

Coronavirus Risk Assessment, the ADA and FMLA (Part 2 of 3)

PUBLISHED ON

March 11, 2020

(Note: This is Part 2 in a series of alerts for employers concerning the coronavirus focusing on being prepared in the workplace. [Read part 1 here](#). Check back for additional alerts coming soon.)

Employers want to provide a safe environment for their employees amidst the Coronavirus outbreak. Inform employees how to prevent the spread of COVID-19 and to use precautions. Continually monitor virus risks and developments.

But with confirmed cases in Pennsylvania growing each day, what more should employers do to keep the work environment safe without running afoul of their legal obligations under the OSHA, the FMLA and the ADA, as well as state law?

Assess Risk of Coronavirus in the Workplace

Employers may ask employees about the countries they have recently traveled to and if they may have had exposure to COVID-19. Employers can also ask if employees have had close contact with others who have traveled to at-risk countries or otherwise have been exposed to the virus. Currently, those who've traveled in China, Hong Kong, Iran, Italy, Japan, South Korea, Singapore, Taiwan, Thailand and other locations with sustained community transmission are considered high and medium risk. Those who have been on cruise ships where a case of COVID-19 was reported also are high and medium risk.

Employers can tell employees in these categories not to report to work for the COVID-19's incubation period (which is currently identified as a 14-day incubation period). If these employees develop symptoms of coronavirus, employers should advise them to stay home and seek medical evaluation.

OSHA and Workplace Safety

The Occupational Safety and Health Administration (OSHA) [guidance](#) states that all workers with reasonably anticipated occupational exposure to COVID-19, such as hospital and health care workers, should be trained about the sources of exposure to the virus, the hazards associated with that exposure and appropriate workplace protocols to prevent or reduce the likelihood of exposure. Training should include information about how to isolate individuals with suspected or confirmed COVID-19 or other infectious diseases and how to report possible cases. Coronavirus is a recordable illness when a worker is infected on the job.

Can Employers Ask Employees About Their Health Under the ADA?

You can ask an employee how they are feeling. But be careful not to cross the line and ask questions that could elicit specific medical information. [Under the American Disabilities Act](#) (ADA), employers may not make disability-related inquiries and require medical examinations, unless the employer can show that the inquiry

or exam is job-related and consistent with business necessity. A temperature test is a medical exam under the ADA, and employers should not take their employees' temperature unless the CDC or federal, state and local officials have declared that a pandemic has reached the community.

What if an Employee is Exhibiting Signs of Flu-Like or Respiratory Illness Such as Fever, Sweating, Coughing or Difficulty Breathing?

Employers should encourage employees with symptoms to seek medical attention, and instruct them to stay home until symptom free. If diagnosed with COVID-19, employees should stay home for the 14-day incubation period, or until their doctor releases them to return to work. According to CDC guidance, if an employee is 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 ADA. Employers should not identify or explain to other employees the reason an employee is not at work. Communications with employees about medical conditions should be kept confidential and medically related documents kept in a location separate from the employee's personnel file. Employers should refer to CDC guidance for how to conduct a risk assessment of an employee who was exposed to another employee with confirmed COVID-19.

Are Employees Able to Use FMLA Leave in Connection with the Coronavirus?

It depends. Employees may be eligible for leave under the Family and Medical Leave Act (FMLA) if their symptoms rise to a serious medical condition that makes them unable to work. For example, when complications develop that require an overnight stay in the hospital, or when an employee can't work for more than three consecutive days and that absence is coupled with treatment from a health care provider twice in 30 days. Ask employees to provide medical certification of their need for FMLA leave. Also, under the FMLA, an employee who is taking care of a qualifying family member with COVID-19 who meets the criteria of a serious medical condition may be permitted to take protected FMLA leave. Such employees should contact their company's human resources department to obtain information about family medical leave, short-term disability leave benefits and other discretionary medical leave. However, employees who refuse to come to work out of fear of contracting COVID-19 would not likely qualify for FMLA leave.

What if Pennsylvania or the Federal Government Order an Employee To Be Quarantined or Isolated?

On March 6th, Gov. Tom Wolf signed an emergency disaster declaration to provide increased support to state agencies involved in the response to the virus. In addition, [Pennsylvania law authorizes public health authorities to order quarantine](#) and isolation to inhibit the spread of communicable diseases and to protect the public from the spread of communicable disease. Specifically, the Disease Prevention and Control Act of 1955 allows the Pennsylvania Department of Health, county/municipal health departments and local health authorities to order an individual quarantine if the person has been exposed to a communicable disease. It also can order a general quarantine when necessary to protect the public from the spread of communicable disease. There is no law to address the procedures if an individual refuses to comply with public health quarantine but it is likely that court action would be sought if a person refuses isolation/quarantine.

Employees who are quarantined or isolated by government order likely have protections under the ADA and the FMLA, in addition to state law, and employers should defer to the health authorities until the employee has been released from the health risk. Now is an uncertain time for both employers and employees, as the concerns about

COVID-19 unfold. Employers are encouraged to work with legal counsel when navigating these complex legal issues. If you have questions on any of these points, please contact [Sarah Yerger](#), [Jill Welch](#) or any member of the [Barley Snyder Employment Practice Group](#).

More on the legalities of coronavirus:

BUSINESS: [How Governments Could Affect Your Business During Coronavirus Outbreak](#)

EMPLOYMENT: [Coronavirus and Workplace Preparedness](#)

BUSINESS: [Is COVID-19 a "Force Majeure" Event?](#)

SENIOR LIVING: [Coronavirus and Senior Living Facilities](#)

EDUCATION: [Schools Already Planning for Coronavirus](#)

BUSINESS: [Planning for Coronavirus: A Necessary Business Exercise](#)

WRITTEN BY:



Jill Sebest Welch

Partner

Tel: (717) 399-1521

Email: jwelch@barley.com