This general Q&A is applicable as of today, March 12, 2020. It applies only to U.S. employment law obligations. Many situations are so fact specific and nuanced that this Q&A cannot fully address them.

The responses below are therefore general and do not address all considerations and jurisdiction-specific analyses that may need to be undertaken prior to taking action. Thus, employers should seek specific counsel.

Given the fluidity of this rapidly developing situation, we encourage employers to reach out to a member of the Sidley Employment Team with questions regarding specific situations. We note that there are legislative developments in states and municipalities which impact each of these questions, and which we are closely monitoring. Because of the frequent developments, employers should consult counsel regarding specific arrangements.

What should employers be telling all employees? We appreciate that individual employers communicate differently with their employees. At a minimum, it is important to be transparent with employees about plans for addressing COVID-19 risks. Share the COVID-19 symptoms with employees and tell them that they should not come to work if they have any of these symptoms (at least that are not explained by some other condition). Explain that staying home when they have these symptoms prevents the spread of the virus and minimizes exposing co-workers to a serious chance of illness. Other plans may include increasing routine cleanings — particularly in high-traffic or common areas — spacing workstations, increasing remote-work capabilities and modifying visitor policies. Share advice from public health authorities like the U.S. Centers for Disease Control and Prevention (CDC) about handwashing, reporting of illness and reporting travel. Now is a good time to remind employees of any applicable leave policies (paid or unpaid) and telecommuting or remote work policies. Update your communications regularly. The CDC is changing its recommendations in various locations on a daily basis. For example, for some counties, the CDC has recommended daily health screenings. Check the CDC website before taking any such action.

Can employers tell employees with symptoms to stay home? Yes. Employers can tell employees that if they have a cough, fever, runny nose or other cold or flu-like symptoms that they should stay at home and not risk exposing others to illness. Employers who use staffing through agencies should advise their vendors that their employees who are ill or have these symptoms should not come to the office either. In some states, wage and hour laws may be implicated where employees who report to


What should employers do when employees say they are experiencing otherwise undiagnosed symptoms of COVID-19 or have been exposed to someone who has COVID-19? The employee should be sent home or told to stay home and the employer should take all appropriate steps to, among other things, determine with whom they have worked in close proximity in the last 14 days and notify these persons of the possible exposure. The steps the employer can take should be informed by jurisdiction-specific analysis, including of relevant privacy-related obligations. Depending on the facts and circumstances, employers may wish to send some or all of those employees home for 14 days, which could include the entire workforce. The CDC has released a risk-assessment for individuals who have been exposed to or are experiencing symptoms of COVID-19 which could be shared with impacted employees and could aid the employer in determining which employees should be sent home. The employer should not identify the individual employee suffering the symptoms. Employers should not share personally identifiable medical information with other employees. Individual facts and circumstances, as well as applicable laws and considerations, will vary, and thus we recommend that employers appropriately consult counsel prior to taking action.

What if the employee does not self-report but the employer notices the employee exhibiting symptoms of COVID-19? The employer should send the employee home and ask the employee to please advise if the employee has been exposed to COVID-19. In the event of an exposure, the employer should take appropriate steps to inform other employees that they may have been exposed, but in doing so, employers should not identify the affected employee. The steps the employer can take should be informed by jurisdiction-specific analysis, including of relevant privacy-related obligations. Employers should not share personally identifiable medical information with other employees. As above, individual facts and circumstances, as well as applicable laws and considerations, will vary, and thus we recommend that employers appropriately consult counsel prior to taking action.

What should an employer do if an employee refuses to come to work though they are not ill and have not been exposed? While generally employees do not have the right to refuse to come to work unless they believe they are in imminent danger, it may be advisable to allow employees to use sick leave and other paid time off as well as allow remote work where possible. Employers may also want to consider allowing employees to go into the negative in their sick leave bank. These options may or may not be feasible for employers depending on the nature of their business. Allowing flexibility may engender good will with your employees.

What are employers’ obligations toward employees who are out sick or home due to office closure? Generally, employees who are not working are not entitled to wages under federal law, but state laws may impose payment obligations. For example, states including California and cities including Chicago require employers to provide paid sick leave. Employees who report to work and then are sent home under certain circumstances may be entitled to partial pay. In New York City, employers must allow employees to use earned sick time to care for children if schools are closed due to an emergency declaration. Employees who perform any work — whether in the office or from a remote site or home — are entitled to pay. Employers should be especially careful with exempt employees, who must be paid their salary for the entire workweek if they do any work during the workweek.

Can employers require employees to self-report if they have COVID-19? While the answer to this
question may clearly have been “no” before this week, the answer to this question varies with state and local laws and the continuing guidance of the CDC. Employers should seek up to the minute guidance on this issue. Employers can tell employees that if they are exhibiting symptoms of COVID-19, they should not come to work or go home (if at work already) and self-quarantine for 14 days.

**Can employers require employees to report contact with an infected person?** Yes. Generally, employers can ask employees if they believe they have been exposed to COVID-19 as exposure is not a medical condition. Employers should exercise care in doing so, as employers will want to avoid claims that any employee was subject to discrimination or retaliation based on an employer's knowledge of such exposure and other laws may require steps in advance to ensure appropriate notice to employees. Employers who choose to collect such information must ensure that the information is kept secure, confidential and limited to personnel with a need to know.

**Can employers require employees to report personal travel?** In all states and the District of Columbia, an employer may inquire if an employee has traveled to any locations identified by the CDC as a Level 3 risk area. Additionally, employers may ask employees if they have traveled to any areas where state or local public health officials recommend that visitors self-quarantine after visiting. However, an employer should not require employees to report personal travel to any non-affected areas or other forms of travel. As of March 12, the countries at Level 3 risk are China, Iran, South Korea and most of Europe. The CDC is regularly updating its website, so employers should check periodically for updates at [https://www.cdc.gov/coronavirus/2019-ncov/travelers/index.html](https://www.cdc.gov/coronavirus/2019-ncov/travelers/index.html). Employers should consider obligations to provide appropriate notice to employees regarding the collection of this information.

**Can employees use sick leave or other time off?** Yes. Family and Medical Leave Act-eligible employees will be able to take unpaid leave, and several states (and cities) offer paid or unpaid leave through their own programs that certain employees may be eligible to use if they have COVID-19. Whether employees will be able to use employer-provided leaves is generally determined by the specific policies of that employer. Under California law, employers cannot require quarantined employees to use paid sick leave, but employees may choose to do so.6

**How should companies handle possible issues around discrimination/harassment based on disability or race/national origin perceived to be affiliated with an affected area?** Employers have a duty to protect their employees from discriminatory or retaliatory behavior by other employees if they are suspected to have COVID-19 or have self-reported. Where COVID-19-related rumors directed at ethnicities arise, employers should address the rumors and proactively state that COVID-19 is not an ethnically based disease.

**Can you report to public health authorities cases of an employee’s possible or confirmed COVID-19 diagnosis?** This question requires fact-specific analysis, including in light of certain state laws that may require employee authorization.

**Can employers require medical certification before an employee returns to work after a COVID-19 diagnosis?** Generally, employers may ask for a doctor’s note if it is the employer’s practice to require certification after an employee’s absence due to illness. However, it is important to review individual state and local laws, as some states limit requiring a doctor’s note by the number of days an employee is out. Also some states limit an employer’s ability to ask for a healthcare provider's
certification or impose other privacy-related obligations or restrictions. Practically speaking, even if certification is allowed, doctors and other healthcare practitioners may be too busy to provide it, and public health officials in some states and the CDC\(^2\) have asked employers to relax their policies on this issue. Employers may want to consider other approaches, such as relying on a local clinic to provide a form, stamp or email to certify an employee as fit.

**What is the impact of new COVID-19-related work from home and remote hire policies on the on-boarding process for new hires?** Under the I-9 rules, every employer must review original identity and work authorization documents in the physical presence of the employee within 3 days of the start of work. The government does not permit the use of webcams or other technology in lieu of the in-person review of the original documentation. However, employers may designate any employee, and even a non-employee, to serve as its agent for the in-person review of the documentation and the completion of the I-9 process at hire. For situations such as this, employers should develop a protocol for designation of a suitable agent and a quality control procedure to ensure that the I-9 process for remote hires is conducted in a compliant manner.

**Are there any special considerations for employers with foreign national employees?** In the current situation, employees who are foreign nationals may have additional restrictions on their travel, their ability to obtain visas and travel documents, and other considerations. Government operations issues such as closures of foreign consulates will require additional advance planning to ensure minimal disruption in work and travel schedules. Depending on the employee’s visa classification, there may be special compliance implications to the employer related to work from home policies, workplace office closures, work stoppages and other consequences of disrupted business activity.


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In the CDC’s Interim Guidance for Employers, employers are encouraged not to require “a healthcare provider’s note for employees who are sick with acute respiratory illness to validate their illness or to return to work...” [https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html].

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