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An Employer's Guide to Navigating COVID-19

Can we require employees who have traveled overseas or elsewhere in the U.S. to self-quarantine before returning to work?

Yes, you can. So long as there is no apparent discriminatory basis for the testing requirement (e.g., you only quarantine people who traveled to predominantly Muslim countries), this is permissible.

What should we do if one of our employees tests positive for COVID-19?

Current guidance suggests that an employer in this situation should send the employee home (or for medical treatment) and notify employees who work closely enough with the person – as well as customers or vendors who may have been in close contact with the infected person – that they may have been exposed. For your exposed employees, ask them to self-quarantine. Notification and quarantining are not legal requirements, but rest on judgments about the practical and reputational consequences of failing to take such measures. There are other situations that are more difficult to evaluate – the employee who has a suspected but unconfirmed case, the employee who reports exposure to a suspected but not confirmed case, etc. The response to these needs to be evaluated against the larger backdrop of events in the community at that moment to determine how much disruption to work and business you can and should accept in responding.

Won't we violate HIPAA by letting other employees know they were exposed?

No. Employers are not considered a “covered entity” subject to HIPAA, at least not with respect to health information they obtain in their capacity as employers (as opposed to in their capacity as a sponsor of a self-funded health plan). Still, you should not identify the employee who is reporting being diagnosed or exposed or you may violate other common law privacy or confidentiality obligations.

Can we require employees to travel on business? What if an employee refuses to come to work or go to a customer's place of business because he is afraid of contracting the virus?

This is a bit ticklish. Knowingly placing an employee at risk in the course of work raises potential concerns under OSHA/MIOSHA and even workers compensation law. Under OSHA, employees can only refuse to work when a realistic threat is present. Employees must believe they are in imminent danger, defined as a workplace hazard that puts them at immediate serious risk of death or serious physical harm. Some individuals may be more at risk than others, such as pregnant women, the elderly, or the immunocompromised. Your response to a refusal to travel accordingly must consider conditions “on the ground” where the employee is supposed to go (a trip to China probably looks different today than one to St. Ignace) and the employee's known or disclosed risk profile. Additionally, employees who object on behalf of others or as a group to travel may be deemed to be engaged in concerted activity protected under the National Labor Relations Act. For all these reasons, we advise that you contact legal counsel before taking action against any employee who refuses or objects to traveling for work.

Can we require an employee to go home and/or be tested if we think he looks sick or has symptoms such as a cough or sneezing?

Yes, you are permitted to ask employees to seek medical attention and be tested for COVID-19, and under most circumstances you can ask them to leave work.

Can we instead simply test employees at work, such as by checking them for fever?

Maybe, but this probably isn't advisable. Requiring an employee to submit to a medical examination (the EEOC considers taking an employee's temperature to be a “medical examination”) by the employer may be an unlawful inquiry under the ADA. Such an inquiry may be permissible if it is job-related and consistent with business necessity and you have a reasonable belief that the employee poses a “direct threat” to the health or safety of the employee or others. An elevated temperature is a sign of COVID-19, but also of myriad other infections that present little or no threat to the individual or co-workers and present little risk of disrupting your business. Since you almost certainly have no means of determining anything about the health status of the employee beyond the existence of a fever, it is better to simply send the worker home or to the doctor for any medical examination, including taking the employee's temperature.

May we prohibit employees from traveling even for personal reasons?

Probably, but do you want to? If travel anywhere is deemed risky, consider advising the employees of this and of the consequence of a decision by them to travel (e.g., they will be required to self-quarantine for 2 weeks without pay upon their return). If only travel to certain locations is deemed off-limits, let them know what those locations are. Make sure those locations are rationally connect to the perceived risk (i.e., don't prohibit travel to Iran but not to Italy or China).

Can we require employees to use sick pay or PTO for self-quarantine periods that the Company imposes?

This is another ticklish issue. If the employee is actually sick, then there should be no problem. But if they are merely self-quarantined as preventative measure, it's a different story. Start by analyzing your leave policy. In general, you are the master of your fringe benefits (such as paid time off, sick leave and vacation); but Michigan law requires first that you provide those benefits in accordance with any policy or practice that you have adopted. Of course, our current situation – where you now may want to force an employee to be on leave – is likely not something you have addressed in your policy or that you have encountered enough (or at all) previously so as to have a “practice.” There's also nothing that necessarily precludes you from changing on a prospective basis you policy or practice. However, if you are an employer covered under the Michigan Paid Medical Leave Act and have combined that mandated leave into your PTO program, go slow before requiring employees to use leave that is ostensibly reserved for MPMLA purposes. Otherwise, you may be deemed to have NOT provided that required leave. Best practice is to allow the employees to hold onto at least the 5 days of MPMLA (or lesser number if this is their inaugural year) that they are entitled to under the MPMLA. You can reduce that amount if you are able to identify and have tracked PTO they have already taken this calendar year for MPMLA purposes.

If we require an employee to self-quarantine, must we provide the means for her to perform her work from home?

There obviously are a lot of jobs that simply cannot be done from home. But what if the job could be done if only the employee had a phone, a decent computer and an internet connection? Do you have to provide that for them? Or if they already have it, must you allow them to work from home? No. It is impossible to say that a COVID-19 infection – or the concern that an employee may be infected with the virus – can never be deemed a “disability,” we think it is very unlikely to come within the definition of a “disability” under the ADA or Michigan's state counterpart. That being so, no duty to “accommodate” arises and, therefore, no duty to either facilitate or even allow work-from-home during a period of self-quarantine.

May an employee use FMLA leave to cover a self-quarantine period or because their child's school has been closed?

Maybe. If an employee otherwise meets FMLA eligibility requirements, they may be protected by the FMLA and entitled to leave. Generally, employees may not take FMLA leave to *avoid* getting sick, but may qualify for leave if they are ill or they are caring for a qualifying family member. For parents whose children have been sent home from school but who are not sick, FMLA leave is not available. This is not to say that an employer may not grant personal leave or otherwise excuse the absences of employees who find themselves in these situations; but you may not treat it as FMLA leave or reduce the employee's available FMLA leave unless the employee is sick or caring for a qualifying family member who is sick – and then only if the illness rises to the level of being a “serious health condition.”

Are we obligated to provide masks, hand sanitizer or other protective equipment at work?

Generally no, though doing so may help you avoid a number of other more disruptive and expensive problems. The World Health Organization and others have said that only persons treating patients with COVID-19 require a mask for their safety. Still, if an employee who is at elevated risk requests a mask or gloves in order to minimize the risk of exposure and wearing the mask or gloves does not create its own set of risks given the nature of the work performed, providing the equipment (or at least allowing the use of a mask or gloves) may be the path of least resistance.

If we send an employee home mid-week, how long must we continue to pay her?

It depends. If the person is a non-exempt worker, there is no legal duty to pay her for time she did not actually work. If the person has PTO and can use it, that's a different issue. However, if the person is an exempt salaried employee, the answer is different. Such employees generally must receive their full salary for any week in which they performed any work for the employer. Their first and last weeks of employment are exceptions. Weeks where the employee misses part of the week due to illness or injury are also exceptions to this rule, provided the employer has a bona fide sick pay policy. If the employee has exhausted the benefit provided under the sick pay policy, the employer generally may not pay for a partial week's absence. But absent such a policy, if you send an employee home starting on Wednesday for a two-week quarantine, the sick pay policy probably isn't triggered. This means you will have to pay the employee's salary for that first partial week (when she is home Wednesday through Friday) and the last partial week (when she is home Monday and Tuesday). You do NOT have to pay any salary, however, during the middle full week the employee is off because the Fair Labor Standards Act and comparable Michigan statute do not require payment of any salary when an employee performs no services for the employer during any portion of the workweek. This highlights a risk of permitting work-from-home arrangements for salaried exempt employees. In the example above, if the employee did some work from home during the middle week – say, answered emails and made some business phone calls – she would be entitled to receive her full salary for the week.

Can we discipline employees who show up to work when they know they are sick?

This would not be a good idea. Although the illness is probably not a "disability," disciplining an employee for simply showing up to work is apt to trigger a backlash. It will be very difficult to prove what the employee actually "knew" and one can imagine a judge being sympathetic toward a worker who perhaps lacked available PTO or was simply trying to "go the extra mile" for you. If the employee shows up in defiance of a direct order to stay home – perhaps in violation of a requirement to self-quarantine following a trip overseas or after presenting at work with what appeared to be symptoms of illness – that may be another question. If you encounter such a situation, it is probably best to contact legal counsel before taking any irrevocable action so the particular circumstances can be evaluated.

online resources



[EEOC: Pandemic Facts](#)

[OSHA: Publications](#)

[CDC: Resources for Businesses and Employers](#)

[Michigan.gov: Coronavirus for Employers and Workers](#)

Employment Law Team

If you have any questions regarding the COVID-19 Pandemic or any other employment law issues, please do not hesitate to contact a member of the Rhoades McKee Employment Law Team.



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