



Thank you for attending SHRM's webcast on returning to work in Texas. You may now view this webcast on demand.

COVID-19 – Bringing Texans Back to Work: What Employers Need to Know

Program Date: May 5, 2020

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Following are the Questions & Answers from the live webcast.

Answers provided by Society for Human Resource Management (SHRM)

Question: Does SHRM have a template for an infectious disease preparedness and response plan that we can utilize to tailor to our workplace?

Answer: *Here are a few other resources that could also be helpful:*

- *How to Handle Communicable Diseases in the Workplace*
<https://www.shrm.org/resourcesandtools/tools-and-samples/how-to-guides/pages/communicablediseasesinworkplace.aspx>
- *Managing Through Flu and Other Epidemics in the Workplace*
<https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/managingfluandepidemics.aspx>
- *Managing Through Emergency and Disaster*
<https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/managingemergencyanddisaster.aspx>

Question: Does SHRM have templates on these policies at this point?

Answer: *You can find several COVID-19 related templates here:
<https://www.shrm.org/ResourcesAndTools/tools-and-samples/hr-forms/Pages/default.aspx>*

Answers provided by Dustin A. Paschal, JD, Partner – Simon|Paschal, PLLC

Question: What happens when an employee does not wish to return to work for fear of COVID, but their position's essential duties cannot be performed while remote working. Should they be terminated or moved to another position? We are not a small business, so we don't apply to the FFCRA act.

Answer: *You should consult your legal counsel before taking any final action to terminate, but assuming (1) you comply with the OSHA guidance and state guidance on reopening your workplace and (2) the employee is not protected under the ADA such that he/she would need a reasonable accommodation, you likely would be able to require the employee to return to work or face a change in position or termination.*

Question: Are there guidelines for how far apart cubicles need to be or if they require a minimum wall height, considering social distancing?

Answer: *There are no guidelines other than the 6 feet rule of thumb with respect to distance. That said, the further apart you can make things and the more barriers you can provide, the better your claim that the workplace is safe.*

Question: My question is not sure it pertains to this webinar but want to ask. We have an employee who tested positive for COVID-19. The employee was hospitalized and released last week. As an employer what are we required to ask of the employee before they come back to work.

Answer: *There are no requirements for what you must ask. But the safest approach is to confidentially inquire about the date of their last symptoms, inquire whether they have any symptoms currently, and whether they are or have been around anyone since their hospital release that has either tested positive or exhibited symptoms.*

Question: Are municipalities and government employers exempt from OSHA?

Answer: *In Texas, OSHA does not apply to state and local government employers.*

Question: Can an employee who gets injured at home while working from home file a Workers' Comp claim? If so, how can this claim be mitigated by the employer?

Answer: *Yes, the employee can. The employer is best to have clearly defined policies in place for workers working from home, which include a defined workspace and set hours of work. Periodic checks by the employer also help.*

Question: Do you recommend we post the 10 Steps at our local restaurants?

Answer: *I think it is beneficial to post it with your other employment posters.*

- Question:** Is it permissible to close our office kitchen where the refrigerator, water cooler and coffee maker are located?
- Answer:** *Yes, you can close that area. A better approach, though, may be to provide hand sanitizer and hand washing in that area and implement a policy that states the area may only be used for retrieving items and that gathering or loitering in the area is prohibited.*
- Question:** Can COVID-19 testing be included as part of the pre-employment process, similar to drug screens?
- Answer:** *Right now, it can be. You should monitor the EEOC guidance, though, because that could change.*
- Question:** Would it still be considered discrimination if you were to bring back those under the age of 65 but still pay those over the age of 65, even though they are still working at home or just asked not to come in, earning their regular rate of pay?
- Answer:** *It likely would be considered age-based discrimination but there would be no damages since the employees at home were not suffering job loss or reduction in pay. However, someone over the age of 40 but under the age of 65 could claim that he/she was treated differently based upon age.*
- Question:** What if you furlough an employee versus laid off? Can you still fill the position with a new worker?
- Answer:** *If the furloughed employee is still on your payroll (i.e., furloughed in the sense of on leave without pay), you can't simply hire a new worker to fill the position without first terminating the employment of the furloughed worker. You would want to make sure you're not making that decision based on a discriminatory reason.*
- Question:** I see in the Ten Steps lists, it says "encourage those who are sick to stay home." Is it possible to make it a requirement that they stay home and not have any issues?
- Answer:** *Yes, you can require sick employees to stay home. You will just want to comply with your PTO policies and the FFCRA, as applicable, with respect to any compensation owed.*
- Question:** Is someone in a high-risk category, i.e. underlying health conditions, that are at higher risk for COVID19 considered a protected disability?
- Answer:** *Right now, the EEOC has not indicated that COVID-19 is a protected disability. That said, the underlying health conditions that make the person higher risk may themselves qualify as a protected disability.*
- Question:** Can we send out a survey asking employees what age their children are and do they have childcare arranged for the summer?
- Answer:** *I would not send out a survey but instead address each individual situation as it arises.*
- Question:** Are employers allowed to make social distancing a choice in the workplace or is it required?
- Answer:** *There is nothing that currently requires it, but OSHA guidance indicates you should comply with it as much as possible.*

Question: Can you require non-essential workers to return to work if they don't feel comfortable?

Answer: *Assuming there is no government order prohibiting you from having the employee return to work, and assuming you are complying with OSHA guidance to provide a safe workplace, and assuming the employee is not requesting a reasonable accommodation based upon a protected disability, then you likely could require the employee to return to work. But you should consult with your lawyer on the specifics first.*

Question: Masks: What about Dallas County ordinance?

Answer: *The Dallas County Ordinance requires masks, but the Governor's Order indicates that Dallas County cannot penalize anyone for violating the order. So, it is a requirement with no enforcement ability.*

Question: We have tenants in our building. Can we require them and their visitors to wear masks?

Answer: *If you own the building, you certainly can require that anyone that comes into the building must wear a mask.*

Question: Can employees be mandated to wear masks while at work?

Answer: *Yes, employees can be mandated to wear masks. That said, if an employee seeks a reasonable accommodation not to wear a mask based upon a legally protected category (i.e., most likely disability), you might have to accommodate the employee. You should look at that specific situation and consult your lawyer.*

Question: How should employers handle break room refrigerators and coffee stations that are normally utilized by staff?

Answer: *I would indicate that they are open for storing and retrieving items but not for gathering. And make sure hand washing and hand sanitizer is available in that room.*

Question: If masks are required, is the employer responsible for providing them?

Answer: *There is no clear guidance on whether employers are responsible for providing them. The only law that would indicate so is OSHA, but most legal folks believe that would not cover simple face coverings. Although County Orders may require employers to provide masks, the Governor has indicated those cannot be enforced.*

Question: If we DO require masks in the workplace, are we required for this new PPE to meet OSHA standards?

Answer: *There is debate over what constitutes PPE for purposes of OSHA standards to pay for masks. It would appear that simply face covering masks would not be included, but true N95 style masks might be.*

Question: Can they stay home if their spouse/housemate may have been exposed due to work?

Answer: *I'm assuming your question is along the lines of can you require the employee to come to work and absent a government order or healthcare order to quarantine, you can. Although in that situation I would recommend you not.*

Question: What qualifications for temperature takers are requires?

Answer: *I haven't seen any qualifications listed anywhere but since it is a confidentiality issue, I would leave that to a designated HR personnel employee.*

Question: Should employers maintain the screening record (general questions) of employees if required to screen prior to start of work?

Answer: *Yes, I would maintain this but keep it confidential and in a file separate from the personnel file.*

Question: What is a timeline to think about before getting to the point of laying off an employee that won't return to work out of fear? And, if they still get to apply and are eligible for unemployment, does this not fall under the category of turning down a job offer which would jeopardize their eligibility?

Answer: *I can't give you a specific timeline because each situation is different. Unless they meet one of the six delineated reasons for refusing to return to work, they would not be eligible for unemployment.*

Question: Can an employer terminate an employee for refusal to come to work if employment is at-will?

Answer: *That certainly is possible, but you would need to consider whether you have followed OSHA guidance to provide a safe workplace and whether or not the employee may need a reasonable accommodation.*

Question: Is there any training out there to teach us how to take temperatures?

Answer:

Question: Who should take the temperatures for employees?

Answer: *Since you need to maintain the confidentiality, I would have a designed HR team member do it.*

Question: What symptoms would an employee have to have in order to require they get tested? For instance, we have had some employees that just have a fever but don't have any of the other symptoms.

Answer: *That really is your choice. There is no guidance on when or how to test your employees.*

Question: We are considering opening up our office to employees that want to come into the office. We will identify a period of time for this phase of optional work from home/in-office work. If people feel more comfortable continuing to work from home, they can elect to do so. We will work to comply with OSHA/state guidance to keep our office as safe as we can. Are there concerns around making it optional for all employees to come into the office for this period of time? We're thinking a month-long period to start and maybe extending it through the summer months.

Answer: *I have no concerns with an optional return as you've outlined.*

Question: What is definition of household member? We have an employee taking care of elderly parent that cannot return to work due to nursing home acceptance on hold. What are the employer's options?

Answer: *I'm not sure in what context you're asking. If you're talking about FFCRA leave, this could potentially qualify for the emergency paid sick leave.*

Question: For a layoff where you mentioned we can hire new people when we are able to hire again...Is there a certain amount of time we have to wait before we can hire for the same or a similar position? I know you mentioned not doing this in a discriminatory way. We are extremely small (<10 people).

Answer: *There is no time period, you just don't want to make your decisions about returning existing vs. hiring new based upon protected categories.*

Question: Where is the poster we should post in our workplace from OSHA?

Answer: *The poster is available on the OSHA website at <https://www.osha.gov/pls/publications/publication.html>*

Question: If you require employees to wear face masks, are you required to provide them to the employees?

Answer: *There is no clear guidance on whether employers are responsible for providing them. The only law that would indicate so is OSHA, but most legal folks believe that would not cover simple face coverings. Although County Orders may require employers to provide masks, the Governor has indicated those cannot be enforced.*

Question: We returned to work on Monday and have implemented temperature check. I tend to receive push back from several employees regarding checks as they don't see the benefit. What should I as HR do?

Answer: *From a legal standpoint, I would indicate that you are doing it comply with relevant OSHA guidance regarding providing a safe workplace for all employees. And you can let them know that you're maintaining the confidentiality of the information.*

Question: What is the protocol for requiring people to use face masks?

Answer: *There is no defined protocol. It is left to the employer. Certainly, though, requiring masks is another way for an employer to indicate the workplace is safe.*

Question: What is advice on employees who do not have childcare and their position is essential to the job?

Answer: *From a legal standpoint, they may have both job protection and the right to pay under the FFCRA.*

Question: How do you conduct office meetings? Are you recommending banning conference room use?

Answer: *I would conduct office meetings over the phone as much as possible (using the intercom system or otherwise). But to the extent you do meetings in a conference room, I would try to implement physical distancing as much as possible.*

Question: What is the recommended protocol to allow the return of an infected (and recovered) employee?

Answer: *I would require the employee to have a 14-day period following recovery (i.e., 14 days of no symptoms). At that point, you can return the employee, but I would require the employee to wear a mask for the first week and limit the employee's interactions with others. After that, you should be fine assuming you maintain other OSHA guidance for the workplace.*

Question: Do you recommend having an employee sign a document with them acknowledging they fall into a high-risk category, but they still want to return to the office environment placing them at a higher risk?

Answer: *I would not take this course of action.*

Question: Can we require doctor statement to be able to work in the office; that is, that self-quarantine is not being advised by healthcare provider? May run afoul of Title VII if only for disabled employee but concern is health and safety of employee with advanced cancer.

Answer: *I have no problem with requiring a doctor's note to return to work but certainly it would run afoul of anti-discrimination law if you're targeting disabled individuals.*

Question: If we are requiring employees to wear masks, and they refuse not for an ADA reason, but because they don't want to...Assume this is a disciplinary issue?

Answer: *Yes, that is correct.*

Question: If we send an employee home for signs of a fever or respiratory symptoms, does the employer have to pay them for that time off?

Answer: *You should follow your PTO policies and pay in compliance with those. With respect to the FFCRA, that situation would not require payment unless and until the employee is seeking a diagnosis (because he or she would then be covered under the EPSL reason of "experiencing symptoms and seeking a diagnosis.")*

Question: We are an essential SBA IT company. Our owners allow us tele-work but now with Texas opening up. We can return to our HQ with only 8 staff members in the office. We have an employee that is refusing to return. She has no FFRCA issues. Can I let her go?

Answer: *I would consult with your lawyer on the specifics of the situation. If you are complying with OSHA guidance and the employee is not seeking a reasonable accommodation, then you very well might be able to.*

Question: We only have 10 people in our office. Should we block off common areas, and create a specific flow of traffic?

Answer: *I would do that, yes.*

Question: Can we eliminate of a position - lay the person off? It's restructuring due to process changes while working remotely and realizing we don't need the role. It is a manager role.

Answer: *There is more information necessary to truly answer that. I would consult with your legal counsel.*

Question: We have workers coming in from the New York/New Jersey area. Will the 14-day Quarantine for those coming to Texas be lifted for folks originating in that area?

Answer:

Question: So, we have an employee out who has exhausted her 80 hours - we are getting close to running out of remote work, she is pregnant & Dr. has extended her quarantine - is about to run out of FMLA - what are our options?

Answer: *If there is no FFCRA leave available and no FMLA leave available, the remaining option would be an accommodation under the ADA (only if the pregnancy has risen to that level since pregnancy in general is not a protected disability). Other than that, you would need to accommodate her leave if you have accommodated leave for non-pregnant individuals in similar situations (so that you don't run afoul of pregnancy discrimination).*

Question: Do you have to require employees that came into contact with a COVID-positive team member to self-quarantine if they are not showing symptoms?

Answer: *For purposes of safety of the workplace, I would require a COVID-19 test for anyone that comes into contact with a COVID-positive person.*

Question: If someone has been exposed to COVID-19 symptoms and tests negative, when can they return to work?

Answer: *If they tested negative, then there is no true danger in them returning. That said, the negative test is only good for that moment. You would need to continually monitor the employee such that if he/she begins experiencing symptoms, you may want to have the employee stay home.*

Question: What if the employee is not willing to share the information on their testing results?

Answer: *I would need to know more specifics here to truly answer this, but employers right now can require employees to submit to testing and/or provide information.*

Question: On the example where the employee having tested positive for COVID, can we require they take a COVID test?

Answer: *Yes, you can.*

Question: Since I'm not a medical professional only the HR Director. Can I check employees temps each time that come into our office?

Answer: *Yes, you can. Just maintain the confidentiality of the information.*

Question: Can you require a doctor's note stating employee is ok to return to work after testing positive?

Answer: *Yes, you can.*