

COVID-19



CORONAVIRUS: EMPLOYER TIPS FOR MANAGING COVID-19

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By: Tara Eberline and Sarah E. Stula

Foulston has produced a series of issue alerts as we continue to monitor the evolving COVID-19 situation and provide additional guidance. Please find all updates and our latest resources available [here](#).

Now that positive cases of the coronavirus (COVID-19) have been confirmed in Kansas and Missouri and the WHO has declared the outbreak a pandemic, local employers must act quickly to create plans to prevent the spread of the virus in the workplace, educate employees about how to reduce the risk of exposure and transmission, and consider their obligations under the FMLA and ADA. The following are important tips and resources as employers prepare for the potential spread of COVID-19.

PROMOTE A SAFE WORK ENVIRONMENT

Employers have a legal duty to maintain a safe workplace. For example, the Occupational Safety and Health Act requires an employer to provide a workplace that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm to [its] employees.” Recently, the Occupational and Safety Administration (OSHA) indicated that an employer has a duty under this Act to take steps to prevent occupational exposure to COVID-19. That means employers should take feasible measures to reduce the likelihood that employees will be exposed to COVID-19.

Importantly, employers who allow employees to wear respirators should provide disclosure information required by OSHA, and those who require employees to wear respirators should follow OSHA rules for implementing a respiratory protection program, including the proper fit-testing procedures and medical evaluations. Keep in mind that the definition of respirator includes what some might consider to be a face mask (for example an N-95 mask). Additional information about respiratory protection may be found on OSHA’s website.

Employers in industries that face an elevated risk of exposure to the virus — such as the healthcare and travel industries — should take extra precautions to protect employees. According to the CDC, healthcare employers

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should screen patients for symptoms of acute respiratory illness before entering the facility and instruct employees who develop respiratory symptoms, even a cough or shortness of breath, to stay home. Further, the CDC recommends that members of an airline cabin crew should practice routine handwashing, treat all bodily fluids as infectious, and wear personal protective equipment when necessary to assist a sick passenger.

Such protective measures are important not only to meet federal legal obligations, but also to prevent future worker's compensation claims. Generally, worker's compensation claims can be based on "occupational diseases" that arise out of an individual's employment. Arguably, complications from COVID-19 could be grounds for a worker's compensation claim, especially if the employee works in an elevated-risk industry.

So, what can employers do to help protect their employees from the spread of COVID-19? Following the recommendations in the CDC's "Interim Guidance for Businesses and Employers" and OSHA's COVID-19 webpage is a good place to start. The CDC's recommended strategies for employers include:

- Actively encouraging sick employees to stay home and not to return to work until they have been symptom-free for at least 24 hours
- Educating employees about how to prevent the spread of the virus, including staying home when sick, cough and sneeze etiquette, and hand hygiene
- Performing routine cleaning of all frequently touched surfaces in the workplace, like countertops and doorknobs, and providing disposable wipes for employees to clean their workplaces

Additionally, it is important to review the COVID-19 resources from your state government. The states of Kansas and Missouri have developed online resource centers with directives for specific industries. The online resource center for Kansas is located [here](#), and for Missouri is located [here](#).

CONSIDER YOUR OBLIGATIONS UNDER THE FMLA AND ADA

In some instances, employees who contract COVID-19 may have paid time off available for their recovery time, and some employers may choose to permit sick or quarantined employees to work remotely. But if paid time off or telework is not an option, an employee might request leave under the Family and Medical Leave Act. Under the FMLA, an eligible employee may take up to 12 workweeks of unpaid leave for a "serious health condition," which includes an illness requiring inpatient care at a hospital or continuing treatment by a healthcare provider. An illness associated with COVID-19 could rise to the level of a "serious health condition" under the FMLA.

While it is unclear whether an asymptomatic individual subject to quarantine would qualify for FMLA leave, we recommend giving employees as much flexibility to telework or take unpaid leave as necessary. Taking a flexible approach will help prevent COVID-19 from spreading in your workplace and throughout the community, and it will enable your employees to fulfill their legal obligation to cooperate with a government-ordered quarantine. In Kansas and Missouri, individuals who break a quarantine may be subject to criminal penalties.

Complications from COVID-19 could also cause or aggravate a disability covered by the Americans with Disabilities Act. For example, an employee with a disability such as a respiratory condition may request to work from home as a reasonable accommodation to avoid contracting the disease. If doing so would not cause an undue hardship to the employer, such a request should be granted. Importantly, the ADA not only protects employees with disabilities from discrimination but also regulates disability-related inquiries and medical examinations in the workplace — even inquiries or examinations meant to protect the rest of the workforce from the spread of the virus.

An employer may send an employee who is showing signs of COVID-19 infection home from work — in fact, the CDC encourages employers to do so, and OSHA may ultimately take the position that failing to do so violates an employer's duty to keep the workplace free from recognized hazards. Additionally, the ADA permits an employer to send an individual with a disability home from work who poses a "direct threat," meaning a significant risk to

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workplace safety that cannot be eliminated by a reasonable accommodation. But the employer cannot ask employees who do not have COVID-19 symptoms to disclose whether they have a medical condition that would make them vulnerable to an outbreak.

The ADA generally prohibits employers from conducting medical examinations of existing employees, such as taking their temperatures. A narrow exception may apply if COVID-19 becomes widespread in the community, as assessed by state or local health authorities or the CDC, but we are not recommending that employers take that step at this time. Currently, individuals in Kansas and Missouri remain at low risk of contracting COVID-19. But if you believe the spread of COVID-19 poses a direct threat to your workplace, consult with an attorney about your employee screening options. For additional guidance, review the EEOC's guidance titled "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act".

FOR MORE INFORMATION

If you have questions or want more information regarding managing COVID-19 in the workplace, contact your legal counsel. If you do not have regular counsel for such matters, Foulston Siefkin LLP would welcome the opportunity to work with you to meet your specific business needs. Foulston's lawyers maintain a high level of expertise regarding federal and state regulations affecting employers. At the same time, our employment and labor practice group's relationship with Foulston's other practice groups, including the taxation, general business, healthcare, and commercial litigation groups, enhances our ability to consider all of the legal ramifications of any situation or strategy. For more information, contact **Tara Eberline** at 913.253.2136 or teberline@foulston.com, or **Sarah E. Stula** at 913.253.2149 or sssula@foulston.com. For more information on the firm, please visit our website at www.foulston.com.

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