

## **When a Sick Employee Comes to Work**

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In response to the current virus situation, most employees are at home for a variety of reasons like their place of work being closed, they are sick, they are caring for someone who is sick, or they cannot get to work. As the current restrictions are lifted, employers should guard against premature re-entry into the workplace by employees who are sick or may be carriers of the virus. So, some enhanced screening and observation is in order.

Certain employees may lack judgement about when to stay home sick, especially when that means they won't be paid. In some cases, and certainly while COVID 19 is active, employers may need to step in and send an employee home. How this is done can have legal, privacy and morale implications. As we all know, COVID 19 impact on the work place and governmental agencies response is a fluid and dynamic situation. Legal advice on such issues will be constantly changing as the pandemic changes. There is no one size fits all solution to any of these issues and how a particular employer responds is subject to multiple variables. Given these practical concerns, this article offers issues to consider as employees begin to return to work under various governmental guidelines.

### **The EEOC Supports Excluding Sick Workers**

On March 19, 2020 the U.S. Equal Employment Opportunity Commission (EEOC) issued guidance for employers on handling the consequences of COVID 19 in the workplace. It took the position that the protections for disabled employees provided by the ADA do not prevent employers from following the recommendations of the Centers for Disease Control. That basic recommendation is that employees who show symptoms of this communicable disease should be required to leave, since they pose a "direct threat" to themselves and co-workers.

### **Reinforce "Stay at Home When Sick"**

Announce to all employees the employer's policy or, even stronger, rule, that employees are not to come to work when sick for their own good and the protection of other employees. Add that a violation of this standard can result in discipline.

### **Detailed Inquiry Is Not Appropriate**

When an employee is coughing, sneezing, exhibiting visible perspiration and shortness of breath or some combination of these, there is no need for questioning. The employee is sick and should leave. Asking questions about contacts with others may be appropriate but a detailed conversation about onset, treatment or other health conditions, such as underlying asthma, are not necessary. Once the employer has enough visible evidence of illness, the decision to take that employee out of contact with other workers should be made. The protection of the Family Medical Leave Act and its local counterparts should be considered as should the benefits of the new legislation.

An employer may wish to ask employees who have cared for a sick person in the home to "quarantine in place" for the current estimated 14-day incubation period. However, there is presently no guidance on this point from the Federal Government.

### **Non-professional Testing Is Not Useful**

Some employers have determined that screening of employees might be useful. Although the EEOC has stated that it is okay to take employees' temperatures, we strongly recommend against it. The EEOC has

also stated licensed healthcare providers are competent to determine whether an employee is ill with this virus, another illness, a pre-existing condition or another explanation. Since many people exposed to this virus are carriers or perhaps ill with few or virtually no symptoms, an employer should not make unqualified assessments of apparently healthy employees. Have a professional make these evaluations. Remember, an employer can require an employee who is returning from sick leave to provide a physician's verification of good health.

### **Discretion is Recommended**

Observation of employees by managers is prudent at this time. If an employee is exhibiting signs of this virus or is otherwise visibly ill, an HR person should be designated to receive that information so that decisions can be consistent. If the decision is made to send the employee home, it should be done in a closed door witnessed two-person conference. Hopefully, there is a large room that can serve this purpose and maintain appropriate distances. Invite the employee to the room, inform the employee and provide a discrete path of exit.

### **Informing Co-Workers**

There is tension between the privacy rights of an employee kept home or sent home because of serious communicable disease and the right of employees who may have had contact with that person to be informed of the possibility of exposure. Since potentially exposed co-workers may now be carriers and could expose other employees, families and others, getting tested and perhaps taking a 14-day absence could be necessary.

If a potentially exposed co-worker isn't told of the exposure, these precautions will not be taken. Therefore, we advise that, on balance, these privacy concerns should be subordinate to the need to know. If a potential exposure has occurred in the workplace, the employees in contact with the possibly positive employee should be told that they may have been exposed, without identifying the employee by name. That isn't a perfect solution, since the employer may not know of all contacts. In such cases, it is appropriate to ask the potentially sick employee who to notify.

### **Universal Standards and Practices**

Apart from dealing with an individual employee who may pose a health risk to co-workers or customers, several agencies have provided advisory guidelines on their websites for employers in regard to their appropriate response to COVID 19 that are applicable to all workers.

1. The EEOC has clarified its view of the application of the Americans with Disabilities Act by emphasizing the duty of an employer to protect employees and customers by excluding sick employees from the workplace. See "[United States Equal Employment Opportunity Commission: What You Should Know About COVID-19 and the Americans with Disabilities Act,](#)" dated April 23, 2020.
2. The Occupational Health and Safety Administration offers website guidance, based on 29 CFR 1910, Part I and 654(a)(1) to strongly encourage the use of respirators, using protective barriers, equipment and clothing, regular cleaning and disinfecting the workplace and maintaining

distances between workers. See "[OSHA COVID-19, Guidance on Preparing Workplaces for COVID - 19](#)" OSHA Publication 3990-03 2020.

3. The Centers for Disease Control is recommending routine screening for all employees (temperature check) asking all employees to report if someone at their home has become sick, greater flexibility in working hours and offering more teleworking, as well as informing employees to refrain from entering another employee's workspace or using their phone or computer. See "[CDC Coronavirus \(COVID19\), Businesses and Workplaces: Interim Guidance for Businesses and Employers, March 21, 2020.](#)"

A review of these sources leads to the conclusion that employers should do everything reasonably possible to prevent the spread of this disease. Apart from the benefits of regulatory compliance and the normally available defenses for employers under workers compensation law, an employer does not want to appear lax or unconcerned about employee welfare should employees become sick at work. With all the anxiety and damage this disease is causing, being seen as uncaring is unlikely to lead to a good outcome.

