

## COVID-19 VIRUS AND THE WORKPLACE: FREQUENTLY ASKED QUESTIONS

---

Multiple U.S. states have reported cases of COVID-19, an illness caused by the novel coronavirus, including some resulting in death. Although the CDC is still reporting that the *immediate* health risk from COVID-19 is considered low in the United States, employers increasingly face the unique challenge of maintaining a safe workplace while avoiding potential legal landmines. To assist our clients with this predicament, we have answered below some commonly-asked questions about COVID-19 from an employment-law compliance standpoint.

- **Can I ask employees about potential exposure to the COVID-19 virus?**

The Americans with Disabilities Act (ADA) limits an employer's ability to ask disability-related questions, even when dealing with an emerging public health crisis. Questions about exposure to a disease may be likely to illicit information about a disability and therefore be prohibited disability-related inquiries. In that case, the ADA requires a "direct threat" to the health of the employee or others before an employer may make a disability-related inquiry that is not job related or consistent with business necessity. The question from a legal perspective is whether the illness caused by COVID-19 is severe enough that it poses a direct threat to the employee or others in workplace. The answer to that question is uncertain at this point, but we believe asking employees (or requiring them to tell you) if they have been exposed to the virus is not an impermissible disability-related inquiry. We caution employers, however, to act on actual, objective evidence and guidance from public health authorities instead of unlawful stereotypes or generalizations. The [EEOC had previously issued guidance](#) on pandemic preparedness in the workplace and ADA considerations. The CDC has also [issued interim guidance for businesses](#). We recommend all employers review the guidance and consult counsel before making generalized inquiries about exposure to COVID-19.

- **Can I ask employees about travel to high-risk areas?**

Questions about travel are not disability-related, and while the ADA does not restrict inquiries about employee travel to gauge potential exposure and risks, employers must be careful not to discriminate on the basis of race or national origin. For example, while an employer may inquire about recent travel of all employees to identify any who might have recently traveled to a high-exposure area (such as China), it should not limit those inquiries solely to individuals of Asian descent.

Concerning work-related travel, employers should strongly encourage their workers to avoid (or prohibit) all nonessential travel to areas where coronavirus outbreaks are active, as the CDC has recommended. Employers with business involving travel to those areas should consider reasonable alternatives for their workers, such as videoconferencing. As more states and countries continue reporting

cases of COVID-19, employers should recognize that assessments of elevated travel risks must remain dynamic.

- **REVISED March 19, 2020: An employee has just returned from a trip overseas. Can I require the employee to work from home and present a medical release before returning to work?**

If the employee is returning from travel to a high-risk area, you can require him or her to work from home (or not to return to work) for a time, alert you if they experience any symptoms, and obtain medical clearance before returning to work. For other travel, you may consider instead asking the employee if he or she was exposed or is experiencing any symptom. Again, your decision to require employees to self-quarantine and under what circumstances should be based on guidance from the CDC and other public health authorities. Employers should be careful to base such a decision on the risks arising from exposure to and transmission of the disease and not on the belief that the employee actually has the illness.

On March 19, Congress enacted the Families First Coronavirus Response Act (H.R. 6201) (FFCRA). The FFCRA provides many American workers with paid sick leave. In short, covered employers are required to provide employees with up to 80 hours of paid sick leave (or the equivalent of the average number of hours an employee works during a two-week period for part-time employees) for certain enumerated COVID-19-related reasons, including but not limited to (i) if they are subject to a governmental quarantine or isolation order related to coronavirus-COVID-19; and (ii) a healthcare provider has advised them to self-quarantine due to coronavirus/COVID-19-related concerns. A full discussion of the FFCRA can be found [here](#).

- **ADDED March 19, 2020: If an employee calls in sick, can I ask what symptoms he or she is experiencing?**

According to new EEOC guidance, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. However, employers must continue to maintain all information about employee illness as a confidential medical record in compliance with the ADA.

- **REVISED March 19, 2020: Can I require mandatory fever screenings in the workplace?**

Screening employees for fevers or other symptoms of COVID-19 presents an additional challenge under the ADA. The EEOC typically considers fever screening a “medical examination,” and generally does not permit mandatory screenings unless they are “job related and consistent with business necessity” or justified by information suggesting that the employee poses a direct threat. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, the EEOC now has affirmatively stated employers may permissibly measure employees’ body temperature.

- **REVISED March 19, 2020: What can I do with employees who refuse to report to work?**

While employees may be justifiably concerned about potential exposure to the COVID-19 virus, it is critical for employers to assist employees in understanding the facts without falling susceptible to panic. Most importantly, as there is no present vaccine to prevent COVID-19, circulating good hygiene practices to workers is the next best step for employers to stay proactive during the coronavirus outbreak. Although employers may elect to allow concerned employees to work from home, there is no legal obligation to make such an accommodation for employees who do not exhibit symptoms of the COVID-19 virus, have not recently returned from any of the locations with Level 3 or 4 travel advisories from the State Department and CDC, or have not had known contact with an infected person. In other words, subject to the caveat below, employers may require “low risk” employees to report for work and perform their jobs despite generalized fear permeating some workplaces.

The FFCRA now provides 10 days of protected unpaid leave and up to 10 weeks of protected paid leave to eligible employees when those employees are unable to work (or telework) because they need to care for children due to school closures or the unavailability of childcare for a COVID-19-related reason. Also, covered employers are required to provide employees with up to 80 hours of paid sick leave (or the equivalent of the average number of hours an employee works during a two-week period for part-time employees) for certain enumerated COVID-19-related reasons. A full discussion of the FFCRA can be found [here](#).

- **What if the employee who refused to report to work is immuno-compromised?**

If the employee has a medical condition that puts him or her at high risk of more serious complications from the COVID-19 virus, you may be required to adjust the working conditions of that employee as a reasonable accommodation under the ADA. That may include following the recommendation of a treating physician that the employee work from home.

- **Can I require my employees to wear masks at work? What if the employee wants to do so?**

An employer can require employees to wear personal protective equipment (and may be required to in certain circumstances in order to comply with OSHA standards) but we do not recommend that you do so unless necessary to protect against workplace exposure to a contaminant. Some masks — such as N95 masks — are respirators. Requiring employees to wear a respirator brings OSHA’s respiratory protection standard into play, including such requirements as around a written program, medical evaluations, and fit testing. Even if the use is voluntary, that OSHA standard requires employers to ensure that respirator use will not in itself create a hazard (*i.e.*, by ensuring that masks are not used if dirty or contaminated, and that their use does not interfere with the employee’s ability to work safely). The employer also must provide certain prescribed information to each voluntary wearer.

---

The spread of COVID-19 presents complex employment-law compliance issues, and there are few straightforward answers. Nevertheless, employers should take the following steps to ensure that they base

COVID-19-related employment decisions on factual information rather than fear:

- Keep up to date on the latest CDC and other public health agency guidance.
- Educate concerned workers about the symptoms and transmission of COVID-19, specifically addressing employee concerns about workplace safety.
- Actively encourage sick employees to stay home.
- Consider enhancing routine environmental cleaning.
- Establish a protocol requiring employees to report any symptoms of COVID-19 or actual exposure to both the employer and appropriate health authorities.
- Require employees who are planning travel or returning from travel to locations with Level 3 or 4 travel advisories from the State Department and CDC to notify you and follow CDC guidelines on recommended measures, such as self-quarantine.
- Consider creating an infectious disease outbreak response plan. The CDC guidance linked above contains helpful information for developing such a plan.

**QUESTIONS?** If you have any questions about these and other complex legal and practical issues raised by the COVID-19, we have the experience and expertise to help. Please contact the Thompson & Knight attorney with whom you regularly work or one of the attorneys listed below.

## TK EMPLOYMENT CONTACTS:

**Anthony J. Campiti**

214.969.1565

[Anthony.Campiti@tklaw.com](mailto:Anthony.Campiti@tklaw.com)

**Katy A. Mathews**

214.969.1156

[Katy.Mathews@tklaw.com](mailto:Katy.Mathews@tklaw.com)

**Charles W. Shewmake**

214.969.2122

[Charles.Shewmake@tklaw.com](mailto:Charles.Shewmake@tklaw.com)

**Bennett W. Cervin**

214.969.1124

[Bennett.Cervin@tklaw.com](mailto:Bennett.Cervin@tklaw.com)

**Bryan P. Neal**

214.969.1762

[Bryan.Neal@tklaw.com](mailto:Bryan.Neal@tklaw.com)

**Lauren Timmons**

214.969.2538

[Lauren.Timmons@tklaw.com](mailto:Lauren.Timmons@tklaw.com)

**Stephen F. Fink**

214.969.1120

[Stephen.Fink@tklaw.com](mailto:Stephen.Fink@tklaw.com)

**Meghan McCaig**

214.969.1172

[Meghan.McCaig@tklaw.com](mailto:Meghan.McCaig@tklaw.com)

**Jasmine S. Wynton**

214.969.2102

[Jasmine.Wynton@tklaw.com](mailto:Jasmine.Wynton@tklaw.com)

**Barbara-Ellen Gaffney**

214.969.1232

[Barbara-Ellen.Gaffney@tklaw.com](mailto:Barbara-Ellen.Gaffney@tklaw.com)

**Micah R. Prude**

214.969.1698

[Micah.Prude@tklaw.com](mailto:Micah.Prude@tklaw.com)

**Sarah Yousuf**

214.969.2115

[Sarah.Yousuf@tklaw.com](mailto:Sarah.Yousuf@tklaw.com)

**Marc H. Klein**

214.969.1795

[Marc.Klein@tklaw.com](mailto:Marc.Klein@tklaw.com)

**Elizabeth A. Schartz**

214.969.1737

[Elizabeth.Schartz@tklaw.com](mailto:Elizabeth.Schartz@tklaw.com)

*This Client Alert is sent for the information of our clients and friends. It is not intended as legal advice or an opinion on specific circumstances and is not intended or written to be used, and may not be used, by any person for the purpose of avoiding penalties that may be imposed under United States federal tax laws.*

©2020 Thompson & Knight LLP