Travel Policies, Payroll, and Leave - COVID-19 Questions That Just Won't Go Away

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During the COVID-19 pandemic, questions regarding when employees may or may not travel, how to assess temperature checks at the front door, and a wide array of other issues have continued to crop up. Whenever an employer feels like they've gotten their arms around the appropriate answers, circumstances change, with states opening and closing, infection rates spiking, and politicians continually issuing new direction and orders. However, regardless of the day or the noise, some basic questions remain the same.

What about travel?

If your governor, mayor, or other state authority has indicated that your state, county, or city is "open" it can be more difficult to limit personal travel for your employees. However, basic safety and OSHA considerations necessitate that you talk with employees before they return to the workspace after personal travel.

Reasonable inquiries about travel include:

- Date
- Location
- Form of transport used (planes, trains, buses, cruise ships, and other mass transit are higher risk)
- High-risk activities (e.g. volunteer work in a nursing home with a significant number of COVID-19 cases)

Other factors to consider include a travel companion testing positive for COVID-19, staying at a resort where multiple cases have been logged, or similar issues. Particular attention should also be paid to whether or not they have chosen to travel into a state with a high COVID-19 rate or, in violation of governmental authority, traveled in a "closed" state. These can be routinely checked on the CDC and Iowa websites.

Employees with high-risk factors such as plane travel to a state which is currently closed or experiencing a significant spike should be prohibited from returning to the workspace for a minimum of 14 days and 72 hours symptom-free.

What about travel for work?

Employers bear a heightened obligation to ensure the safety of employees, particularly when assessing travel for work during the COVID-19 pandemic. Assessment factors should include:

- Travel location
- How contact will occur

- What safety measures can be put into place
- An appropriate process for contact tracing

Contact tracing documentation should be maintained in order to minimize litigation risk. The statute of limitations in Iowa for a personal injury claim is two years, so we generally suggest keeping documentation of this type for a minimum of three years. While contact tracing apps may be used, the type of consent and security policies needed vary by state.

What about taking your temperature at the door?

In Iowa, it should be noted that there are two different sets of guidelines in relationship to temperature - one set for healthcare facilities and another for non-health-related entities.

If you are in a healthcare facility such as a hospital, long-term care facility, or something similar, the Governor has not lessened the restrictions regarding how and when temperatures should be taken or symptoms assessed and recorded. Healthcare industry guidelines include posting a person at the door to take and record temperature and to assess potential symptoms. Multiple facilities have received fines and citations for failure to meet these stringent guidelines. Note, unlike other industries, *Iowa healthcare facilities cannot rely on self-certification.*

For other industries, the Governor has relaxed the restrictions regarding temperature and this remains a question of generalized assessment of safety and security. The decision to take temperatures (or have employees self-certify temperatures, exposures, symptoms) is workplace dependent and currently remains recommended for all industries.

How do I store this stuff?

If they are being kept, temperature logs and notes from discussions relating to symptoms should be treated as employee health records and maintained in your standard employee health file. Employee health files are *separate* from the standard personnel record and have additional confidentiality protections. Any customer or vendor health records would be kept separately.

The length of time you should keep such records may depend on your industry as well as whether you believe the records will be useful in mitigating future liability concerns. In healthcare or other high-risk industry, you must be able to produce to DIA/DHS or other governing agencies, documentation that you have done the appropriate temperature and symptom checks in order to show compliance. To mitigate issues of personal injury based on the statute of limitations, keep these records a minimum of two years although three years is recommended to avoid accidental early destruction of documentation.

Employers in other industries may choose to use the same litigation risk assessment, however, those not in high-risk categories could choose to either not record such documentation or to destroy it on a shortened timeframe such as every week or 30 days based on their own individual and industry risk assessment. *This is something you should discuss specifically with your legal counsel absent other statutory requirements.*

Is every COVID-19 case OSHA recordable?

No. Our April 23 post reviews this in further detail, but OSHA has periodically reviewed its guidelines, issuing new amendments and changes to address whether or not COVID-19 cases are recordable on an employer's 300 log. Many employers are not required to keep 300 logs and that assessment does not change during the COVID-19 pandemic. High-risk employers such as healthcare entities, hospitals, clinics, and long-term care facilities typically must record COVID-19 exposures as part of their 300 logs. Moderate to low risk industries are required to assess the likelihood of workplace exposure but are not automatically required to log COVID-19 cases on the 300 log.

What can I do when my employee keeps exposing herself to COVID-19?

As the COVID-19 pandemic has gone on for a longer period than many anticipated, some employers are experiencing a problem with employees who simply don't care or don't believe that the pandemic is a significant safety issue. This includes employees who routinely meet or interact with others they know have tested positive for COVID-19, employees intentionally exposing themselves as part of a "COVID-19 party," and similar issues.

Employees who intentionally expose themselves to COVID-19, particularly if that exposure is in the hope of receiving paid time off, unemployment compensation, or something similar, are subject to counseling and review of their conduct and in certain egregious circumstances, could be disciplined or terminated.

What do I do if an employee has been exposed but doesn't have any symptoms?

The CDC indicates at this time that a person who has come into close contact with anyone known to have COVID-19 should remain at home, practice social distancing for 14 days, and before returning to the workspace, be at least 72-hours symptom-free. Those with symptoms should follow the recommendations of their medical care provider, social distance, and stay away from work.

Is it a violation of employees' Constitutional rights to require that they wear a facemask?

No. If you are a private employer, the Constitution doesn't even come into play. Private employers can impose safety rules and regulations within your company without any Constitutional issue or concern. The Constitution could potentially apply to public employers, however, reasonable safety requirements and restrictions are not considered to violate a constitutional principle even when there may be other factors at play such as religious or disability accommodations.

Reasonable rules and requirements are commonly imposed by governments and employers, even when the employee may or may not recognize the risk. Under state law, you are required to stop at a stop sign even if no other traffic is coming. Failure to do so will result in fine and citation - masking is not all that different.

Can I discipline an employee for refusal to wear a mask, wash his or her hands, or otherwise follow safety guidelines?

Absolutely. If you have determined that certain guidelines are necessary for the safety of your employees, you are required to enforce those guidelines reasonably and consistently. Choosing not to enforce the guidelines that you have set for the basic safety of your employees or that are otherwise set by governmental entities indicates a compliance failure.

Should I have all of my employees tested?

Let's first clarify the two different types of tests. One is to determine whether someone has an active infection and the other is to determine whether or not a person has been exposed - an antibody test. The CDC does not recommend that employers use antibody tests to determine which employees can work and the EEOC does not allow you to require antibody tests.

Certain industries, such as healthcare, may be required to test for active infections pursuant to the terms of various contacts, grants, or payment programs such as CMS. Absent specific state, industry, or contract requirements testing is not required for your workplace as a whole.

As for the question of should you test if not required to, it seems unlikely that testing will provide significant additional protection from any claims given the limits of the testing process and delays in test results.

Should I have everybody sign a consent form when they return to work?

The question of a consent form should be carefully addressed with your legal counsel as there is no one size fits all answer to this question.

My business uses a fair number of volunteers can I bring them back now that our state is open?

The risk profile for volunteers will need to be assessed in the same way that you would assess any other risk profile during the pandemic. Additionally, special consideration should be given to bringing back minor volunteers as the rules and regulations regarding potential liability for minors differs from that of adults. While OSHA does not apply to volunteers, the basic safety requirements or OSHA standards would likely be applied as the standard in any volunteer's claim that they have been injured while volunteering.

With the length of time that the pandemic has gone on, our employees have now exhausted their Emergency Family and Medical Leave due to school closures, their Emergency Sick Leave due to quarantine for basic exposures, and their unemployment compensation. What next?

It is not clear what will occur at this time. Many of the benefits that we saw, whether it was the FFCRA or the Payroll Protection Plan, were federally-based and funded. At the current time, no new funds have been made available and there has been significant disagreement between the House and the Senate as to what, if any, additional action will be taken. This question remains a wait and see.

The Big Picture

If your head is spinning with changing guidance, you're not alone. Each week brings new guidance from governmental agencies as they try to open the economy with the least impact on public health.

However, there are constants you can keep in mind - employers can set safety guidelines and enforce them and you should always keep your eye on the current health situation in your area, adapting your policies to fit the moment. We may not all have an M.D. or Ph.D. in immunology, but we're going to feel like it at the end of this!

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