

COVID-19 RESPONSE

Employment Compliance Considerations for Re-opening the Workplace



Marjory Robertson,
AVP & Senior Counsel

This content is not to be considered legal advice. We recommend Clients speak with legal counsel specializing in labor and employment law to ensure your organization meets requirements.

Agenda

- Overview of key legal issues: OSHA, ADA and more
 - Overview of federal, state and local Reopening Requirements/Recommendations:*
 - Temperature checks
 - Other screening measures
 - Personal protective equipment
 - Workplace safety measures
 - What to do if an employee has COVID-19 symptoms at work - Accommodating disabilities and employee fears
 - Responding to complaints about workplace safety
- *On www.sunlife.com/coronavirus: **Summaries of individual federal, state and local orders/recommendations**

This presentation is only a summary

- This presentation is a summary of various federal, state and local orders and guidance regarding safety measures required or recommended in the workplace because of COVID-19
- Neither Hylant nor Sun Life are not endorsing any particular measures
- Hylant and Sun Life are also not representing that any of these measures will effectively eliminate risks associated with COVID-19
- Employers should consult their own safety and legal experts on these issues
- We have created a separate slide deck that includes source references to federal, state and local orders and guidance.

Overview of key legal issues

Occupational Safety & Health Act (OSHA)

- OSHA imposes *a general duty of care* that requires employers (ERs) to provide *a safe and healthy working environment*
- OSHA can require:
 - Cleaning and sanitation
 - Screening of employees (EEs) and on-site visitors
 - Social distancing
 - Appropriate personal protective equipment
 - Safety measures if someone at work displays COVID-19 symptoms

Americans with Disabilities Act (ADA)

- ADA permits some medical inquiries because COVID-19 has been declared a *pandemic*
 - EEOC permits ERs to *follow guidance from the CDC* and other reputable medical sources in responding to this direct threat to safety
 - Must focus on *exposure* and *symptoms*
- *Medical information* obtained from EEs must be *kept confidential*
- EEs with disabilities may be entitled to *reasonable accommodations*
 - *Including:* leave; remote work; reassignment of duties; job transfers and more
 - *Duty to accommodate* applies to EEs who are *working on-site* and EEs who are *telecommuting* because of COVID-19

Worker's Compensation



- Worker's compensation statutes provide EE is entitled to benefits for **occupational diseases** but typically exclude **ordinary diseases of life** to which general public is equally exposed.
- But, if EE can establish **direct causal connection to workplace**, worker's compensation coverage may apply.
- ERs can help avoid worker's compensation claims related to COVID-19 by having **appropriate preventative steps in the workplace**.

Federal, State and Local COVID-19 Orders



- Many states, counties and cities are issuing orders pertaining to COVID-19 workplace safety requirements
- Before you start to bring EEs back into the workplace, make sure you are fully aware of *federal, state and local orders and requirements* that may impact your work location and/or industry
 - Are you allowed to reopen?
 - If so, what are the rules?

Table of Contents of Separate Presentation on Orders

Agency/State	#	State	#	State	#	State	#
White House	4	Connecticut	40	Michigan	62	Oklahoma	87
OSHA	12	Florida	45	Minnesota	64	Pennsylvania	89
CDC	17	Georgia	47	Mississippi	67	Tennessee	93
State/Local Orders Face Masks & Temperature Screening	20	Idaho	50	Montana	69	Texas	95
National Governor's Association	25	Illinois	52	Nevada	72	Utah	97
Alabama	27	Kansas	54	New Jersey	74	Washington	99
Arizona	29	Kentucky	56	New York	77	Wisconsin	101
California	31	Maine	58	North Dakota	82		
Colorado	38	Maryland	60	Ohio	84		

Temperature checks

Temperature checks are permitted

- *EEOC Pandemic Guidance* permits temperature checks
- Communicate the process in writing:
 - *Be aware of local legal requirements:*
 - *California law* requires advance written notice advising EE that you will collect body temperature and purposes for which information will be used
- Establish *threshold temperature* over which an EE or other person will not be admitted entrance
 - *CDC: 100.4 degrees Fahrenheit, or higher*

How to take temperatures

- Testing should be the *least invasive way possible*:
 - Touchless devices are best
- A *trained, qualified individual* must *administer* the temperature checks
- You may have to provide adequate *personal protective equipment for individual administering the checks*
 - Masks, gloves, sanitizer, access to soap and water
- You must ensure that the *equipment is sanitized*

Prepare the temperature taking location

- Plan for *social distancing* at temperature taking location
- Take temperatures in *private location* so that results are *confidential* and can be *discussed discreetly* with the EE or visitor
- Think about how to have *EE or visitor whose temperature exceeds the threshold* leave the worksite to *minimize both potential exposure and embarrassment*

Additional temperature-taking considerations

- Consent *is not* required.
 - Make clear in writing that having a temperature taken is required for admission to the building
- If you decide to *keep the results, you must store results* in *confidential* and *secure* manner
- *Consider paying your nonexempt EEs* as they wait for and go through the temperature-taking process
 - In some states (e.g., CA), you may have to pay a minimum amount of time if EE is not admitted to the building because of elevated temperature

Self-administered temperature checks

- ERs can require EEs and others to self-administer temperature checks on a daily basis and to verify in writing results of those tests before entering worksite each day
- *May be less reliable, though less costly*
- Consider requiring home self-administered tests *even if* you take temperatures at worksite in order to reduce exposure/surprise at workplace
- If you challenge veracity of self-reported results, be mindful of potential for discrimination claims

Other screening measures

Ask questions about potential exposure and symptoms

- You *may ask* EEs and visitors:
 - Symptoms
 - Diagnosis
 - Exposure
- *You must keep medical information confidential*
 - Medical information must be *stored separately* from other personnel information

What questions are okay?

- Questions about symptoms of EE or family or household member with whom EE lives or has close contact
- According to CDC, symptoms include:
 - Fever
 - Cough
 - Shortness of breath
 - Loss of sense of taste and/or smell
 - Chills
 - Gastrointestinal problems such as nausea, diarrhea and vomiting
 - Sore throat
 - Headache



Symptoms are evolving:
follow CDC guidelines

What questions are not okay?

- *Do not ask* age
- *Do not ask* about underlying health conditions
- *Do not ask* about pregnancy
- *Do not* make return-to-workplace decision based on *age* or your *belief/perception about underlying medical conditions*
 - EEs may ask for accommodations because of these conditions but do not presume

Testing as a screening device

- Tests are being developed to evaluate:
 - Whether a person *has COVID-19* or
 - Has *previously had COVID-19* and now has *antibodies* that could protect the EE from COVID-19
 - Has been exposed to COVID-19 (*contact tracing*)
 - There may be privacy limitations on asking for *non-workplace contacts*
- On 4/23/2020, EEOC advised that ERs may conduct tests before allowing EEs to enter worksite
 - https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm
- If a *vaccine* is developed, ER may be able to require EEs to become vaccinated
 - ERs will have to evaluate accommodations for religious beliefs and/or disabilities

Personal protective equipment

OSHA & personal protective equipment (PPE)

- When a hazard exists:
 - ERs can mandate that EEs use PPE *and*
 - EEs have the right to demand PPE
- *Examples:* Face masks, gloves, goggles, face shields, respiratory protection
- What rules govern PPE? *ER must:*
 - Perform a hazard assessment
 - Consider other alternative options to protect EEs
 - Identify and provide appropriate PPE
 - Train EEs in use, care, cleaning, and replacement of PPE
 - Prepare a plan that is periodically reviewed

When is PPE required for EEs with regard to COVID-19?

- *Originally*, CDC was *only* recommending the use of PPE for *health care workers who have greater exposure*
- But, there is more and more evidence of asymptomatic spread
- CDC *revised its guidance*:
 - CDC now recommends that even non-health care personnel should wear *a cloth face covering*, which can be home-made from household items
 - These cloth coverings must be *kept clean through washing*
 - *Main purpose* of cloth face covering is to prevent spread of COVID-19 from wearer to others

Orders requiring or recommending face coverings

- States and local governments have adopted orders regarding face coverings
- *Variations:*
 - Some are *mandatory* and some are *recommendations*
 - Some apply to *all individuals in public*/outside of residence
 - Some apply to *only “essential” businesses*
 - Some apply only to *public-facing businesses*, e.g., retail stores, pharmacies, food service enterprises, public transit, etc.
 - Some *require ERs to pay for* the face coverings
 - Some also require that EEs be provided with *disposable gloves*
 - Some contain *other requirements* (e.g., mandatory breaks to wash hands)

Are *cloth face coverings* considered *PPE* under OSHA?

- OSHA guidance:
 - “Allow” workers to wear masks to help prevent spread
 - If ER mandates face covering, is it deemed PPE?
- Cloth face coverings provide little protection to EE
- Who pays for cloth face coverings?
 - OSHA requires ERs to provide PPE free of charge
 - OSHA does not require ER to pay for:
 - Everyday clothing
 - Normal work boots
 - Weather protection, e.g., winter coats, jackets, gloves, raincoats, ordinary sunglasses, sunscreen
 - ERs cannot require EEs to use their own PPE (must be voluntary)
 - Many new state and local mandates require ERs to pay for face coverings

Summary of federal and state workplace safety measures

Considerations to maintain and reinforce Social Distancing

- Limit occupancy
- One-way aisles
- Plexiglass
- Placement of tables or other physical barriers to create distance
- Contactless delivery options
- Place floor tape to mark 6-foot distances
- Limitations on elevator usage



Other workplace considerations



- Create distance between desks and workstations
- Modify open floor plans with partitions
- Make only certain workstations available (e.g., every other)
- Close or modify common areas and conference rooms
- Create touchless entries and devices
- Improve air flow and ventilation
- Improve signage to remind EEs and others to:
 - Maintain social distance
 - Avoid touching surfaces unnecessarily
 - Maintain regular and proper hand washing
 - Wear a face covering

Potential changes in workplace behavior

- Hold fewer in-person meetings and use video conferences instead
- Limit size of in-person gatherings
- Instruct EEs not to use other EEs' workspaces or equipment
- Develop a crowd control plan
- Establish restrictions regarding travel
- Set staggered or spaced meal and break schedules
- Set staggered shifts, alternating teams, continued telework
- Prohibit nonessential visitors

Examples of cleaning measures

- Require infection control practices, such as regular hand washing, coughing and sneezing etiquette and proper tissue disposal
- Have ample supplies of cloth face coverings, gloves and sanitation materials, including wipes and sanitizers in all common areas and work areas
- Frequent sanitization of high-touch areas including restrooms, countertops, door knobs
- Frequent breaks for EEs for handwashing

Accommodating disabilities & employee fears

Accommodations related to COVID-19 safety measures



- Non-latex gloves for EEs with latex allergies
- Alternatives to cloth face coverings for those with respiratory conditions
- Sign language assistance and/or clear face masks for hearing impaired who rely on lip reading
- Some state/local orders say you cannot ask for documentation of medical condition
- *Can you send someone home who cannot wear a face covering because of medical condition?*
 - Not if there is reasonable alternative accommodation such as social distancing and/or clear face masks

Accommodations for high-risk EEs

- Under ADA ***if EE has disability***, ER needs to evaluate reasonable accommodations and engage in the interactive process
- In some states, ERs must also make ***accommodations for pregnant EEs***
- Accommodations ***must be granted unless*** accommodation would:
 - Create an undue burden
 - Relieve an EE from performing an essential job function
 - Create a direct threat to safety of EE or others
- ***WA State:*** ERs must make ***special efforts to accommodate high-risk EEs***
- Other state orders requiring accommodations related to high risk individuals
 - Colorado, Montana

Accommodating fear of COVID-19

- No legal duty to accommodate generalized fear that is not based on evidence of hazards in workplace
- However, if EE has underlying disability that contributes to fear, you may have to accommodate under ADA
 - It is possible that psychological impairment may qualify as disability that needs accommodation
- Be mindful of OSHA issues
 - *Are you taking appropriate steps to keep your workplace safe?*

What to do if an employee shows signs of COVID-19 at work

CDC Guidance if EE shows symptoms at work



- If EE *becomes sick* during the day:
 - EE should be isolated and sent home immediately
 - Surfaces in their workspace need to be cleaned and disinfected
- ER should compile information on persons who had contact with ill EE during the time the employee had symptoms and 2 days prior to that and notify those individuals of exposure (but maintain confidentiality)

CDC guidance on entry to work for **Critical Infrastructure Workers** exposed to COVID-19

- Permits EEs to *continue to work on-site even if exposed* to COVID-19 if asymptomatic *and* ER takes additional precautions to protect them and the community at large
- Potential exposure is: *household contact or close contact within 6 feet of any individual with confirmed or suspected COVID-19*
- The period of time *includes the 48-hour period before* individual became *symptomatic*

Additional CDC guidance on Exposed Employees

- Additional requirements to permit EEs who have had exposure but remain asymptomatic to work on-site:
 - ER must screen EEs by measuring temperature and assessing symptoms
 - EE should self-monitor under supervision of ER's occupational health program
 - EE must wear face covering at all times for 14 days after last exposure
 - EE should maintain social distance of at least 6 feet
 - ER should clean and disinfect frequently and routinely

CDC guidance on return to workplace after having COVID-19

- At least 3 days (72 hours) have passed since recovery which includes:
 - Resolution of fever without fever-reducing medications *and*
 - Improvement of respiratory symptoms (e.g. cough, shortness of breath) *and*
 - At least 7 days have passed since symptoms first appeared
- **Test-based approach:**
 - Resolution of fever without the use of fever-reducing medications *and*
 - Improvement in respiratory symptoms (e.g., cough, shortness of breath) *and*
 - Negative results of an FDA Emergency Use Authorized Molecular Assay for COVID-19 from at least 2 consecutive nasopharyngeal swab specimens collected ≥ 24 hours apart*** (total of 2 negative specimens)

****All test results should be final before isolation is ended. Testing guidance is based upon limited information and is subject to change as more information becomes available.*

Responding to employee concerns about workplace safety

Take employee concerns seriously and address



- Under *OSHA*, ERs can be held liable:
 - If they do not properly and promptly address and alleviate dangerous conditions
 - If they retaliate against an EE for raising a concern about workplace safety
- The *National Labor Relations Act (NLRA)* protects concerted activity to address workplace safety
 - ER can be held liable for retaliating against an EE engaged in protected concerted activity
 - Union activity is also protected
- State *Whistleblower* laws
- Federal and state *Discrimination* laws

OSHA – Refusal to work

- EEs may refuse to do work if *all of the following conditions* are met:
 1. Where possible, EE asked ER to eliminate danger and ER failed to do so; *and*
 2. EE refused to work in “good faith” (i.e., EE genuinely believed that an imminent danger exists); *and*
 3. A reasonable person would agree that there a real danger of death or serious injury; *and*
 4. There isn’t enough time due to urgency of hazard to get it corrected through regular enforcement channels such as an OSHA inspection

Worker's Compensation & COVID-19

- Worker's compensation rules vary by state
- Generally, worker's compensation provides immunity from lawsuits in exchange for administrative system of compensation for workplace injuries
- In some states ERs do not have immunity for willful and wanton misconduct
- Generally, flus and other "ordinary diseases of life" are not covered – but occupational diseases are covered
 - Key is degree of proof that EE was infected at work
 - Highlights importance of good ER procedures to disinfect, distance and screen
- ***Retail establishments can be sued by customers – no immunity***

Don't forget: Compliance with Leave laws

- There are new and old federal, state and local leave laws that require paid or unpaid job protected leave.
- Families First Coronavirus Response Act (FFCRA) applies to ERs with fewer than 500 EEs and certain public ERS of all size.
 - Requires up to 80 hours of paid sick leave for COVID-19 reasons and
 - Up to 12 weeks of FMLA for leave to care for a child whose school or place of care has been closed due to COVID-19 (10 weeks paid).
- Regular Family and Medical Leave Act may apply
 - EE's own serious health condition
 - To care for child, parent or spouse with serious health condition
- State and local leave laws
 - Paid Family and Medical Leave
 - Paid sick leave
 - Unpaid leave

Leave laws are complex.
We offer a separate webinar on this topic

Questions?

- Visit us at:
 - <https://hylantcoronavirusinfo.com/>
 - sunlife.com/coronavirus

For information about Hylant's insurance, consulting and risk management services, please contact a Hylant representative.



Life's brighter under the sun

Thank you

This content is not to be considered legal advice. We recommend Clients speak with legal counsel specializing in labor and employment law to ensure your organization meets requirements.

Group insurance policies are underwritten by Sun Life Assurance Company of Canada (Wellesley Hills, MA) in all states except New York. In New York, group insurance policies are underwritten by Sun Life and Health Insurance Company (U.S.) (Lansing, MI).

© 2020 Sun Life Assurance Company of Canada, Wellesley Hills, MA 02481. All rights reserved. Sun Life Financial and the globe symbol are registered trademarks of Sun Life Assurance Company of Canada. Visit us at www.sunlife.com/us.

GAMSPPT-9363h

SLPC 30096 04/20 (exp 04/21)

HYLANT