



Doherty Wallace Pillsbury & Murphy P.C.

EMPLOYMENT LAW E-ALERT: COVID-19
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With the World Health Organization (WHO) recently declaring the coronavirus disease (COVID-19) a pandemic, employers should consider certain legal issues applicable to the workplace.

When is excluding employees from the workplace appropriate?

According to the Equal Employment Opportunity Commission, during a pandemic such as this, an employer may exclude an employee from the workplace if he or she poses a “direct threat,” defined as a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” Assessments of whether an employee poses a direct threat in the workplace will be made on a case-by-case basis, and will be based on objective, factual information such as (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur; and (4) the imminence of the potential harm.

For example, if an employer learns that an employee has flu-like symptoms or his/her live-in family member contracts COVID-19, it would be reasonable to exclude that employee from the workplace for an appropriate period of time, given the disease’s high transmission rate from person-to-person.

How long should an employee be quarantined for?

There is no certain period regarding the length of an appropriate quarantine from the workplace, but 14 days to begin with is currently suggested. After 14 days, an employer should assess the situation and determine if a longer period is required to protect the health and safety of the workforce and/or the general public.

What about potential disability discrimination claims?

Employers have an obligation under the Americans with Disabilities Act (ADA) and Mass. Gen. Laws c. 151B not to discriminate against employees on the basis of a disability. Generally, if an employee experiences mild, flu-like symptoms, it could be considered a “transitory” illness and therefore not a disability. In order to qualify as a disability, the condition or symptoms would need to limit an employee’s major life activity. For example, if an employee had severe respiratory symptoms, this could limit their ability to breathe, a major life activity.

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Bearing in mind the ADA, what information can employers request from employees calling in sick?

Employers covered by the ADA may ask employees if they are experiencing flu-like symptoms, like coughing and fever. Employers must maintain the confidentiality of such information in accordance with the ADA. If an employee's symptoms are like the seasonal flu, the inquiries would not be considered disability-related, given the transitory nature of the illness. If, however, the symptoms become more severe than the seasonal flu, the inquiries, even if related to a disability, can be justified based on a reasonable belief, based on objective evidence, that the severe risks of COVID-19 poses a direct threat to the workplace.

Do employers have to pay employees while they are on leave?

Under the Massachusetts sick leave law, all employees are entitled to 40 hours of sick leave per year, but only employers with over 11 employees must provide paid sick leave. If an employee has accrued unused sick leave, he or she may use that sick leave during a quarantine leave. Similarly, an employee may use any accrued, unused vacation. After those are exhausted, there is no further legal obligation to pay an employee during leave, provided they are not performing any work. After use of accrued sick leave and vacation, an employer need not pay exempt employees who do not perform any work and may reduce pay for full days in which the employee performs no work.

We recommend employers give employees the option of using accrued sick leave or vacation before taking unpaid leave.

What remedies are available to an out-of-work employee?

If an employee is out of work due to illness and has exhausted available paid leave, he or she may be entitled to recover under an employer's short-term disability policy, subject to the policy's terms. Generally, an employee will not be entitled to recover under short-term disability if he or she is self-quarantined but not exhibiting symptoms of illness. Additionally, employees in Massachusetts who are out of work for at least five days may apply for unemployment compensation. If employers are subject to the Family Medical Leave Act, eligible employees may be able eligible to take leave under the Act if they are ill or caring for an ill family member.

Is working remotely an option?

Employers should consider whether working remotely is an option for employees. If non-exempt employees are working remotely, employers should either direct them not to work at all or accurately record all hours worked and pay them on their usual pay dates. For exempt employees, employers should clearly inform employees of work expectations and any procedures for monitoring productivity and also pay them on their usual pay dates.

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Can an employer require an employee to certify his or her fitness for duty to return to work?

Yes. Such inquiries are permissible because they are either not related to a disability or because if the outbreak is severe, it would be justified under ADA standards for disability-related inquiries.

Can an employee refuse to report to work out of fear of contracting COVID-19?

An employee can refuse to report to work if he or she can demonstrate an imminent danger of death or serious harm, as defined by the Occupational Health and Safety Act (OSHA). The threat must be immediate or imminent. Employees may also have certain protections under the National Labor Relations Act (NLRA), which protects employees acting together for their mutual protection. This will typically be difficult for most employees to prove. Absent evidence of such imminent threat, an employer may discipline an employee for failure to report to work as required.

Best Practices

- Notify the workforce if an employee is suspected or confirmed to have COVID-19. Inform the workforce of their possible exposure and steps the employer is taking to reduce the chance of the infection spreading. Remember to comply with rules regarding confidentiality of health information under the ADA.
- Identify essential and non-essential personnel and determine whether non-essential personnel can work remotely.
- Consider eliminating all non-essential business travel.
- Consult with employment law counsel to determine if leave or reasonable accommodations are warranted for particular employees.
- Update contact information for employees and employees' emergency contacts.
- Post signs about COVID-19 prevention practices and where to seek treatment should they experience any symptoms.
- Educate and train employees on proper hygiene and information.
- Provide hand sanitizer and disinfecting wipes to the workforce.
- Regularly sanitize the workplace.
- Encourage employees to immediately report any symptoms of illness to Human Resources.
- Limit large gatherings and non-essential visitors to the workplace.
- Encourage the use of videoconferencing, phone conferencing, and other alternate methods of meeting to practice "social distancing."

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