs.
- Older people, and those with underlying medical problems like high blood pressure, heart problems or diabetes, are more likely to develop serious illness.

# Legal Considerations for Employers

- Occupational Safety and Health Act (OSHA)
- Americans with Disabilities Act (ADA)
- Title VII and other laws against national origin and other discrimination
- Federal, state and local leave laws including Family and Medical Leave Act (FMLA) and paid sick leave laws
- Fair Labor Standards Act (FLSA) and state and local wage and hour laws
- Section 7 of the National Labor Relations Act (NLRA)
- Genetic Information Nondiscrimination Act (GINA)
- Individual privacy rights under state laws and common law
- Immigration laws

# How Does COVID-19 Spread?

- People can catch COVID-19 from others who have the virus.
- The disease can spread from person to person through small droplets from the nose or mouth which are spread when a person with COVID-19 coughs or exhales.
- These droplets land on objects and surfaces around the person. Other people then catch COVID-19 by touching these objects or surfaces, then touching their eyes, nose or mouth.
- People can also catch COVID-19 if they breathe in droplets from a person with COVID-19 who coughs out or exhales droplets. This is why it is important to stay more than 1 meter (3 feet) away from a person who is sick.

# CDC's Guidance for Non-Healthcare Employers

**1. Actively encourage sick employees to stay home.** Employees with symptoms of acute respiratory illness should stay home and not come to work until they are fever-free and free from symptoms for at least 24 hours.

**2. Separate sick employees.** Employees who appear to have acute respiratory illness symptoms (i.e., cough, shortness of breath) should be separated from other employees and sent home immediately.

# CDC Guidance for Non-Healthcare Employers

**3. Emphasize staying home when sick, respiratory etiquette and hand hygiene by all employees.** The CDC provides links to posters that encourage employees to stay home when sick, cough and sneeze etiquette and hand hygiene and recommends that employers put posters at the entrance to the workplace and in other work areas. The CDC also encourages employers to provide tissues, no-touch receptacles, hand sanitizer and instructions on handwashing and use of hand sanitizer.

**4. Perform routine environmental cleaning.** The CDC recommends routine cleaning of all frequently touched surfaces and that employers provide disposable wipes so that commonly used surfaces such as doorknobs can be wiped down by employees before each use. The CDC does not recommend any particular cleaning product or additional disinfection beyond routine cleaning at this time.



# CDC Guidance for Non-Healthcare Employers

**5. Advise employees to take certain steps before traveling.** Everyone should check the CDC's Traveler's Health Notices for each country before traveling and not travel if they have symptoms of acute respiratory illness. Employers should also make sure that employees know what to do and who to contact before they travel, and if they become sick while traveling.

**6. Additional Measures.** The CDC recommends that employees who have a sick family member at home with COVID-19 “should notify their supervisor and refer to CDC guidance for how to conduct a risk assessment of their potential exposure.”

**7. Refer to CDC Website.** Provide employees with web address and encourage them to review as needed

# CDC Risk Assessment

- The CDC has published extensive guidance for conducting a risk assessment
- Employers who are concerned that an employee(s) may have been exposed to the virus should consult the CDC's risk assessment. This guidance addresses various potential exposure scenarios and identifies four exposure risk categories: (1) High Risk, (2) Medium Risk, (3) Low Risk; and (4) No Identifiable Risk. (Updated March 7<sup>th</sup>)

# CDC Risk Assessment

- Employees who live in the same household as someone with confirmed COVID-19, for example, may fall under either “High Risk” or “Medium Risk” depending on the circumstances. Individuals who are “High Risk” but have no symptoms should be quarantined (voluntary or under public health orders) for 14 days.
- For employees who fall under the “Medium Risk” category, as long as they have no symptoms, the CDC generally recommends that they avoid areas where people congregate which includes workplaces for 14 days.

# CDC Risk Assessment and Planning

- If an employee is confirmed to have the COVID-19 infection, the CDC recommends that employers inform co-workers of potential exposure.
- Knowledge about potential exposure is certainly important, but we counsel employers to consider legal issues including confidentiality requirements under the Americans with Disabilities Act and state law.
- CDC recommends that employers consider now, whether when faced with an outbreak of the illness, they could have employees telecommute, or stagger shifts to create physical distance among employees and whether they have the infrastructure to support those efforts.
- The CDC also recommends that employers consider plans to minimize exposure between employees and the public if public officials call for social distancing and prepare for increased absenteeism.

# What Is Close Contact?

- The CDC defines “close contact” as being within 6 feet of a COVID-19 case for a prolonged time or having direct contact with infectious secretions such as being coughed on when the contact occurs without wearing proper protective equipment.

## Widespread sustained (ongoing) transmission and restrictions on entry to the United States

CDC recommends that travelers avoid all nonessential travel to the following destinations. Entry of foreign nationals from these destinations has been suspended.

- China ([Level 3 Travel Health Notice](#))
- Iran ([Level 3 Travel Health Notice](#))

## Widespread sustained (ongoing) transmission

CDC recommends that travelers avoid all nonessential travel to the following destinations:

- South Korea ([Level 3 Travel Health Notice](#))
- Italy ([Level 3 Travel Health Notice](#))

## Sustained (ongoing) community transmission

CDC recommends that older adults or those who have chronic medical conditions consider postponing travel to the following destinations:

- Japan ([Level 2 Travel Health Notice](#))

## Limited community transmission

Travelers should practice usual precautions at the following destination:

- Hong Kong ([Level 1 Travel Health Notice](#))

## According to CDC

### Who presents a risk in the workplace even without symptoms?

\*\* Risk is based on exposure to symptomatic COVID-19

\*\* Should ALSO consider realities of the specific workplace

\*\* We expect that this risk assessment may change to align with countries with restrictions on entry to USA

High Risk = away from office for 14 day incubation	Medium Risk = away from Office for 14 day incubation except very limited circumstances
Living with someone with <b>symptomatic</b> COVID-19 without using defined precautions	Living with someone with <b>symptomatic</b> COVID-19 <b>while using</b> defined precautions.
Intimate partner of someone with <b>symptomatic</b> COVID-19 without using defined precautions	Intimate partner of someone with <b>symptomatic</b> COVID-19 <b>while using</b> defined precautions
Providing care (non-healthcare setting) for someone with <b>symptomatic</b> COVID- 19 without using defined precautions	Providing care (non-healthcare setting) for someone with <b>symptomatic</b> COVID- 19 <b>while using</b> defined precautions
Travel from Hubei Province, China	Travel from mainland China and <b>NOT</b> having any High Risk exposures
	Close contact (within 6 feet for prolonged period of time or direct contact with infectious secretions) <b>(that is not covered in High Risk)</b> with someone with symptomatic COVID-19

**Most Frequently Asked  
Questions of JL DLHM  
COVID-19 Response Team**



## May Employers Ask Employees About Geographic Areas Where They Have Traveled Or Intend To Travel?

- Yes, absent a claim that an employee has a recognized privacy interest in their travel activities.
- Employers should take steps to reduce any reasonable expectation of privacy that employees might have in those activities.

# May Employers Direct Employees Not To Engage In International Travel Designated Affected Areas?

- At least one federal appellate court has held that an employer did not violate the Americans with Disabilities Act (ADA) by terminating an employee who violated its direction not to travel to Africa during an Ebola outbreak. [EEOC v. STME, LLC](#) 11<sup>th</sup> Cir. September 2019
- The court found that the employer's actions did not regard the employee as having a disability.
- While this is just one appellate court decision, the reasoning is sound and, based on this case, employers can reasonably expect not to be liable for ADA discrimination if they take similar actions.
- Employers must remember that, even if other federal courts follow this decision, states and localities may have disability discrimination that provide greater protections.
- Don't base decisions based on employee's national origin

## May Employers Bar Asymptomatic Employees From Entering The Workplace If They Have Traveled To Designated Affected Regions?

- Yes. At this point, anyone returning from mainland China, South Korea, Iran, and Italy is routinely being asked to self quarantine, engage in health monitoring, and seek medical assistance if they develop symptoms.
- Employers have to make reasonable risk based decisions on employees who have returned from visiting other countries, especially countries with sustained or widespread community transmission of COVID-19.
- As long as employers act consistently based on travel activities and do not say or do things to suggest they believe such employees actually have a physical or mental impairment, or target people of particular national origin, such steps should not violate the Americans with Disabilities Act or other federal, state or local EEO laws.

## May Employers Bar Asymptomatic Employees From Entering The Workplace If A Household Member Has Traveled To Designated Affected Regions?

- Yes, given the close contact ordinarily experienced by household members, we believe employers usually would be justified in barring employees from entering the workplace in these circumstances.
- Close contact does not include merely passing by someone in the hallway.

# How Long May Employers Require Asymptomatic Employees Remain At Home ?

- Employers should require these employees to work from home for 14 calendar days following return from return to U.S., the length of the suspected incubation and transmission period.
- Employers have to make reasonable risk based decisions on employees who have returned from visiting other countries, especially countries with sustained or widespread community transmission of COVID-19.

# Must Employers Pay Employees Who Are Denied Access To The Workplace?

- No federal law requires employers to pay non-exempt employees for time they do not actually work.
- Federal or state wage hour laws may require exempt employees to be paid their regular salary if they have worked one day during a work week.
- Many state and local laws require paid sick leave that may apply to symptomatic employees
- Safe and Sick Time Legislation – State law ?

# May Employers Send Employees Home If They Develop Symptoms Of COVID-19 Infection?

- Yes. An employer never has to allow a sick employee to remain at work.
- The CDC states that employees who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace.
- EEOC has stated that such actions would be permitted under the ADA if the illness were serious enough to pose a direct threat.

## May Employers Require Employees To Provide A Doctor's Note Confirming They Are Capable Of Returning To Work?

- If employers do not require disclosure of medical information, they can require notes confirming employees are capable of returning to work without violating the Americans with Disabilities Act because the request would not be disability-related.
- Public health authorities have warned that doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation.



# What Responsibilities Do Employers Have To Employees While They Are Working From Home?

- **Non-Exempt Employees**

- Employers should take steps to ensure that all work time is recorded and paid, as well as any overtime.
- Employers who anticipate having employees working from home for an extended period of time prepare a simple agreement for employees to sign acknowledging their understanding of the arrangement including the employee's obligation to maintain a safe workspace as well as the temporary nature of the arrangement.
- Abide by privacy, technology policies

# Must Employers Pay Employees Who Are Denied Access to the Workplace?

- Absent a contractual commitment to pay, including an applicable collective bargaining agreement, no federal law requires employers to pay non-exempt employees for time they do not actually work. Federal or state wage hour laws may require exempt employees to be paid their regular salary if they are directed not to report to work. Some state or local laws may impose additional pay obligations for certain occupations, especially if employers provide little or no advance notice that employees are not to report to work as scheduled.

## Does Federal FMLA Cover Employees Who Are Directed To Remain Out Of Work But Are Unable To Work? Remotely?

- No, assuming employee is not sick
- The federal FMLA would not cover this situation, however, some state or local leave laws provide leave in cases of public health emergencies.

## May Employers Require Employees Confirmed for COVID-19 Infection to Test Negative for COVID-19 Infection Before They Return to Work?

- Yes, we anticipate such inquiries will satisfy ADA standards for disability-related inquiries or medical examinations. However, as a practical matter, testing capacity may be limited and employers may need to consider other reliable methods to certify that an individual does not have the pandemic virus.

# May Employers Take Employee Temperatures Before Permitting Them To Work?

- Generally, measuring an employee's body temperature is a medical examination and must be justified under ADA standards that such exams are either job-related and consistent with business necessity based on individualized facts.
- If COVID-19 becomes more severe than the seasonal flu or the H1N1 virus in the spring/summer of 2009, or if pandemic influenza becomes widespread in the community as assessed by state or local health authorities or the CDC, then the EEOC has stated employers may measure employees' body temperature.
- Employers should be aware that some people with COVID-19 may not present with a fever.

## What Obligations do Employers Have to Safeguard Medical Information They Request or Require About Employee Family Members?

- The Genetic Information Nondiscrimination Act (GINA) prohibits employers from requesting, acquiring or collecting genetic information. Genetic information is defined to mean, among other things, “the manifestation of disease or disorder in family members of the individual (family medical history).” It appears information about an employee’s family member actual infection with COVID-19 would be protected by GINA and, if inadvertently acquired, must be maintained as confidential medical records.

## May Employers Or Businesses Bar Visitors From Entering Their Business If They Have Traveled To Designated Affected Areas?

- Yes, as long as employers and businesses act consistently based on travel activities and do not say or do things to suggest they believe such visitors actually have a physical or mental impairment, such steps are not likely to violate federal, state or local public accommodation laws.
- Employers and businesses nevertheless should guard against intentional discrimination claims that may be driven by activities stigmatizing or perceiving to stigmatize individuals of particular races or national origins.

# What Obligations do Employers Have to Safeguard Information About Employee Travel Activities?

- While this information is not medical information subject to protection under the ADA, it may be considered personal information that is subject to protection under various state privacy laws, such as the California Consumer Privacy Act (CCPA)



## May Employers Ask Visitors To Disclose The Geographic Areas Where They Have Traveled Before Authorizing Their Entry To Their Premises?

- Yes, absent a claim that visitors have recognized privacy interests in their travel activities, businesses may ask them if they have traveled to areas of concern.

# Can a Retail Store Ask a Customer to Leave/Refuse to Serve?

- Some business are places of public accommodation so they are subject to laws against discrimination in public accommodations. A public accommodation may exclude an individual with a disability from participation in an activity, if that individual's participation would result in a direct threat to the health or safety of others.

# Can Employers Discipline Employees if They Fear Coming to Work?

- The answer depends on whether employee's concern about workplace safety is reasonable and fact based
- Employer has obligation under OSHA General Duty clause to maintain safe workplace
- Employee may have a mental health issue (e.g., anxiety disorder)

# What To Do if Employee Tests Positive?

- Contact and coordinate efforts with the Local Department of Health and CDC.
- Keep the employee out of work until he/she is certified as being free from illness and no longer contagious.
- Try to determine, in conjunction with the Local Health Department and CDC, the source of the infected employee's exposure to COVID-19, including whether it is believed to have been the result of community spread.
- Identify individuals the employee may have had close contacts with while work
- In consultation and coordination with the local health department and/or CDC, notify individuals determined to have had close contact. Without disclosing the name of the employee, tell them an employee has tested positive for COVID-19 infection and the company believes they may have had close contact with the individual.

## Test Positive (cont'd)

- Direct employees determined to have had close contact to remain out of work (self-quarantine) for the presumed incubation period (currently believed to be 14 days). Encourage them to self-monitor for symptoms of illness and contact their healthcare provider if they have concerns or develop symptoms. Provide similar recommendations to non-employees.
- Depending on the nature and scope of the infected employee's presence in the workplace, consider the need to temporarily close the workplace while cleaning efforts are undertaken.
- Retain a qualified vendor to deep clean/sanitize all work areas at the location, particularly those known to have been used by the employee with confirmed COVID-19 infection.
- Consider retaining a public relations consultant for public facing companies

# Advance Planning

- Business continuity plan
- Identify functions critical to your business and who can support
- Telecommuting capabilities
- Address privacy issues for those working from home
- Confirm how non-exempt employees will track time
- Confirm coverage under workers comp policy for at-home workers
- Assess flexibility of company policies on sick leave, PTO, etc.

# Key Takeaways

- Identify objectives such as: (a) reducing transmission among staff, (b) protect people at higher risk, (c) maintain business operations, (d) minimize adverse impact on supply chain.
- Identify possible work-related exposures i.e. business and personal travel by employees and how you will handle.
- Prepare for increased absences.
- Consider available staffing options including remote work, staggered shifts, etc.
- Plan to minimize exposure between employees and the public.
- Plan employee communications.
- Plan for supply chain disruption if various areas experience widespread COVID-19 spread.

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Thank **you.**