

READY TO REOPEN? LEGAL CONSIDERATIONS AND TESTING STRATEGIES FOR MAINTAINING A SAFE WORKPLACE FAQs

PRIVACY

- **What information is protected by HIPAA in this situation?**

NONE. HIPAA only applies to certain “covered entities” – which is defined as health care providers (doctors, hospitals, etc.), health insurance plans, and to companies that work with those entities and receive patient information (“business associates”). It does not apply to ALL health information and it specifically does not apply to health information gathered by an employer for human resources/employment purposes. Employers may have HIPAA exposure by virtue of their health insurance plans, but generally speaking, unless employers are using health plan data to make HR decisions (which is not permissible under HIPAA), HIPAA does not come into play in the return-to-work analysis.

- **For Employee Screening, if we take an employee’s temperature and recorded it with their name and used "Yes" or "No" to "below temp of 100.4?" to document, is this still considered medical recordkeeping information?**

This type of documentation would be an employee health record in the general sense and should be kept confidential (under the ADA but not HIPAA – see above). Any record including identifying information and information about the employee’s health would presumably be subject to that same standard, regardless of whether the actual temperature itself is logged.

Please consult your internal record retention policies and your own counsel on specific matters.

- **If we have a mechanical temperature taking device that has the ability to capture people's faces and names and temperatures, are there HIPAA considerations?**

NO, see above. However, certain states may have “biometric” information privacy laws that would apply. Please consult your own counsel on specific matters.

- **We are in long term care. If we document "Worker 1" "Worker 2" their temps and the responses to the CDC questions we ask before they come into our facilities, is that violating HIPAA?**

NO, even for a HIPAA covered entity such as a long-term care facility, health data gathered in the HR context is not HIPAA-covered.

Please consult your internal record retention policies and your own counsel on specific matters.

- **If screening all employees’ temperatures, do we need to keep private the results of each temperature scan?**

YES, this information should only be shared internally on a need-to-know basis.

TRAVEL

- **When is it recommended to have employees self-quarantine after personal travel?**

There are many differing opinions on self-quarantine post-travel. The best course of action may be to stick to the CDC guidelines: request self-quarantine 14 days for international travel; exercise caution but no limits on domestic travel.

There is very little evidence to suggest that someone engaging in travel to visit a relative in the Chicago suburbs, for example, is engaging in a riskier activity than someone who spends 2 hours waiting in line at their local Home Depot. Any attempt to limit domestic travel is potentially drawing arbitrary lines, which is likely to lead to disputes with employees and allegations of unfair/inequitable treatment. Employers can *encourage* employees who have spent a significant amount of time travelling (or engaging in arguably riskier activities, (i.e. domestic airplane travel) to self-quarantine for a period of time, but potentially should not be required.

It is important to note that recommendations or requirements could differ by state, county and local governments.

- **What if employees travel (personal travel) to areas outside of WI? Can we/should we ask them to stay at home/quarantine upon return?**

See above.

- **I am wondering if employees choose personal travel, can an employer require a 14 day quarantine when they return? I feel like I saw a LIRC case but I can't find it.**

See above.

- **What if employees travel out of state as states open up and summer kicks off? Is there a recommendation how to address those who chose to do voluntary travel and how to address when they return to work?**

See above. Employers could continue with normal screening practices.

- **What are recommendations for employees that choose to travel by plane, upon their return to work? Quarantine or not and if so how long?**

See above.

RETURN TO WORK

- **How should employers handle the return to work if employees are not wanting to return to the workplace?**

Employers should determine whether the refusal is based on a protected characteristic (disability; FFCRA-covered reason), or just fear and/or preference. Employers are allowed to request medical documentation to support the need for this type of accommodation.

- **How do you handle employees not wanting to come into work because they are aware another employee is not social distancing outside of work and following recommendations of CDC and such?**

See above. Accommodation or leave may be required (at least in short term) for those who qualify. For those employees who prefer not to report to the physical worksite, employers may want to acknowledge that the employee has the right to make decisions they feel are in their best interest but that the Company may need to fill the role in their absence. Employers could then allow those employees to re-apply for any open position when they are ready to return to work.

Please consult your own counsel on specific matters.

- **What can an employer do if an employee says they don't want to come to work because someone in their family is at high risk?**

See above. It is possible that FFCRA leave or other forms of employer paid leave may apply. However, the employer has the right to fill the position if the employee does not return to work.

Please consult your own counsel on specific matters.

- **How do you handle a situation in which an employee was laid off due to lack of work, has been recalled to work, but is now saying that he cannot return to work due to high risk family members? Can we fill the position as we need someone to do that job and tell the laid off employee to reapply when he feels comfortable returning?**

See above.

TESTING

- **Employee A comes into contact with family member B who has tested positive for COVID. Employee A leaves the work place and then gets tested for COVID and his test is negative. Can employee A return to work or are they supposed to stay off of work for 14 days, regardless of the negative test.**

Please refer to [M3 guidance documents](#), CDC, local health dept. for scenario-specific recommendations.

- **Can an employer (nursing home) make testing mandatory? Any religious or personal conviction considerations?**

An employer can make testing mandatory, unless there are religious objections. Religious objections should be taken into consideration, but not personal convictions.

- **What about customers? Can a business screen customers/students/clients before entering the space where employees work.**

Yes

- **If someone has been tested and has the antibodies, are they still contagious?**

Current thought is that accuracy of the antibody test depends on its predictive value and should not currently be used to make return to work decisions. If someone has antibodies but has not developed illness or symptoms, they are likely not actively infected and no additional follow-up is needed (per CDC) but they should continue to practice recommended infection control strategies (physical distancing, PPE, etc.). If they have or had symptoms within last 14 days, they should contact their health provider for further testing and should follow symptom isolation protocol. Refer to M3 guidance document- [Testing Comparison with HHS Interpretation Guidance](#).

- **Are we able and should we have staff sign a statement that says they haven't had a temp over 100, haven't had any other COVID symptoms, have followed social distancing outside of work, etc.?**

Yes

- **Can an employer make an employee get a COVID-19 test if they develop symptoms?**

Yes

- **Are COVID-19 tests reliable if not ordered by doctor?**

Tests done at labs, by the county, or at legitimate point of care testing sites most likely have a Standing Order, where a medical director (doctor) or health department doctor writes a blanket order for certain trained collectors to be able to collect the sample and send to affiliated lab for processing. The lab must then have a CLIA certificate to process that type of test or be CLIA-waived for that type of test.

Commercially marketed tests MUST have an FDA EUA and are usually done in conjunction with a healthcare provider or at the direction of a health department, which includes “point of care” and authorized home-collection diagnostic tests.

- **Employee "A" comes to you and says they were in contact with a person who went to get a test. The test results have not been returned yet. Do you inform the other employees that Employee "A" was in contact with (the person/relative who went to get tested in NOT an employee)?**

Employers could inform employees that they had contact with someone who may have been exposed to COVID-19, and that they should continue to follow CDC guidelines, monitor symptoms, check temperature regularly, and seek testing if any symptoms develop.

In addition, it is [recommended](#) that the exposed employee quarantine for 14 days and monitor for symptoms if they had/ have close contact someone symptomatic with COVID-19. IF the employee is tested and the test returns negative, the employee would not need to continue quarantine.

- **What about taking temperatures of customers before allowing them in to your work space?**

This would be acceptable from a legal standpoint. However, there are practical considerations, including how an employer would turn away customers that have a temperature.

FFCRA

- **Do we have an obligation to offer staff protected leave? We sent out the posting and it has been posted. Do staff have to actively request it when discussing return to work?**

An employer has the obligation to offer protected leave if the employer is a “covered employer” and the reason for leave is covered. If there is a situation where the leave might apply, it may be in the employer’s best interest to bring it up if the employee has not.

GENERAL

- **What can an employer do if an employee that is allowed to tele-work during COVID-19 wants to continue to tele-work but normally the employer does not allow tele-work and wants the employee to return to on-site work.**

The answer depends on whether the employee has a medical or other covered reason for not wanting to work at the worksite and whether the employer plans to allow teleworking going forward.

- **How do you communicate if someone is positive and is it necessary every time?**

An employer should consider communicating to exposed employees that they have been in contact with a confirmed positive test (no names). This should be done consistently.

- **Is it necessary to create an entirely new policy/procedure if we already have a pandemic policy and procedure in place (flu)?**

Employers should determine how expansive pre-existing pandemic policies are and whether those policies fit the guidance that has been issued specific to COVID-19. Many times employers may be able to build off existing policies by adding specific information related to COVID-19.

- **Would employees who are sent home by their employers (For having a temp for example) qualify for UI? If we as the employer are not allowing them to work?**

The answer depends on whether or not employees are receiving income from other sources (e.g. FFCRA leave, vacation/sick time, etc.). If not, it is possible that they would qualify depending on how long they out of work.

- **How do we question an employee who has COVID to determine if it was contracted at work? Are we able to ask about personal activities? This is for determining what to record on the OSHA 300 log.**

YES, within reason. Please refer to the guidance in the OSHA memo: <https://www.osha.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19>.

M3 also has an [investigation resource](#) in the RTW toolkit.

- **If you require someone to quarantine should the employer pay for their time outside of work?**

If the employee is performing work while quarantined (i.e. working from home), the time has to be paid. If the employee qualifies for leave, the leave must be provided. Absent those circumstances, a non-exempt employee does not need to be paid. The analysis is more complicated for exempt employees and will depend on whether the employee has worked in that particular week.

Please consult your own counsel on specific matters.

RESOURCES

- **Is there a sample manual or plan that can be provided?**

There is no government sanctioned manual or plan. Please refer to the [M3 Covid-19 business page](#) and RTW toolkit for resources.

- **What resources are available to help an employer understand the various state and local requirements?**

State/Local Departments of Health websites provide information as well as state unemployment pages.

- **We are considering a symptom checker app that employees would complete prior to entering the office each day. Are you aware of whether an app such as that already exists and is available to companies?**

Yes, and M3 is hoping to roll out its own version soon!

- **What are the employee screening questions?**

There is no single set of questions that every employer must use, a standard set of questions are provided in the webinar slides.

[M3 Health Check Guide](#) and [Health Check Log](#) can provide a guideline of questions and how to handle.

- **What is your Return to Work website?**

<https://www.gklaw.com/COVID-19.htm>, <https://www.m3ins.com/content/return-work-toolkit>