

LEGAL ALERT

COVID 19 – WHAT CAN EMPLOYERS ASK AND DO?

Balancing the need to protect employees and continue to manage necessary business interests can be challenging. Add on top of that the need to navigate the myriad of employment laws with current health concerns, and employers are faced with a difficult and evolving situation. In an effort to assist employers through this, we have set forth questions and answers to common situations employers are dealing with today.

Is being infected with COVID 19 a disability under the Americans with Disabilities' Act As Amended¹ (ADA)?

Likely not, because the duration of the infection is short; only two to three weeks.

Do employees infected with COVID 19 qualify for leave under the Family and Medical Leave Act² (FMLA)?

Yes, if the employee is otherwise eligible for FMLA, being infected with COVID 19 is likely a serious health condition under the FMLA. In addition, an otherwise eligible employee caring for a qualified family-member with COVID-19 would likely be entitled to leave under the FMLA.

Can I skip steps in designating time as covered by FMLA?

Do not designate time as FMLA based only on what an employee says. Employers should continue to follow all steps in designated FMLA leave as approved including requiring health care certifications. However, deadlines may need to be extended to account for the difficulty in getting information back from a doctor.

Can employers ask employees about their symptoms?

The Equal Employment Opportunity Commission (EEOC) says questions about symptoms are not disability-related questions. For example, employers can ask employees about whether they are experiencing fever, chills, cough, etc. Employers should be hesitant to take employees' temperatures (although this may change as the circumstances change), as there is risk in performing medical exams on employees. Additional legal analysis should be sought if this is the course an employer wishes to implement.

Can employers ask about employees' family-members' health?

No. This would be a violation of the Genetic Information Non-discrimination Act³ (GINA).

¹ Employers with more than 15 employees are covered by the ADA.

² Private employers with more than 50 employees are covered by FMLA.

³ Employers with more than 15 employees are covered by GINA.

Mallor Grodner Legal Alert

COVID 19 – What Can Employers Ask and Do?

March 12, 2020

Page 2

Can employers require employees to stay home if the employer has a concern regarding an employee?

Yes. If an employee has symptoms such as shortness of breath, fever, chills, etc., an employer can send an employee home and require them to not return until they have been symptom free for a specified period of time.

Can employers require employees to stay home if employees have traveled to certain areas?

Employers can restrict business travel, but not personal travel. If an employee elects to engage in personal travel during this time, an employer can provide the employee with an analysis of the risks associated with travel. Employers can also notify an employee that if they travel to certain areas that have been designated under a CDC travel advisory, the employee may be subject to self-quarantine upon their return.

Can employers require employees to stay home if there is concern regarding an employee's association with an infected individual?

Yes, this would not likely be a problem under the ADA.

Can employers continue to require doctor's notes to cover absences and return to work?

If your policies already require this, you can continue to require doctor's notes. However, be mindful of the difficulty an employee may have in obtaining a note from a doctor due to circumstances today. If employer's elect to temporarily modify their policy due to the current circumstances, employers should document this decision.

Can employers continue to enforce their attendance policies?

If an employee is missing work because they have a disability which legitimately creates a greater risk for them should they contract the virus, then the employer may need to accommodate the employee's disability. If an employee refuses to work simply because they are nervous of contracting the virus, employers can enforce its regular attendance policies. If an employee is sick and does not have available leave, employers should allow them to remain at home for the safety of the employee and their co-workers.

Are employers required to allow employees to work from home?

If an employee has an underlying disability, telecommuting may be a reasonable accommodation. Employers are not required to allow employees to telecommute if they do not have a disability. If employers elect to allow employees to telecommute due to the extraordinary circumstances based on the virus, they should document this as an exception to their normal policy requiring work be performed at the office.

Mallor Grodner Legal Alert
COVID 19 – What Can Employers Ask and Do?

March 12, 2020

Page 3

If an employer requires an employee to stay home and they cannot work from home, should the leave be paid or unpaid?

Employers should follow their already existing policies and be aware of state law. Indiana does not require employers to provide paid sick leave to employees. If an employer elects to make an exception, the exception should be documented.

Can an employer mandate that employees wear protective gear (facemasks/gloves)?

Yes, but be mindful of an applicable disability (latex allergy).

Can employees insist they be allowed to wear protective gear?

If the employee needs to do so because of an underlying disability this may be a reasonable accommodation. Otherwise, employers can generally deny these requests if an employer believes such gear is not in line with their business.

What may an employer tell co-workers about an employee’s possible exposure?

Employers cannot disclosure confidential medical information. Supervisors must be trained to not reveal an employee’s confidential medical information to others. You can disclose to your workplace that there has been an exposure, but do not specially identify which employee.

What needs to be done today?

Communicate with your employees. If you have not addressed this issue with your employees yet, you need to do so as soon as possible. Talk to employees about business travel, what the expectation is if an employee has symptoms, remind employees to use social distancing and wash their hands. Make certain that employees know that you have a plan in place and that you are monitoring the situation and will keep them informed.

Keep in mind that while COVID-19 is a serious health condition under the FMLA, it is likely not a disability under the ADA (certain state laws may offer broader protection). As with any potential ADA issue, employers can inadvertently provide employees with protection under the ADA if employees are regarded by employers as having a disability, so it is important to not treat employees with COVID-19 as if they have a disability.



Please contact Kathryn Cimera (kcimera@lawmg.com) in our firm’s Indianapolis office with questions on these issues and for any other employment law matters.