

COVID-19 in the Workplace: How Employers Should Respond



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03/16/2020

The spread of COVID-19 (coronavirus) in Arkansas requires employers of all sizes to take proactive measures to mitigate the risk to their employees and businesses. When doing so, however, employers must be bear in mind how their responses interact with their obligations under various employment laws.

CDC Interim Guidance for Businesses and Employers

As a starting point employers should review the CDC's has issued Interim Guidance for Businesses and Employers found at <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>. The CDC's interim guidance recommends the following strategies for employers to use:

- Actively encourage sick employees to stay home. For example, employees who have symptoms of acute respiratory illness are recommended to stay home and not come to work until they are free of fever (100.4° F [37.8° C] or greater using an oral thermometer), signs of a fever, and any other symptoms for at least 24 hours, without the use of fever-reducing or other symptom-altering medicines (e.g. cough suppressants). Employees should notify their supervisor and stay home if they are sick.
- Separate sick employees who either arrive at work or become sick during the workday:
- Emphasize staying home when sick, respiratory etiquette and hand hygiene by all employees;
- Perform routine environmental cleaning;
- Advise employees before traveling to take certain steps such as checking the CDC's Traveler's Health Notices; and
- Additional Measures in Response to Currently Occurring Sporadic Importations of the COVID-19, such as referring employees to CDC guidance on how to conduct a risk assessment of potential exposure.

With regarding to mitigating the impact of COVID-19 (coronavirus) on business operations, if they have not already done so, employers should create business response plans that are flexible depending on the severity of transmission within the communities in which their business operates. At minimum, a business response plan should prepare for a possible increase in the number of employee absences due to illness in employees and their family members, dismissals of early childhood programs and K-12 schools due to high levels of absenteeism or illness. To address this issue the CDC recommends the following:

- Employers should plan to monitor and respond to absenteeism at the workplace. Implement plans to continue your essential business functions in case you experience higher than usual absenteeism.
- Cross-train personnel to perform essential functions so that the workplace is able to operate even if key staff members are absent.
- Assess your essential functions and the reliance that others and the community have on your services or products. Be prepared to change your business practices if needed to maintain critical

operations (e.g., identify alternative suppliers, prioritize customers, or temporarily suspend some of your operations if needed).

In addition to the foregoing, employers can encourage or require employees to telework as an infection control or prevention strategy. Employers may not, however, single out employees in violation of any Equal Employment Opportunity laws.

The Fair Labor Standards Act (FLSA) and Telework

Employers must take care to ensure employees who are either required or permitted to telework are correctly paid under the Fair Labor Standards Act (“FLSA”). Under the FLSA, employers are required to pay employees for the hours they actually work, whether at home or at the employer’s office. This requires employers to ensure non-exempt hourly employees accurately track the hours they work teleworking. Employers must pay at least the minimum wage for all hours worked, and at least time and one half the regular rate of pay for hours worked in excess of 40 in a workweek. Salaried exempt employees must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions.

The Family Medical Leave Act and COVID-19

Under the Family Medical Leave Act (“FMLA”), covered employers must provide employees job-protected, unpaid leave for specified family and medical reasons, which may include COVID-19 where complications arise that create a “serious health condition” as defined by the FMLA in the employee or a family member of the employee. Employees on FMLA leave are entitled to the continuation of group health insurance coverage under the same terms as existed before they took FMLA leave.

Leave taken by an employee for the purpose of avoiding exposure to COVID-19 would not be protected under the FMLA. Likewise, there is currently no federal law covering non-government employees who take off from work to care for healthy children, and employers are not required by federal law to provide leave to employees caring for dependents who have been dismissed from school or child care. Employers should note, however, there exists the potential for federal legislation which may address paid leave and leave to care for a child of an employee.

If an employee’s leave request qualifies as FMLA-protected leave, the FMLA allows the employee to elect or the employer to require the substitution of paid sick and paid vacation/personal leave in some circumstances.

The Americans with Disabilities Act (“ADA”) and COVID-19

The U.S. Equal Employment Opportunity Commission (“EEOC”) has issued guidance entitled “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act.” The guidance is available at https://www.eeoc.gov/facts/pandemic_flu.html. Although not issued specifically for COVID-19, the EEOC has stated the guidance “can help employers implement strategies to navigate the impact of Coronavirus in the workplace.”

The ADA is relevant to pandemic preparation in at least three major ways. First, the ADA regulates employers’ disability-related inquiries and medical examinations for all applicants and employees, including those who do not have ADA disabilities. Second, the ADA prohibits covered employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a “direct threat” (i.e. a significant risk of substantial harm even with reasonable accommodation). Third, the ADA requires reasonable accommodations for individuals with disabilities (absent undue hardship) during a pandemic.

The guidance makes clear that an ADA-covered employer may send employees home if they display influenza-like symptoms during a pandemic. Advising such workers to go home is not a disability-related action and is permitted under the ADA if the illness were serious enough to pose a direct threat. ADA-covered employers may also ask employees who report feeling ill at work or who call in sick if they are

experiencing influenza-like symptoms, such as fever or chills and a cough or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

Generally, measuring an employee's body temperature to determine if they have a fever is a medical examination prohibited by the ADA. The guidance suggests that if pandemic influenza becomes widespread in the community as assessed by state or local health authorities or the CDC, then employers may measure employees' body temperature. Before taking such a step employers should consult with their legal counsel.

If an employee voluntarily discloses (without a disability-related inquiry) that he or she has a specific medical condition or disability that puts him or her at increased risk of COVID-19 complications, the employer must keep this information confidential. The employer may ask the employee to describe the type of assistance the employee thinks will be needed (e.g. telework or leave for a medical appointment). Employers should not assume that all disabilities increase the risk of COVID-19 complications.

During a pandemic employers must continue to provide reasonable accommodations for employees with known disabilities that are unrelated to the pandemic, barring undue hardship. Only when an employer can demonstrate that a person with a disability poses a direct threat, even after reasonable accommodation, can it lawfully exclude him from employment or employment-related activities.

Finally, asking an employee about the illness of a family member does not implicate the ADA, but is generally prohibited under the Genetic Information Nondiscrimination Act ("GINA"). GINA prohibits employers from inquiring about family medical history. As discussed below, employers may implement policies asking employees to self-disclose potential exposures. If an employer believes that an employee has an infected family member, and has not self-reported, employers would be well-advised to consult legal counsel before taking any action.

OSHA and COVID-19

The Occupational Safety and Health Administration ("OSHA") has also issued guidance to help employers and workers identify risk levels in workplace settings and to determine any appropriate control measures to implement. The guidance entitled "Guidance on Preparing Workplaces for COVID-19 is available at <https://www.osha.gov/Publications/OSHA3990.pdf>.

OSHA requires that employers provide employees with a safe working environment free of recognized hazards that are likely to cause significant harm. To comply with OSHA's existing obligations, OSHA has identified the following steps all employers can take to reduce worker's risk of exposure to COVID-19:

- Develop an Infectious Disease Preparedness and Response Plan if one does not already exist.
- Prepare to Implement Basic Infection Prevention Measures.
- Develop Policies and Procedures for Prompt Identification and Isolation of Sick People, if Appropriate.
- Develop, Implement, and Communicate about Workplace Flexibilities and Protections.
- Implement Workplace Controls, including engineering controls, administrative controls, safe work practices, requiring the use of personal protective equipment ("PPE"), and following existing OSHA standards.

To help employers determine appropriate precautions, OSHA has divided job tasks into four risk exposure levels: very high, high, medium, and lower risk. The guidance notes that most Most American workers will likely fall in the lower exposure risk (caution) or medium exposure risk levels.

- **Very high exposure risk** jobs are those with high potential for exposure to known or suspected sources of COVID-19 during specific medical, postmortem, or laboratory procedures.
- Workers in this category include: healthcare workers (e.g., doctors, nurses, dentists, paramedics, emergency medical technicians) performing aerosol-generating procedures (e.g., intubation, cough

induction procedures, bronchoscopies, some dental procedures and exams, or invasive specimen collection) on known or suspected COVID-19 patients, healthcare or laboratory personnel collecting or handling specimens from known or suspected COVID-19 patients, and Morgue workers performing autopsies, which generally involve aerosol-generating procedures, on the bodies of people who are known to have, or suspected of having, COVID-19 at the time of their death.

- To reduce the exposure risk for workers in very high exposure risk category OSHA's guidance recommends additional engineering controls, administrative controls, safe work practices, and PPE:
- Engineering Controls: ensuring appropriate air-handling systems are installed and maintained in healthcare facilities; CDC recommends that patients with known or suspected COVID-19 (i.e., person under investigation) should be placed in an airborne infection isolation room (AIIR), if available; use isolation rooms when available for performing aerosol-generating procedures on patients with known or suspected COVID-19; for postmortem activities, use autopsy suites or other similar isolation facilities when performing aerosol-generating procedures on the bodies of people who are known to have, or suspected of having, COVID-19 at the time of their death; use special precautions associated with Biosafety Level 3 when handling specimens from known or suspected COVID-19 patients.
- Administrative Controls: employees working in a healthcare facility should follow existing guidelines and facility standards of practice for identifying and isolating infected individuals and for protecting workers. Additional recommended administrative controls are: develop and implement policies that reduce exposure, such as cohorting (i.e., grouping) COVID-19 patients when single rooms are not available; post signs requesting patients and family members to immediately report symptoms of respiratory illness on arrival at the healthcare facility and use disposable face masks; consider offering enhanced medical monitoring of workers during COVID-19 outbreaks; provide all workers with job-specific education and training on preventing transmission of COVID-19, including initial and routine/refreshers training; and ensure that psychological and behavioral support is available to address employee stress.
- Safe Work Practices: Provide emergency responders and other essential personnel who may be exposed while working away from fixed facilities with alcohol-based hand rubs containing at least 60% alcohol for decontamination in the field.
- Personal Protective Equipment: Most workers at high or very high exposure risk likely need to wear gloves, a gown, a face shield or goggles, and either a face mask or a respirator, depending on their job tasks and exposure risks. Those who work closely with (either in contact with or within 6 feet of) patients known to be, or suspected of being, infected with COVID-19, should wear respirators.
- **High exposure risk** jobs are those with high potential for exposure to known or suspected sources of COVID-19.
- Workers in this category include: healthcare delivery and support staff (e.g., doctors, nurses, and other hospital staff who must enter patients' rooms) exposed to known or suspected COVID-19 patients, Medical transport workers (e.g., ambulance vehicle operators) moving known or suspected COVID-19 patients in enclosed vehicles, and Mortuary workers involved in preparing (e.g., for burial or cremation) the bodies of people who are known to have, or suspected of having, COVID-19 at the time of their death.
- To reduce the exposure risk for workers in high exposure risk category OSHA's guidance recommends the same additional engineering controls, administrative controls, safe work practices, and PPE as is recommended for very high exposure risk jobs.
- **Medium exposure risk** jobs include those that require frequent and/or close contact with (i.e., within 6 feet of) people who may be infected with SARS-CoV-2, but who are not known or suspected COVID-19 patients. In areas without ongoing community transmission, workers in this risk group may have frequent contact with travelers who may return from international locations with widespread COVID-19 transmission. In areas where there is ongoing community transmission, workers in this category

may have contact be with the general public (e.g., in schools, high-population-density work environments, and some high-volume retail settings).

- To reduce the exposure risk for workers in medium exposure risk category OSHA's guidance recommends installing physical barriers, such as clear plastic sneeze guards, where feasible as an engineering control. Recommended administrative controls consist of: offering face masks to ill employees and customers to contain respiratory secretions until they are able leave the workplace; keeping customers informed about symptoms of COVID-19 and ask sick customers to minimize contact with workers until healthy again; where appropriate, limit customers' and the public's access to the worksite, or restrict access to only certain workplace areas; consider strategies to minimize face-to-face contact (e.g., drivethrough windows, phone-based communication, telework); and communicate the availability of medical screening or other worker health resources (e.g., on-site nurse; telemedicine services). Workers with medium exposure risk may need to wear some combination of gloves, a gown, a face mask, and/or a face shield or goggles. PPE ensembles for workers in the medium exposure risk category will vary by work task, the results of the employer's hazard assessment, and the types of exposures workers have on the job.
- **Low exposure risk** (caution) jobs are those that do not require contact with people known to be, or suspected of being, infected with SARS-CoV-2 nor frequent close contact with (i.e., within 6 feet of) the general public. Workers in this category have minimal occupational contact with the public and other coworkers.
- OSHA's guidance states that additional engineering controls and PPE are not recommended to reduce the exposure risk for workers in the lower exposure risk group. Instead, OSHA recommends employers monitor public health communications about COVID-19 recommendations and ensure that workers have access to that information.

Employee Confidentiality and COVID-19

If an employee is suspected or confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (ADA). Employees exposed to a co-worker with confirmed COVID-19 should refer to CDC guidance for how to conduct a risk assessment of their potential exposure.

Conclusion

The spread of COVID-19 (coronavirus) represents an unprecedented threat to individuals and business in Arkansas. Employers must take proactive steps to mitigate the dramatic impacts the virus will have on their employees and operations. In doing so employers must be wary to abide by and comply with their obligations under various employment laws. Employers must also stay updated on changes to federal and state laws and the extent of the spread of the virus in their communities to assess whether further actions are required.