

Practical Answers to Real-World COVID-19 Workplace Questions (Part One)

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Workplace issues stemming from the novel coronavirus and COVID-19 abound, and many of our clients continue to seek practical and timely answers and solutions. To help them navigate the practical and workplace compliance-related impact of this unprecedented and ever-evolving national crisis, we have created a "frequently asked questions" (FAQ) series that will tackle some of the myriad COVID-19-related questions employers have received, and continue to field, from applicants and employees.

We plan to update the FAQ regularly with fresh tips and practical strategies as new workplace issues arise and evolve. If you have questions that don't appear here, please don't hesitate to reach out to the authors of this series.

Q: Must I allow my customer-facing employees to wear protective masks?

A: It depends on why he or she is wearing, or wants to wear, a mask.

Is the employee trying to avoid infecting others, or trying to prevent infection? **If it is the former, then they should be sent home.** The Centers for Disease Control and Prevention has said that "employees who appear to have acute respiratory illness symptoms (i.e., cough, shortness of breath) upon arrival to work or become sick during the day should be separated from other employees and be sent home immediately. Sick employees should cover their noses and mouths with a tissue when coughing or sneezing (or an elbow or shoulder if no tissue is available)." Sick employees with other symptoms, such as fever or cough, should be encouraged to stay home. If you have a sick leave program or are in a state or locality with mandated paid sick leave, encourage (but do not require)

employees to take advantage of their leave entitlements, reassuring them that they will not suffer any adverse employment action for having done so.

If a healthy employee wishes to wear a mask to avoid becoming infected, then an employer may, but is not required to, relax its standard dress and grooming policies to accommodate its use, although guidance from experts such as the [World Health Organization](#) (WHO) and [others](#) suggests that using disposable masks alone (like the ones provided in doctor's offices) is not the best means of - and may be ineffective in - generally preventing infectious disease transmission - either by, or to, the mask wearer.

The CDC has provided extensive guidance on how to minimize the risk of infection in other ways, including through improved hand hygiene and avoiding close contact with others who are or may be sick ("social distancing"). You should also **consider the nature of the employee's job** in determining whether to allow the use of a face mask. For example, allowing reception or concierge staff to use face masks could well be off-putting to customers at best, and at worst, could leave the mistaken impression that a healthy employee is, in fact, sick and potentially infectious.

That said, if an employee is in a high-risk category, i.e., has an underlying medical disability, and asks to be allowed to **use a mask as a reasonable accommodation** under the federal Americans with Disabilities Act (ADA), you must consider the request, evaluating whether there are equally effective alternatives to allowing the employee to wear a mask and/or whether permitting the use of a face mask would impose an undue burden on business operations.

Also, it is possible (although unlikely) that **categorically denying older workers** who may be at greater risk of contracting COVID-19 the ability to wear masks, which then leads to a loss of pay (such as because they are forced to use unpaid leave) or employment, could implicate the Age Discrimination in Employment Act (ADEA) - to the extent it is considered a specific employment practice that has a statistically significant adverse impact on older workers and is not justified by reasonable factors other than age.

Q: Can I require an employee with diabetes or other "compromised" medical condition to come to work?

A: Unless you know that an employee has a disabling medical condition for which leave is needed as a reasonable accommodation, you may require him or her to show up for work.

Once a request for reasonable accommodations is made, however, you must consider the request and provide an accommodation that is both reasonable and effective. That may or may not be leave of absence. For instance, it may be possible to modify the employee's work schedule or

(nonessential) job duties, or transfer the employee temporarily into another open position (such as moving a customer-facing lobby receptionist to a job with little or no face-to-face customer contact).

Remember that an employer's obligation is to engage with the employee to identify possible accommodations and to implement one that is reasonable and effective; the employer is under no obligation to implement the employee's accommodation of choice.

Aside from workplace accommodation obligations, it is important to keep in mind that there may be state or local paid leave laws, such as in California, for instance, that allow the use of leave for covered reasons that may include "preventive care" or a declared health emergency.

Q: If an employee has an underlying medical condition (that does not qualify as an actual disability) that likely would develop into a disabling condition if the employee were to contract COVID-19 (or even the flu), does an employer have any "prophylactic" ADA reasonable accommodation obligations to that person?

A: No. The ADA does not impose such an obligation.

The ADA requires employers to provide workplace reasonable accommodations to qualified individuals with disabilities. There is no legal obligation to accommodate individuals with a record of, or that may have mistakenly been regarded as having, a disability.

For more information and guidance, please read [part two](#) of our series.

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