ROPES & GRAY

# CORONAVIRUS
# INFORMATION & UPDATES

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## U.S. Employer Return-to-Work FAQs


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This list of frequently asked questions and answers provides some initial guidance on how to navigate and mitigate the challenges employers may face as workplaces around the country begin to re-open or resume some operations.

Companies will need to customize their policies to reflect their operations, and the guidance from federal and state agencies is rapidly changing. Please email COVID-19RecoveryPolicies@ropesgray.com if you have specific questions your business's re-opening process.

### 1. When is it legally permissible to have employees return to the workplace?

State and local public health orders have, in some jurisdictions, mandated workplace closures for certain categories of businesses and organizations. These orders vary widely from state to state and even county to county, and the pace (and scope) at which they now are being lifted also varies. Ropes & Gray has a dedicated team of attorneys monitoring these developments, an overview of which is available here.

### 2. May employers instruct ill employees not to report to work?

Employees displaying COVID-19 Symptoms

U.S. employers generally have the right to instruct visibly ill employees to stay away from the workplace in order to prevent the spread of illness. The Centers for Disease Control and Prevention ("CDC") has issued interim guidance advising businesses to immediately separate and send home any employees, volunteers and others who appear to have symptoms of COVID-19. The Occupational Safety and Health Administration ("OSHA") has issued similar guidance, noting that COVID-19 implicates employers' duty to furnish to their workers "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." The Equal Employment Opportunity Commission ("EEOC") has likewise issued guidance reasoning that employers would not violate the Americans with Disabilities Act and its relevant regulations (together, the "ADA") by requiring employees to stay home if they have symptoms of COVID-19. For a discussion of temperature checks of employees, see Question 4 below. Any policies requiring employees to stay away from the workplace would need to be applied consistently and narrowly tailored to meet specific health and safety objectives.

Employees with Pre-Existing Risk Factors

Employers may not generically exclude from the workplace employees whose health status or demographics put them at higher risk from COVID-19. But the ADA would permit exclusion if the employee's presence in the workplace would constitute a "direct threat" to themselves or others, though the EEOC has emphasized that the "direct threat requirement is a high standard." Consult with counsel before excluding an employee on the basis of a pre-existing condition, as any such action will require an individualized assessment of the particular employee's circumstances and the available reasonable accommodations. See also Question 6, below.

Employees who are Pregnant

Employers may not exclude an employee from the workplace involuntarily due to pregnancy, nor may employers single out employees on the basis of pregnancy for adverse employment actions such as leave, layoff, or furlough. Although pregnancy itself does not trigger an employer's obligations to make reasonable accommodations, pregnancy-related medical conditions may be disabilities covered by the ADA, and pregnant employees may be entitled to job modifications (such as remote work or leave) to the extent such modifications are available to other employees.

### 3. What certification may an employer require before allowing an employee to return to work?

Employers may require employees to provide fitness-for-duty or return-to-work certification after being treated for COVID-19 or quarantining at home at the direction of the employer or a public health official or health care provider. Employers also may require—and state or local reopening orders or guidance may recommend or compel—all returning employees to submit responses to screening questionnaires asking whether they have been diagnosed with, or are experiencing symptoms associated with, or potentially have been exposed to COVID-19. Questions could include:

- Have you tested positive for or otherwise been diagnosed with COVID-19?
- Do you have reason to believe you may have been exposed to COVID-19?
- Are you experiencing any symptoms of infection with COVID-19, such as fever or chills, cough, shortness of breath, fatigue, muscle or body aches, headache, new loss of taste or smell, nausea or vomiting, diarrhea or sore throat?
- Have you been in contact with any person who has tested positive for or otherwise been diagnosed with COVID-19 within the past 14 days?
- Have you been the subject of a self-quarantine or self-isolation order from a public health official or public healthcare provider?
- Have you traveled outside your home state within the past 14 days?

Any required certification should be narrowly tailored to seek information that is job-related, consistent with business necessity and sufficient to make a determination an employee is not a "direct threat." Employers should consult with counsel, and follow and take into consideration any updates from the CDC and/or other public health authorities regarding their current assessment of the spread and severity of COVID-19.

Additionally, current government guidance cautions against mandating fitness-for-duty or return-to-work certifications that require a visit with a health care provider, whose availability may be limited under current circumstances and who thus may not be able to provide such documentation in a timely manner. Alternative approaches may include employee self-certification or a form, stamp, or email from a local clinic administrator.

### 4. Can employers require temperature checks, COVID-19 tests, or antibody testing before allowing employees to enter the workplace?

The EEOC has recently issued guidance stating that, pursuant to CDC guidelines, employers may not require employees to submit to antibody testing before allowing them to enter the workplace, because such a test is not sufficiently "job related and consistent with business necessity."

By contrast, employers may require or administer checks such as a COVID-19 test or a temperature check before allowing entrance to the workplace. In addition, several states have issued laws or orders that require (*e.g.*, Arizona and Colorado) or recommended (*e.g.*, Tennessee and Connecticut) daily temperature checks of employees entering the workplace. Employers should consider outsourcing such testing to a third party that is qualified to perform clinical tests, and, if performing the test in-house, should ensure that the testing will be performed by personnel who are adequately trained and equipped with personal protective equipment ("PPE"). Employers should also undertake reasonably diligent efforts to ensure that the test to be administered is safe and reliable. An alternative—and potentially easier to administer—approach would be to require employees to take their own temperatures at home before reporting to work, and certifying upon arrival to the workplace that they do not have a fever. It is possible that employees' time spent taking their temperature at home would be counted as paid time under state law, though U.S. Supreme Court precedent suggests that this time would not be compensable under federal law.

Employers should be mindful of the practical limitations of such testing. For instance, all available testing (particularly temperature testing) is imprecise, and some infected individuals will pass the screening and some non-infected individuals will be turned away. Also, even an accurate test for infection is a valid result only for the time at which the test is taken, leaving undetected any subsequent exposure to, or incubation of, the disease. Finally, employers should consider carefully the logistics of testing, and whether it would force employees to queue or otherwise violate social distancing practices in a way that is ultimately counter-productive.

Employers likely do not need to obtain written consent before taking employees' temperatures in this context if the test is not invasive, though they could consider requiring such a signed consent to be conservative, as a condition of allowing return to work. If a test is performed by a third party clinical provider the employee may also need to consent to the sharing of the results with the employer. Employers should consider providing a general notice and/or posting a disclosure at the site where temperatures are being taken (particularly in California, where such advance notice is required of certain businesses and the content of the notice prescribed). Employers should also be prepared to apply any temperature or other testing thresholds consistently, to avoid violating anti-discrimination laws. Results of any testing should be kept confidential like any other medical information received concerning employees (*i.e.*, maintained separately from the employee's personnel file and shared no more broadly than necessary). Note that New York has issued guidance indicating that an employer is prohibited from retaining the actual testing results (*i.e.*, the specific temperature data of an individual), but may maintain records confirming that employees were screened and the results of such screening (*e.g.*, pass/fail).

If an employee requests an alternative method of screening in order to accommodate a medical condition, employers should treat this request as they would any other request for accommodation under the ADA. If the employee's disability is not obvious or already known, an employer may ask the employee for information and medical documentation to establish that the condition is a disability and what specific limitations require an accommodation, and then determine if

that accommodation or an alternative accommodation can be provided. If the request is easy and inexpensive to accommodate, the employer might voluntarily choose to make the accommodation available to any employee who asks, without engaging in a full interactive process.

### 5. What obligations may employers trigger if they preclude employees from coming into the workplace?

If an employer sends an employee home or otherwise excludes an employee from the workplace due to COVID-19-related symptoms, illness (including a high temperature), or exposure, the employer may be required to provide such employee with paid leave or job-protected unpaid leave under various federal, state, and local laws (including the Families First Coronavirus Response Act ("FFCRA") and similar state laws), as well as under any existing company policies, employment agreements or collective bargaining agreements.

Under some state and local laws (*e.g.*, California, New York, Massachusetts), employees may also be entitled to reporting-time pay (*i.e.*, wages that compensate employees who report to work as scheduled but who are not put to work) if they show up for work but their employer sends them home. For those employees located in states that do not require reporting-time pay, employees who report to work and are sent home may nonetheless be entitled to reporting-time pay under the terms of an employment agreement, company policy or collective bargaining agreement. Employees may also be entitled to pay under certain state and local "predictable scheduling" laws (including, for example, such laws in Seattle, New York City, and San Francisco) if they do not receive adequate notice of a scheduling change, though some cities (*e.g.*, Chicago) explicitly provide an exception relating to advance notice for changes to an employee's schedule and the payment of predictability pay in the event of a pandemic.

### 6. How far do employers need to go to accommodate employees with preexisting risk factors who are classified as high-risk for severe illness from COVID-19?

Employees with Disabilities

If an employee's pre-existing risk factor (*e.g.*, serious heart conditions, chronic lung disease, diabetes, severe obesity) constitutes a disability under local, state or federal law and an employee requests a reasonable accommodation, an employer must provide a reasonable accommodation unless doing so would pose an undue hardship (*i.e.*, would result in significant difficulty or expense for the employer, taking into account the nature and cost of the accommodation, the resources available to the employer, and the operation of the employer's business), and must engage in an interactive process with the employee in an attempt to define such an accommodation. Under the current circumstances, telework may be a reasonable accommodation, particularly for those employees who already have been working from home. Employers, however, should be mindful they are not treating employees differently based on protected characteristics (*e.g.*, giving female employees more favorable treatment than male employees regarding flexible work requests, perhaps because of gender-based assumptions about childcare responsibilities). Other reasonable accommodations may include alternate work assignments, staggered work schedules or relocation of a desk or workspace. As discussed in Question 2, exclusion of the employee from the workplace may be permissible, but only after individualized assessment.

Based on current EEOC guidance, employers may now begin asking employees with known disabilities whether they will need reasonable accommodations in the future when they are permitted to return to the workplace. Likewise, employers may make information available to all employees regarding who to contact (should they wish to) in order to

request accommodation for a disability that they may need upon return to the workplace, or send a general notice to all employees who are designated for return to the workplace, noting that the employer is willing to consider requests for accommodation or flexibilities on an individualized basis and specifying whom employees should contact.

Employees with a Disabled Household Members and Older Employees

An employer is not legally required to provide a reasonable accommodation for an employee because that employee lives in the same household as someone, who, due to disability, is at greater risk of severe illness from COVID-19. Similarly, and in accordance with EEOC guidance, employers are not obligated to provide reasonable accommodations to employees based solely on age (absent a qualifying disability under the ADA). Nevertheless, there may be compelling employee morale, retention, liability risk (See Question 9) and/or other considerations that weigh in favor of flexibility.

## 7. Can employers instruct workers not to socialize during their off-duty time?

Some employers have considered establishing rules or guidelines that, at least for the near future, discourage employees who report to a physical workplace from engaging in leisure or other activities with anyone other than co-habiting family members. Although such a rule is in many ways un-monitorable and largely unenforceable, and although it seems intrusive by standards that preceded this pandemic, there may be some wisdom to it, in order to promote individual and group employee health and reduce workplace transmission risk. Before adopting rules of this nature, employers will need to navigate state laws that, in some jurisdictions such as New York and California, limit an employer's ability to regulate lawful off-duty conduct. Employers subject to collective bargaining agreements may also need to carefully consider whether such a rule or guideline would trigger a bargaining obligation.

Employers should ensure that any policies they put in place are applied consistently and are narrowly tailored to discourage activities where employees cannot practice social distancing or otherwise comply with public health guidance.

## 8. What if an employee refuses to return to work?

An employer may terminate the employment of an employee who refuses to come to work out of concern of exposure to COVID-19 *if* that employee is (i) not disabled (or is disabled but no reasonable accommodation exists that does not impose an undue hardship on the employer) *and* (ii) not subject to protection under the National Labor Relations Act ("NLRA"), Labor Management Relations Act ("LMRA") or Occupational Safety and Health Act.

In general, a non-disabled employee who refuses to come to work out of concern that he or she will contract COVID-19 is not entitled to a reasonable accommodation (*e.g.*, teleworking) under the ADA. Employers should, however, be mindful that, apart from obvious physical disabilities, employees may have mental health conditions (*e.g.*, anxiety disorder, obsessive-compulsive disorder, post-traumatic stress disorder) that entitle them to a reasonable accommodation under the circumstances. As in any disability accommodation process, employers may (i) ask questions to determine whether the condition is a disability; (ii) discuss with the employee how the requested accommodation would assist him or her and enable that employee to keep working; (iii) explore alternative accommodations that may effectively meet the employee's needs; and (iv) request medical documentation if needed.

The NLRA prohibits retaliating against employees (whether or not represented by a union) who engage in protected concerted activity. Employees who act in concert to refuse to work because of unsafe or unhealthy conditions in the workplace could be deemed to be engaging in protected activity so long as they have a "good faith" belief that their health and safety are at immediate risk—even if they are mistaken. The LMRA contains similar protections, and does not require that employees act in concert with each other to be protected. The LMRA would, however, require an employee to show more than a good faith belief, but rather present ascertainable, objective evidence supporting a conclusion that an "abnormally dangerous" workplace condition exists. Employers may temporarily replace employees who are acting under these NLRA or LMRA protections, but should consult with counsel before securing permanent replacements.

Under the Occupational Safety and Health Act, employees may refuse to perform work if (i) they refused to work in "good faith," meaning that they genuinely believed that an imminent danger existed; (ii) a reasonable person would agree that there is a real danger of death or serious injury; (iii) where possible, they asked the employer to eliminate the danger and the employer failed to do so; and (iv) there is not enough time due to the urgency of the hazard to get the imminent danger corrected through regular enforcement channels, such as requesting an OSHA inspection. While the Act does not expressly prohibit hiring a replacement for an employee who refuses to perform work under these standards, it does prohibit employers from retaliating against employees who exercise these rights, so employers should consult with counsel before discharging or permanently replacing an employee under these circumstances.

### 9. What liability risks exist should an employee contract COVID-19?

Employers could see personal injury claims from employees who allegedly contract the coronavirus while on the job. For instance, on April 6, 2020, the family of a Walmart employee who died of COVID-19 complications filed suit against Walmart, and a number of similar lawsuits have followed since. Plaintiffs in these cases, however, will face significant hurdles in successfully bringing these claims under current law. Several states (*e.g.*, North Carolina, Louisiana and Georgia) have since passed legislation that protect employers (or, in the case of North Carolina, "essential businesses") from liability claims over exposure to COVID-19, so long as the employer is acting in good faith in accordance with published guidance and has not caused harm through reckless, intentional, willful, or grossly negligence acts. Additionally, Senate Republicans recently unveiled the Health, Economic Assistance, Liability Protection and Schools ("HEALS") Act, which would provide broad liability protections for businesses, schools and other institutions.

Workers' Compensation

Workers' compensation provides benefits (including wage replacement benefits and reimbursement for medical expenses) to employees who are injured or become ill in the course and scope of their job duties and (as to wage replacement benefits) are unable to work. Workers' compensation claims are almost universally covered by workers' compensation insurance policies, unless the employer has opted to self-insure. Workers' compensation claims do not require any proof of negligence or fault, but, in general, the workers' compensation regime preempts all common law and statutory claims against the employer arising out of workplace injuries, including claims of employer negligence. Some states allow exceptions to workers' compensation exclusivity in limited circumstances, such as injuries caused by the employer's "serious and willful misconduct" (a much higher standard than negligence). In some states where there is such an exception, the employee's recourse would be a civil lawsuit; in others, the recourse is an award of double-damages (which is not insurable).

Workers' compensation insurers may take the position that a COVID-19 infection is not a compensable occupational disease that arises out of employment, but rather is an "ordinary disease of life" that is not subject to workers' compensation. Many workers' compensation policies have a second coverage, typically called "Part B, Employer's Liability," to close this insurance gap. Some jurisdictions (*e.g.*, California, and to a lesser extent Washington and Illinois) have taken action to make it more likely that COVID-19-related claims will be eligible for recovery through workers' compensation.

Causation

Given the reality of community spread of COVID-19 and asymptomatic transmission, plaintiffs may also struggle to prove that the defendant (in a lawsuit) or the workplace (in a workers' compensation claim, absent the actions taken by the states noted above) was the source of an infection.

Negligence and Standard of Care

While employers cannot prevent employees or their estates from filing claims or lawsuits due to COVID-19 exposure in the workplace (even if those claims ultimately have no merit), employers may be able to mitigate general liability risks by strictly following applicable guidance from the CDC and OSHA (as well as guidance from state and local authorities), educating and constantly communicating with employees so that employees self-monitor for symptoms and practice proper infectious disease control practices, and appropriately informing employees of risks and potential exposure. While it is not clear that following CDC or OSHA guidance would itself be sufficient to avoid liability, it is likely that failure to follow CDC or OSHA guidance would be used by plaintiffs as evidence of failure to fulfill the applicable standard of care.

## 10. Does requiring employees to adhere to personal cleanliness policies, or to wear masks or other personal protective equipment, have any legal implications?

Any personal cleanliness or workplace hygiene policies should be carefully drafted to include the latest guidance from federal, state and local public health authorities. Supervisors must apply such policies in a neutral and fair manner, in order to reduce the likelihood of claims of unlawful discrimination. Employers should provide facilities and supplies (such as sinks with hot water and soap, and alcohol-based hand-cleansing solution) necessary to comply with its workplace policies.

Requiring employees to wear PPE may trigger OSHA regulations, or comparable state regulations, that impose training and other requirements (*e.g.*, requiring regular hazard assessments, training on proper equipment usage, provision and replacement of equipment). Requiring employees to wear simple masks or other face coverings may arguably trigger these regulations, but, for the duration of the pandemic, and until effective treatments and/or vaccines are identified and widely used, workers—especially in hard-hit geographic areas—should be strongly encouraged, and perhaps even required, to wear masks or other face coverings when interacting closely with colleagues, customers and visitors. In some jurisdictions, state or local law or guidance may require that masks or other face coverings be worn, in particular in situations where social distancing cannot be observed. Although this may upset some workers, rigorous adherence to this practice would likely reduce the risk of workplace transmission of COVID-19, as well as potential liability. If an employer requires masks, other face coverings or PPE, it should provide this equipment to employees. Employers should

also be prepared to provide reasonable accommodations for reasons of disability or religion or other protected characteristics.

### 11. What specific steps can employers take to keep their workplaces safe?

OSHA has published general guidance for employers, which is available here. The CDC's relevant guidance for employers is available here.

In addition, some employers are taking steps such as:

- Adopting flexible sick leave policies, and requiring employees to stay home, or, if practicable, work from home, if they are sick (for any reason) or experiencing symptoms of COVID-19;
- Screening employees' temperatures, requiring completion of daily health attestation forms, and informing and encouraging employees to self-monitor for COVID-19 signs and symptoms;
- Suspending use of common areas, establishing occupancy protocols for high-traffic areas (*e.g.*, bathrooms), and discouraging shared use of work tools and equipment;
- Promoting frequent and thorough handwashing;
- Cleaning and disinfecting the workplace routinely;
- Limiting visitors and in-person meetings;
- Recommending (or requiring under certain circumstances) that employees wear masks or other face coverings;
- Limiting or prohibiting non-essential work travel;
- Creating contact assessment protocols; and
- Monitoring evolving legal developments and public health recommendations.