

LEGAL CONSIDERATIONS

Employers are obligated to provide a safe working environment for staff and visitors coming to the worksite. This obligation is especially heightened during times of public health emergencies that arise from a pandemic.

The first step in providing a safe working environment is to educate and train all employees in proper hand hygiene, cough etiquette, and social distancing techniques, as well as the [guidance to employers by CDC](#). Another measure is to implement controls that could provide additional protection to your employees and visitors, such as: plastic barriers, proper ventilation, and the proper selection, use and disposal of personal protective equipment (PPE). Workers who interact with the public (such as those responsible for medical accompaniment) may need special accommodations in order to keep them safe while performing their jobs. Certain PPE that might be useful includes gloves, goggles, and face shields/masks, of the proper medical grade, and when used appropriately. <https://www.osha.gov/Publications/respirators-vs-surgicalmasks-factsheet.html>

Another preventive measure to consider is whether preconditions exist for certain staff members. The CDC is advising that some individuals may be more at risk of infection than others in the general population. Thus, employers should follow the CDC direction on pregnant employees or on related reproductive issues, as well as the vulnerabilities of those with compromised immune systems and the elderly. Employers should seek guidance from health care experts when making decisions that will put these vulnerable staff members at an elevated risk of infection.

The next step in providing a safe working environment is to ensure that anyone exhibiting symptoms of illness leave the workplace as soon as possible and not return until at least 48 hours after symptoms recede without medication. Anyone exposed to a person with symptoms should be asked to self-isolate for a period of 14 days. During times of emergency, such as a pandemic, if you observe symptoms in your employees at work, such as coughing, fever or trouble breathing, it is legally permissible to ask them to go home. It is also legally permissible to suggest or request that they seek medical attention. https://www.eeoc.gov/facts/pandemic_flu.html#4.

Once the CDC determines that a pandemic becomes severe and poses a direct threat to the general public, employers covered by the ADA (ie, with 15 staff or more) may legally take action to ensure that employees are not posing a threat of spreading disease to the workplace. In order to mitigate the spread of infection in this instance, employers are permitted to make disability-related inquiries or require medical examinations of asymptomatic employees to determine which employees are at a higher risk of complications.

https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm

However, while it may be permissible for an employer to take steps to assess an employee's health, such as measuring the employee's temperature, employers should exercise caution before attempting to assess the health of employees for the following reasons:

1. Interacting in close proximity with a potentially sick employee puts the employer at higher risk of being infected, thus increasing the spread of disease.
2. Employees may be infected with COVID-19 without having a fever, so employee temperature checks may not be an accurate measurement of an infected workforce. This would ultimately instill a false sense of security.

3. As a practical matter, testing may be difficult to administer and provide inaccurate information.

Accordingly, employers' primary steps of prevention should be to increase workplace hygiene, as outlined above, and to send employees home who appear to have symptoms or who indicate that they have symptoms. Employers should *not* insist upon a doctor's note to prove illness, as healthcare providers and medical facilities may be overwhelmed with more serious cases, unable to provide care to those who are better equipped to fight off the virus at home.

https://www.osha.gov/Publications/influenza_pandemic.html.

Additionally, employers should remember that all employee medical information must be protected, kept confidential, and afforded the same protections as those granted by HIPAA. The minimum necessary information should be disclosed, if disclosure of medical information is required. <https://www.fisherphillips.com/resources-alerts-comprehensive-faqs-for-employers-on-the-covid>

Even after preventive measures are taken to ensure a safe working environment, employees may still be anxious about coming into work. Employees may not refuse to work, by law, unless they believe they are in "imminent danger," such that death or serious physical harm could occur within a short time, before the dangerous condition could be investigated by OSHA or the CDC. Working with patients in a medical setting without personal protective equipment at this time may rise to this threshold. <https://www.fisherphillips.com/resources-alerts-comprehensive-faqs-for-employers-on-the-covid>

Employers must consider the specific circumstances of their workplace and job duties for each employee before determining whether it is permissible for employees to refuse to work.

The CDC's interim guidance has encouraged employers to be flexible during this time of national emergency and to consider whether telecommuting is feasible for employees. The EEOC has similarly suggested that telework is an effective infection-control strategy. The EEOC has also stated that employees with disabilities that put them at high risk for complications of pandemic influenza may request telework as a reasonable accommodation to reduce their chances of infection during a pandemic. https://www.eeoc.gov/facts/pandemic_flu.html

As employers continue to manage the coronavirus/COVID-19 situation, it is vital to continue communication with employees, reinforce or amend sick leave policies, develop plans for employees in the event of a state of emergency or lockdown, and consider telecommuting or remote work policies.

If you have questions regarding legal considerations for your organization, contact Liz Boyce, TAASA's General Counsel (eboyce@taasa.org).