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MERITAS LAW FIRMS WORLDWIDE

RETURN TO WORK COVID-19 FAQs

1. **During a pandemic, may an ADA-covered employer take its employees' temperatures to determine whether they have a fever?**

Generally, measuring an employee's body temperature is a medical examination. However, because the CDC, EEOC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions as of March 2020, employers may measure employees' body temperature. As with all medical information, the fact that an employee had a fever or other symptoms would be subject to ADA confidentiality requirements.

However, employers should be aware that some people with influenza, including the 2009 H1N1 virus or COVID-19, do not have a fever.

In addition, an employer may not require antibody testing before allowing employees to enter the workplace

2. **During a pandemic, how much information may an ADA-covered employer request from employees who report feeling ill at work or who call in sick?**

ADA-covered employers may ask such employees 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.

3. **If I feel uncomfortable about the safety precautions being taken at my workplace, can I opt to work remotely even though the expectation is that I will come in?**

A general anxiety or concern about feeling unsafe going back to work is, in most instances, not an acceptable reason to refuse to return to work. Employees are only entitled to refuse to work if they believe they are in imminent danger. Section 13(a) of the Occupational Safety and Health Act ("OSHA") defines "imminent danger" to include "any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act." OSHA discusses imminent danger as where there is "threat of death or serious physical harm," or "a reasonable expectation that toxic substances or other health hazards are present, and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency."

The threat must be immediate or imminent, which means that an employee must believe that death or serious physical harm could occur within a short time, for example, before OSHA could investigate the problem. This guidance is general, so employers should take all precautionary measures to make their workplace safe (see above section on Safety Measures) so that they can show that there is no threat of immediate and imminent harm.

However, if the employee is in a "vulnerable" category (preexisting conditions), they might be eligible for Emergency Paid Sick Leave depending on the specifics of the situation and whether they have been advised by a health care provider or are subject to a specific quarantine or isolation order because of their vulnerability. In addition, anxiety or similar issues could raise potential ADA issues and necessitate discussion of reasonable accommodation through the interactive process, including consideration of accommodations such as working from home (or additional leave time for an employee who may have already exhausted their EPSL).

The CARES Act has also created a new temporary federal program called Pandemic Unemployment Assistance ("PUA"). Under this program, PUA provides up to 39 weeks of unemployment benefits to individuals not eligible for regular unemployment compensation. Individuals are eligible for PUA benefits if they are otherwise willing and able to work except that they are unemployed, partially employed, or unable or unavailable to work because of the following COVID-19-related reasons:

- Their own COVID-19 diagnosis.
- Experiencing COVID-19 symptoms and seeking a medical diagnosis.
- Exposure to a household member diagnosed with COVID-19.
- Providing care for their family or household member who has a COVID-19 diagnosis.
- Being unable to work because they are providing primary care for a child or other household member who is unable to attend school or another facility that is closed due to COVID-19.
- Being unable to commute to work because of a quarantine imposed as a direct result of the COVID-19 public health emergency or a self-quarantine undertaken with the advice of a health care worker.
- Their work being closed as a direct result of the COVID-19 public health emergency.
- Being unable to begin work or reach the jobsite as a direct result of COVID-19.
- Becoming the major support for a household due to the death of the original head of household as a direct result of COVID-19.
- Being forced to quit their job as a direct result of COVID-19.
- Additional criteria set forth by the Secretary of Labor.

Please note that employees are not eligible for PUA if they can either telework with pay or are receiving paid sick days or other paid leave.

Once an employer brings an employee back to work, an employer cannot restrict an eligible employee's use of leave under FFCRA.

For these reasons, it is best to consult with employment counsel to walk through these issues before making a final decision. If there is not a FFCRA or other medical or disability issue, you may be forced with a choice of instructing the employee to return to work (and the potential that they might quit) or terminating the employment relationship.

4. Do we have to return an employee to work only to offer FFCRA leave or can we just continue unemployment?

If you have work for the employee to do, but are aware that they cannot come back due to a reason entitling them to leave under FFCRA or the CARES Act (childcare issues, COVID-19 diagnosis, or other reasons related to COVID-19), you should provide the employee a return to work date and "bring them back," rather than keep them on unemployment. You should explain to the employee that they have to return to work but that their situation may make them eligible for leave under FFCRA.

5. Can we test employees for COVID-19?

According to the EEOC's Technical Assistance Questions and Answers, an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus. As mentioned above, the ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity." Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take steps to determine if employees entering campus have COVID-19. That's because an individual with the virus will pose a direct threat to the health of others.

Consistent with the ADA standard, you should ensure that any tests you administer are accurate and reliable. For example, you may review guidance from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities. Make sure to check for updates, as this is a rapidly developing field.

You may wish to consider the incidence of false-positives or false-negatives associated with a particular test. Remember that accurate testing only reveals if the virus is currently present; a negative test does not mean the employee will not acquire the virus later. Keep in mind, also, that these are medical exams that must be conducted in a confidential way and the results need to be maintained in a separated medical file. Further, PPE should be provided to employees administering the test, as well as training on how to properly use the PPE. For those that may have an exposure to bodily fluids as part of their job, you should provide proper training on blood borne pathogens.

6. Will I be responsible for paying for my own testing or will it be covered my employer? What about PPE?

As for administering COVID-19 tests, the EEOC was silent on the issue of who bears the cost of such testing. When an employer requires an employee to go to a healthcare professional of the employer's choice for testing, the ADA requires the employer to pay all costs associated with the visit. But even if employees are tested by labs that are not of the employer's choosing, it is nevertheless recommended that the employer still pay for all costs associated with the testing. The outcome of the testing should be stored in a confidential manner, in a separate medical file.

Employers are required to make sure all their employees have masks. If employees do not have them, employers must provide them to the employee at no cost, or if they cannot obtain masks due to shortages, the employer must provide materials for the employee to make one.

7. Can an employer terminate an employee who refuses a COVID-19 test?

Yes, but the employee will likely be able to collect unemployment benefits. We recommend that employers first have a dialogue with the employee and explain the alternatives to termination. Employers should advise employees who are not comfortable returning to work, or who refuse to undergo the employer's required screening, that they can quit and explain the possible implications. The employer will provide them an unemployment package, but will check off the box that it was a voluntary quit. In that case, the employee may be unable to collect unemployment benefits.

8. I've heard that guidance is being given that certain individuals, either because of health conditions or age, may be offered or asked to teach remotely. Is this true?

Governor Lamont's executive guidance indicates that older employees should continue to stay home for the time being. However, the guidance does not require an employer to, in every circumstance, grant higher risk and 65+ employees' requests to work remotely rather than in the office. The guidance states that "[t]hose who can work from home should continue to do so." If an employer does not think an employee's position can be fulfilled remotely, then they can require an employee to return to work regardless of age. The employee will then have two options—either returning to their office or not returning to work and continuing to receive unemployment benefits, if eligible.

Being 65 or older and potentially high risk is not, in and of itself, a "disability" as defined. However, an employer may have an obligation to make a reasonable accommodation (such as allow older employees to telework or stay home) if the employee has additional conditions that constitute a disability as defined by the ADA—an impairment that substantially limits major life activity. Requests for accommodations should be evaluated on a case-by-case basis.

If the employee cannot return to the workplace and the employer believes that the employee's position cannot be performed remotely, then the employer needs to look at other possible options. One option is to assess whether the employee is eligible to take up to two weeks of paid leave under FFCRA if the school has fewer than 500 employees. If an employee has already taken leave under the FFCRA – either as part of EPSLA or EFMLA – they will only be entitled to the balance of leave permitted under those laws through December 31, 2020.

9. Will I be sent back to my same position when I return from EFMLA?

The EFMLA provides certain protections for employees who take such leave. When an employee returns from FMLA leave, he or she must be restored to the same job or to an "equivalent job." An employee is entitled to reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. The employee is not guaranteed the actual job held prior to the leave, but is guaranteed a job that is virtually identical to the original job in terms of pay, benefits, and other employment terms and conditions (including shift and location).

An employee returning from FFCRA leave is not protected, however, from a layoff or other employment actions that would have affected the employee, regardless of the leave. Employers with fewer than 25 employees and meet certain hardship conditions do not have to restore employees to the same positions held before taking emergency leave under FFCRA.

10. What specific protections do pregnant women have in light of COVID-19?

Being pregnant puts an individual at potential higher risk, so the same analysis for individuals over 65 applies (see answer to Question 8 above).

11. What should we do if one of our employees tests positive for COVID-19?

Employer should ask the infected employee to identify all other employees with whom they've been in "close contact" during the two days prior to symptoms. The CDC defines "close contact" as "a person that has been within six feet of the infected employee for a prolonged period of time." Recommendations vary on the length of time of exposure, but the CDC considers exposure of 15 minutes to be the operational definition.

1. Employers should inform all employees on the "close contact" list of their possible exposure to COVID-19 but maintain confidentiality of the infected individual as required by the ADA—unless the infected employee consents to using his/her name while communicating with other employees.
2. Most workplaces should follow the Public Health Recommendations for Community-Related Exposure and instruct potentially exposed employees to stay home for 14 days, telework if possible, and self-monitor for symptoms.
3. However, if your business is "essential," self-quarantine is not required for employees who do not have a confirmed diagnosis. Essential business employees who have had an exposure may continue working so long as they remain asymptomatic and adhere to the following practices prior to and during their work shift:
    - Pre-Screen: Employers should measure the employee's temperature and assess symptoms prior to them starting work. Ideally, temperature checks should happen before the individual enters the facility.
    - Regular Monitoring: As long as the employee doesn't have a temperature or symptoms, they should self-monitor under the supervision of their employer's occupational health program.
    - Wear a Mask: The employee should wear a face mask at all times while in the workplace for 14 days after last exposure. Employers can issue facemasks or can approve employees' supplied cloth face coverings in the event of shortages.
    - Social Distance: The employee should maintain 6 feet and practice social distancing as work duties permit in the workplace.
    - Disinfect and Clean work spaces: Clean and disinfect all areas such as offices, bathrooms, common areas, shared electronic equipment routinely.

12. Are employers required to participate in contact tracing efforts?

Connecticut's reopening plan provides that businesses are required to maintain a log of employees on the premises to support contact tracing efforts in the event that someone who has been in the workplace contracts COVID-19. The reopening rules also require employers to perform daily health checks on its employees by asking employees if they are experiencing any of the symptoms of COVID-19.

Although ContaCT will be performing its own contact tracing efforts in Connecticut, employers are encouraged to do their part if and when an employee or customer who had recently been in the workplace tests positive for COVID-19. In such an event, supervisors may be interviewed and the business may be asked to provide security footage or business logs to determine close contacts.

13. Should we require individuals to sign a liability waiver before coming into our business?

In the light of COVID-19, many employers have considered requiring individuals to sign liability waivers to shield themselves from potential liability in the event that someone contracts COVID-19 in its place of business.

Given the unprecedented nature of the COVID-19 pandemic, no courts have yet evaluated liability waivers in this context. This makes it almost impossible to determine with certainty how courts will evaluate these waivers in the future. Nonetheless, a carefully-drafted liability waiver may be considered by all businesses as a matter of caution and a potential layer of added protection from lawsuits. Waivers can be a proactive step for businesses to begin reopening with confidence. However, each business must consider the potential impact that requesting such waivers may have upon its employees and patrons in terms of good will and the willingness to work for or patronize an establishment requesting such an agreement. Depending upon the type of business, the ability to request such waivers may also be difficult.

Generally, liability waivers are a contract between a business ("Releasee") and a "Releasor" who in some way comes into contact with the business. The Releasor could be a customer, employee, or student. By signing the contract, the Releasor gives up rights – usually the right to sue the Releasee – in exchange for the right to come into contact with the business. The scope of the rights that are waived are determined by the contract.

The most important aspect to drafting a waiver is to ensure that the Releasor understands what rights are being released. This information must be clear and easy to read. In the age of COVID-19, any potential exposure or risk of infection should be expressly recognized in the waiver.

The next step is to ensure that your state will recognize the scope of the waiver (i.e., allow the Releasor to surrender certain rights). This is largely a state by state evaluation. Connecticut courts generally take a narrow view of such waivers, and have held that a liability waiver for a Releasee's negligent conduct is void against public policy in the recreational context. Indeed, any contract that violates public policy is void. Connecticut has also held that, in the employment context, an employee's release of injuries as a result of the employer's negligence is void as against public policy.

State legislatures may step in at some point in the future and render liability waivers unnecessary by passing legislation which would indemnify or provide businesses with immunity for COVID-19 related injuries suffered by employees or customers. In Connecticut, the Higher Education Subcommittee recently recommended that the state legislature pass legislation providing immunity for all colleges and boarding schools that reopen in the fall. The Public Readiness and Emergency Preparedness ("PREP") Act, also provides liability protections (except for willful misconduct) for those that undertake certain "countermeasures" to combat COVID-19. One of the stated reasons for a government's reluctance to provide blanket immunity for businesses through legislation, however, is the potential that such protection will serve as a disincentive for businesses to comply with hygiene and other reopening requirements.

14. My child's school or place of care has moved to online instruction or to another model in which children are expected or required to complete assignments at home. Is it "closed"?

Yes. If the physical location where your child received instruction or care is now closed, the school or place of care is "closed" for purposes of paid sick leave and expanded family and medical leave. This is true even if some or all instruction is being provided online or whether, through another format such as "distance learning," your child is still expected or required to complete assignments.

15. An employee has become ill with COVID-19 symptoms and decided to quarantine for two weeks, and then return to work. They did not seek a medical diagnosis or the advice of a health care provider. Do they get paid for those two weeks under the FFCRA?

Generally no. If you become ill with COVID-19 symptoms, you may take paid sick leave under the FFCRA only to seek a medical diagnosis or if a health care provider otherwise advises you to self-quarantine. If you test positive for the virus associated with COVID-19 or are advised by a health care provider to self-quarantine, you may continue to take paid sick leave. You may not take paid sick leave under the FFCRA if you unilaterally decide to self-quarantine for an illness without medical advice, even if you have COVID-19 symptoms. Note that you may not take paid sick leave under the FFCRA if you become ill with an illness not related to COVID-19. Depending on your employer's expectations and your condition, however, you may be able to telework during your period of quarantine.

For further information on the implications of COVID-19 on business, employment or education law related questions, please contact Christopher L. Brigham, at (203) 786-8310 or cbrigham@uks.com, Andrew L. Houlding at (203) 786-8315 or ahoulding@uks.com, Valerie M. Ferdon at (860) 548-2607 or vferdon@uks.com, or Jeffrey E. Renaud at (860) 548-2629 or jrenaud@uks.com.

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