



PREVENTING COVID-19 IN THE WORKPLACE: WHAT QUESTIONS CAN YOU ASK?

As the COVID-19 pandemic progresses, employers, including school districts and joint agreements, will be (or already have been) faced with employees who request sick days or leave related to COVID-19. In these ever-changing times, it is important for employers to protect their workplace and employees from COVID-19 to the best of their ability, while also avoiding taking actions or asking improper questions which violate relevant state and federal employment laws. Below is a summary of (1) recent guidance issued by the federal Equal Employment Opportunity Commission (“EEOC”)



on what actions employers can take to help prevent transmission of COVID-19 in the workplace, and (2) FMLA certification requirements in light of the Emergency Family and Medical Leave Expansion Act (“EFMLEA”) which passed last week as part of the Families First Coronavirus Response Act.

EEOC Guidance

Based on guidance of the CDC and other public health authorities, the EEOC has determined that COVID-19 causes a direct threat to workplaces, meaning that it poses “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” Accordingly, the EEOC has issued instructive guidance on the types of measures employers can take, including what questions they can lawfully ask their employees, to mitigate the chance of COVID-19 transmission in the workplace without violating the Americans with Disabilities

Act (“ADA”) or the Rehabilitation Act. Pursuant to this guidance, employers may take the following actions to prevent the spread of COVID-19:

- Employers
can send home any employees who have COVID-19 or associated symptoms.
- If
employees feel ill at work, or call in sick, employers may ask the employees
questions about their symptoms to determine if they may have COVID-19;
- Employers
are permitted to measure employees’ body temperatures. However, the results of any
such examination are subject to ADA confidentiality requirements.
- If
employees return from travel, employers do not have to wait for the employees
to show symptoms before they are permitted to question the

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employees about
their potential exposure to COVID-19. Similarly, employers
are permitted to
follow the advice of the CDC and state/local public health
authorities
regarding what information is needed by employers to
permit employees to return
to the workplace after visiting specified locations.

- Employers
can encourage employees to telework. Additionally,
employers should note that
employees with a high risk of infection or harm from
COVID-19 can ask to
telework as a reasonable accommodation under the ADA.
- Employers
can require employees to adopt infection-control practices
such as regular
hand-washing, coughing and sneezing etiquette, tissue
disposal, etc.
- If
employees have not been reporting to work, employers are
permitted to ask why

the employees have been absent.

- Employers
can screen job-applicants for COVID-19 symptoms after
making a conditional job
offer to the applicant, so long as employers do this for
all entering employees
in the same type of job.
- Employers
can require applicants to have a medical examination
(including, for example,
having the applicant's temperature taken) after making a
conditional job offer
to the applicant, so long as employers do this for all
entering employees in
the same type of job.
- Employers
can delay the start date for new employees who have
COVID-19 or associated
symptoms.
- Employers
may withdraw job offers to applicants who have COVID-19 or
associated symptoms



when employers need the applicant to begin immediately.

FMLA Certification

The EFMLEA, which was passed last week, provides for a limited and temporary expansion of the Family and Medical Leave Act (“FMLA”) for issues related to COVID-19. For a comprehensive overview of the EFMLEA’s provisions, please see last week’s priority briefing on the Families First Coronavirus Response Act, which can be found [here](#). The below summary is limited to describing how employers’ right to certification under the FMLA has, or has not, been affected by the EFMLEA.

Under the FMLA,
eligible employees are entitled to up to 12 weeks of leave for
the following
reasons:

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1. Because
of the birth of the employee's child and in order to care
for that child;
2. Because
of the placement of a child with the employee for adoption
or foster care;
3. To
care for the employee's spouse, child, or parent if that
spouse, child, or
parent has a serious health condition;
4. Because
of the employee's own serious health condition which makes
the employee unable
to perform the functions of his or her position;
5. Because
of any qualifying exigency arising out of the fact that
the employee's spouse,
child, or parent is on covered active duty (or has been
notified of an
impending call or order to covered active duty) in the
Armed Forces.



The EFMLEA added a sixth reason for which employees can seek leave – to care for his or her child under age 18 if the child’s school or place of care has been closed, or if the childcare provider is unavailable, due to COVID-19.

Under the FMLA, an employer may require an employee to provide it with a certification, issued by a health care provider, to obtain leave under reasons C and D, above. Although the EFMLEA added a new basis for seeking leave under the FMLA, it did not alter or amend any provisions relating to certification. Therefore, an employer can still only require certification from a health care provider if the employee is seeking leave because of his or her own serious health condition, or to care for his or her spouse, child, or parent who has a serious health



condition.

Consequently, if an employee seeks leave because he or she has contracted COVID-19, or to take care of the employee's spouse, child, or parent who has contracted COVID-19, the employer can still require the employee to provide a certification issued by a health care provider. However, if an employee seeks leave to care for his or her child because the child's school has closed, the employer cannot require any form of certification.

If you have any questions, please do not hesitate to contact us. We will provide updated with additional guidance as it becomes available. Attorneys in our Flossmoor (708-799-6766) and Oak Brook (630-928-1200) offices can assist with any questions you may have about these and related matters during these ever-

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changing times.