

EMPLOYER RESPONSE TO HEALTH OUTBREAKS

This FAQ was developed to assist employers in preparation and response to the spread of illnesses such as the novel flu, measles, or other related illnesses and the risk presented to the workplace.

As with any emergency situation, employers must be prepared to respond to absenteeism and implement plans to continue the essential business functions. Employers are encouraged to seek guidance from the [CDC](#), [World Health Organization \(WHO\)](#), or state or local health departments for up-to-date information related to the virus and recommended quarantine or travel restrictions.

Eligible members are encouraged to call the Archbright HR Advice and Legal team with specific questions, or to seek clarification when necessary.

FREQUENTLY ASKED QUESTIONS

WHAT SHOULD AN EMPLOYER DO UPON LEARNING THAT SOMEONE IN THE WORKPLACE HAS CONTRACTED CORONAVIRUS, MEASLES, OR OTHER RELATED VIRUS OR ILLNESS?

Contact the CDC or state and local health department immediately. Clean and disinfect the workplace (you may wish to contact a professional cleaning service) and inform your employees of potential signs and symptoms, offering employees the option to expense their medical test for the virus.

WHAT INFORMATION MUST AN EMPLOYER SHARE WITH ITS WORKFORCE IF AN EMPLOYEE HAS CONTRACTED A VIRUS OR ILLNESS SUCH AS MEASLES OR CORONAVIRUS?

Employers must tread lightly here. Do not disclose the name of the employee. The employer must be cautious not to directly or indirectly disclose the confidential medical information of the infected employee, or expose that individual to potential harassment or other adverse action in the workplace, e.g., name-calling, shunning, etc. Even if not a disability, confidentiality provisions of the Americans with Disabilities Act (ADA) may apply or there may be situations that would be covered by the Health Insurance Portability and Accountability Act (HIPAA).

An example of communication to the workforce may include: "On _____, 2020 it came to management's attention that one of our employees has been infected with [virus or illness]; we are following recommended medical guidelines. We urge all employees to take precautions as set forth in the Center of Disease Control website at <https://www.cdc.gov/>. If you show symptoms of the illness, you are not to come into work and must call in and report this to [Employer Representative]. If you have any questions, please contact [Employer Representative]."

CAN THE EMPLOYER DIRECT EMPLOYEES TO STAY AT HOME AND AWAY FROM THE WORKPLACE IF THEY ARE EXPERIENCING REPORTED SYMPTOMS OR ARE CARING FOR SOMEONE WITH THE VIRUS OR ILLNESS?

Yes. People are contagious at the onset of these symptoms. It is critical that an employee experiencing symptoms or known to be exposed to the disease, stay home for a medically recommended period and only can return to work upon release from a medical provider.

Of course, the employer must enforce this consistently among the workforce to avoid claims of discrimination and inconsistency. For example, if a particular illness is believed to have more cases in a particular country, then the employer may not apply its policies only to people who are or appear to be from that country.

IF AN EMPLOYER REQUIRES EMPLOYEES STAY HOME DUE TO A VIRUS OR ILLNESS SUCH AS THE MEASLES OR CORONAVIRUS, MUST THE EMPLOYEE BE PAID?

The actual issuance of pay will vary from employer to employer, and depends upon the full circumstances of the employer's particular workplace, i.e., the availability of job benefits like sick leave, PTO, vacation, whether the employee is exempt or non-exempt, short-term disability plans, etc.

Wage and hour laws only require payment to non-exempt employees for actual services and time worked; this applies even when the employer unilaterally keeps the employee from coming into work. If the employee has paid leave available, such as sick leave or PTO, the employer may be obligated to allow the employee to use and apply such compensation to the absence. State and local law and ordinances may also be implicated and may entitle the employee to paid time off. Further, the employer should review any collective bargaining agreements that may impose differing payment obligations for unionized employees. An employer may be obligated to pay an exempt employee for time missed if the employer unilaterally and affirmatively requires the individual to stay at home.

WHAT IF AN EMPLOYEE REFUSES TO COME TO WORK BASED ON FEAR OF CONTRACTING THE VIRUS OR ILLNESS?

Employees have a right to refuse to report to work if they reasonably fear doing so would present danger to their safety and health. The employer may not retaliate against the employee under these circumstances. However, there is no requirement to pay the employee for the absence unless the employee is working remotely and/or paid time off is available.

WHAT LEAVE LAW PROTECTIONS MAY APPLY?

Employees may be eligible for leave under federal, state, or local law. The Family and Medical Leave Act may apply for eligible employees. Other protections may include ADA, Washington Family Care Act, Washington's Paid Family Leave Act, Oregon Family and Medical Leave Act (OFLA), and protected sick leave under Washington and/or Oregon law may apply for an employee and family member or if school or daycare closure is mandated by a public official. If the employer is notified that another employee has a medical impairment that compromises their immune system in such a way that exposure to a virus may create a "direct threat" of harm to the employee, it may also be necessary to engage in the interactive process under the ADA to determine the nature of the employee's medical status and need for accommodation.

SHOULD AN EMPLOYER REQUIRE AN EMPLOYEE UNABLE TO WORK DUE TO THE VIRUS OR ILLNESS USE THEIR PAID SICK LEAVE?

Employers should follow their paid sick leave or PTO policies. Employers in Washington should be mindful that the Department of Labor & Industries (L&I) states that paid sick leave is a worker's right under the State's paid sick leave requirements, which only an employee may authorize the use of. Under this interpretation, an employer may not force or automatically apply an employee's accrued paid sick leave. If the employee requests the use of accrued paid sick leave, then the employer could apply it.

SHOULD AN EMPLOYER DESIGNATE FMLA WHEN AN EMPLOYEE IS UNABLE TO WORK DUE TO THE VIRUS OR ILLNESS?

If you are a covered employer, clearly eligible employees with the virus or illness and those with a child, spouse or parent infected by the virus or illness are entitled to FMLA. However, if an employee has no symptoms, but only was exposed to the virus or illness, an employer should not charge any of work missed against the employee's FMLA entitlement.

WHAT IF AN EMPLOYEE INSISTS ON COMING TO WORK EVEN AFTER THEY'VE BEEN SENT HOME PREVIOUSLY BECAUSE THEY HAVE THE VIRUS OR ILLNESS?

If an employee with the virus or illness is instructed to stay home until their physician releases them, that is perfectly permissible. Their presence in the workplace can put many employees at risk, endanger employees who have complicated medical situations, and affect business operations. Make it very clear to all employees that if they show symptoms of the virus, they are not to come into work but should call in and report this. In addition, many healthcare entities are asking people who have symptoms to call first and not expose other patients by going into a practice. Any employee who knowingly ignores this admonition may need to be addressed through disciplinary procedures.

CAN WE INSIST ANYONE EXPOSED TO A PANDEMIC ILLNESS (I.E., EMPLOYEE IS CARING FOR A FAMILY MEMBER WITH THE VIRUS OR ILLNESS) GET A MEDICAL EXAM BEFORE RETURNING TO WORK?

Not currently. Under the ADA, employers can make disability-related inquiries or require medical exams only if they are job-related and consistent with business necessity. Generally, if the employee poses a direct threat due to the medical condition, a medical exam would be permitted. Whether an outbreak rises to the level of a direct threat is up to the CDC or public health authority to determine. The EEOC advises, "During a pandemic, employers should rely on the latest CDC and state or local public health assessments. While the EEOC recognizes that public health recommendations may change during a crisis and differ between states, employers are expected to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location, and to make reasonable assessments of conditions in their workplace based on this information."

MAY AN EMPLOYEE FILE A WORKER'S COMPENSATION CLAIM IF THEY CONTRACT A VIRUS OR ILLNESS SUCH AS MEASLES OR CORONAVIRUS AT WORK?

Determining whether an illness is compensable under workers compensation laws will depend heavily on the facts of each specific case. However, in general, illnesses are not covered by workers compensation laws unless there is a direct connection between the employee's work activities and the exposure to the illness.

CAN THE EMPLOYER MANDATE VACCINATION (IF ONE IS AVAILABLE)?

There are no specific laws that preclude an employer from requiring employees to get a vaccine. However, there are privacy, disability, and religious discrimination considerations regarding vaccinations that must be taken into account. Additionally, if employees are represented by a union, mandating vaccinations needs to be bargained with the union. Before mandating vaccinations, employers are encouraged to seek legal counsel.

To encourage employees to seek vaccination voluntarily, employers can communicate that vaccines are safe and effective, with links to the CDC information. Employers may also offer to arrange onsite vaccinations at the workplace and/or pay for employee vaccinations.

DISCLAIMER: The information in this document is provided for guidance purposes only. It should not be construed as legal advice and is not intended to be a substitute for legal counsel. If you are a Silver or Gold member, please contact us to obtain advice from the Archbright legal team.

SAMPLE MEMO TO EMPLOYEES

To: All Employees

Date:

We are very aware of the [health outbreak, i.e., coronavirus] and are watching the [CDC website as well as the state/local Department of Health's website] for information and will provide additional information if and when it is needed.

This is a good reminder to always practice good health and hygiene practices:

- Stay home when sick – and if you arrive at work sick, you will be sent home
- Avoid close contact with people who are sick
- Avoid touching your eyes, nose, and mouth
- Cover your cough or sneeze with a tissue, then throw the tissue in the trash

[Employer Name] provides workplace hygiene products throughout the office and encourages every employee to help prevent the spread of germs by using the products. Kleenex tissues, disinfecting Clorox wipes, and hand sanitizer bottles are provided throughout the work area in common work locations. Please wipe down common areas and meeting rooms after each use. All used tissues or wipes should be thrown in the trash immediately.

Wash your hands often throughout the day with soap and water, especially before eating. Ensure you lather your hands and scrub between the fingers, under the nails as well as the front and back of the palms for at least 20 seconds before rinsing. An alcohol-based hand sanitizer with at least 60% alcohol should only be used when soap and water are not available.

Please work closely with your manager if you need flexibility to care for your own illness, a family member's illness, or school/daycare closure. Regardless of the type of illness, if you are showing any signs or symptoms of a respiratory infection, you should practice social distancing to help prevent getting others sick. Stay home and seek medical care; refer to [Employer Name] PTO and sick leave policy and communicate with your Manager and HR. Do not return to work until you are symptom free and/or released by your doctor.

Please contact [Employer Representative] if you have any questions.