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COVID-19 Employment FAQ's for Long Term Care and Senior Living Providers

Lane Powell compiled a list of most frequently asked employment questions for senior living and long term care providers related to COVID-19. This is a fluid situation, and we will continue to update our guidance. Please note that this guidance is generally applicable to Oregon and Washington. You should consult with an attorney for state specific employment questions.

1. **If an employee is scheduled to work, but calls off due to fear of COVID-19, which may or may not be present in the facility or community, can the employee use available sick time or PTO? Additionally, if an employee calls off during this time or has had numerous call offs, can the employee be written up for discipline?**

   The employee should be able to use PTO for this absence. If the facility has a combined PTO plan, it should cover sick and safe reasons as well as vacation. While technically an asymptomatic employee who calls off for fear of COVID-19 is not using the time for a sick and safe reason, employers may allow employees to use PTO. It may even be to the employer's advantage to allow employees to draw down on their PTO if the employee is going to be out anyway.

   We caution against writing an employee up for excessive calls off if they are only calling off of work for COVID-19 related reasons, unless you have reason to suspect fraud/abuse.

2. **If an employee tests positive for COVID-19 and it is unknown if the employee contracted the virus at the facility, in the community or at home, can the employee use sick or PTO time, or is the employer obligated to pay the employee for scheduled hours?**

   The employee can use sick or PTO in this situation. Employees should also be allowed to use any other paid time off they qualify for under employer policies, such as paid vacation or personal days.

   Additionally, the Family First Coronavirus Recovery Act (FFCRA) emergency paid sick leave covers absences for employees ordered by a health care provider to self-quarantine because the employee has COVID-19 (and the employee is not able to work remotely). This leave can provide employees up to 80 hours of paid sick leave, for which the facility would be reimbursed. (The exact amount of leave available depends on an employee's normal work schedule.) Long-term care and senior living providers that are considered health care providers under the FFCRA (most are) do not have to offer this benefit. However, health care providers can limit when they offer this benefit, so long as they are consistent. For example, they can offer emergency paid sick leave to employees forced to quarantine, but not to employees seeking time off to care for a child whose childcare is not available. Since employees will be absent from the workplace regardless of whether emergency paid sick leave is provided, and eligible facilities can receive reimbursement for these wages, it is worth considering offering this benefit to employees under quarantine.

   We have not seen any guidance requiring employers to pay for scheduled hours; however, workers' compensation or unemployment benefits may be available.

3. **If an employee calls off for a scheduled shift due to being quarantined for 14 days after exposure to COVID-19 (has not tested positive) and it is not known where the employee**

contracted the virus, can the employee use available sick time or PTO? Also, is the employer obligated to pay the employee for his or her scheduled hours?

The employee should be able to use sick time or PTO in this circumstance. Employees should also be allowed to use other paid time off they qualify for under employer policies, such as paid vacation or personal days.

We have not seen anything suggesting an employer must pay for the time off, but can allow employees to use their PTO. If the employee is a healthcare worker who is quarantined by a physician or public health officer, they may be entitled to workers' compensation or unemployment benefits.

4. **If an employee refuses to work in his or her assigned resident hallway or section, presumably out of fear of exposure to COVID-19 or for a stated concern of being exposed to it, can the employer follow its normal policy and procedures related to employee discipline for non-compliance with accepting a work assignment? Keep in mind all safety protocols and PPE are in place to protect the employee as they demonstrate universal precautions.**

   This is highly fact specific, and the answers will depend on the specific circumstances. Generally:

   - Employees who are refusing to work need to still follow the handbook guidelines on calling out, requesting PTO use, etc. If it is for a sick and safe reason, employers can only ask for verifications for absences exceeding 3 days per the sick and safe laws. They can be disciplined for failing to follow the handbook rules — but we recommend a light touch for both public relations and personnel reasons, given the staff shortage.
   - If an employee refuses to work because they have symptoms, there should be no discipline.
   - If an employee refuses to work because they are high-risk, then we recommend engaging in the interactive process to determine if there is a reasonable accommodation (which includes reassignment, light duty and leave) during this time period. ADA/disability rules apply here — only requesting the specific information needed to explore an accommodation, limits on the type of documentation you can request from healthcare providers (and note a likely delay from healthcare providers verifying this), etc.
   - If an employee refuses to work because they state the facility has not provided enough PPE/protections, we would recommend exploring that contention with the employee and coordinating with counsel on the response and next steps, because it could be a protected activity per workplace safety laws.
   - If none of the above fit, an employee should still be required to explain why they are refusing to work in their assigned area, but we urge employers to be careful in imposing discipline given the current climate. We understand that this is difficult in light of short staffing concerns, but unless you suspect fraud or abuse by these employees, it is the recommended approach.

5. **In the event the outbreak continues and a facility or community's employee base is depleted, can a facility or community call otherwise healthy workers back to work if those workers are staying home as part of "social distancing" or because they identify as part of an at risk population?**

   While technically, employers can still avail themselves of the typical tools to deal with absenteeism, we recommend proceeding with caution. First, if an employee is a member of a high-risk population, or has family members nearby who are part of the high-risk population, they should be allowed to self-quarantine without discipline. If an employee is not high risk, doesn't have a family member nearby who is high risk, and is not exhibiting or experiencing symptoms, then technically their leave is not protected under the sick and safe leave laws, or (without more information) the disability laws, etc., and they can be subject to an absenteeism policy. However, they may still be entitled to take vacation leave, subject

to the vacation leave policy. While employers can explain to employees that the regular attendance rules apply, but if they need to take leave that is not a covered sick/safe reason, then they need to coordinate with HR to explore solutions.

6. **If an employee has tested positive for COVID-19, but is asymptomatic (no cough, fever, respiratory illness), can you allow them to come to work?**

   Per CDC guidance, health care employees who have COVID-19, but are not experiencing symptoms, should not return to work, unless either:

   - 10 days have passed since the date of their first positive COVID-19 diagnostic test, assuming they have not subsequently developed symptoms since their positive test; or
   - They receive negative COVID-19 test results from at least two consecutive respiratory specimens collected at least 24 hours apart.

   Employees should wear a facemask at all times while in the facility until all symptoms are completely resolved.

   Facilities could consider allowing asymptomatic health care personnel who have had limited exposure to a COVID-19 patient, but have not tested positive for COVID-19, to continue to work after options to improve staffing have been exhausted and in consultation with their occupational health program. These health care personnel should still report temperature and absence of symptoms each day prior to starting work. In fact, some states, such as Washington, are requiring checks at the beginning of each shift. Facilities and communities could have exposed health care personnel wear a facemask while at work for the 14 days after the exposure event, if there is a sufficient supply of facemasks. If health care personnel develop even mild symptoms consistent with COVID-19, they must cease patient care activities, don a facemask (if not already wearing), and notify their supervisor or occupational health services prior to leaving work.

   Facilities and communities should have a low threshold for evaluating symptoms and testing asymptomatic health care personnel, particularly those who fall into the *high*- and *medium-risk* categories described in the CDC guidance.

   Facilities and communities, in consultation with public health authorities, should use clinical judgment, as well as the principles outlined in this guidance, to assign risk and determine need for work restrictions. CDC remains available for further consultation by calling the Emergency Operations Center at 770.488.7100.

7. **If an employee who tested positive for COVID-19 was ill and now claims to be better and wants to return to work, what kind of evidence can you require the employee provide to return to work?**

   Per CDC guidance, health care employees who have COVID-19 and are experiencing symptoms should not return to work, unless either:

   - At least three days (72 hours) have passed resolution of fever without the use of fever-reducing medications, improvement in respiratory symptoms (e.g., cough, shortness of breath), and at least ten days have passed since symptoms first appeared; or
   - Resolution of fever without the use of fever-reducing medications, improvement in respiratory symptoms (e.g., cough, shortness of breath), and negative COVID-19 test results from at least two consecutive respiratory specimens collected at least 24 hours apart.

   Employers can request documentation from a health care provider that the above criteria has been met.

8. **What if we have staff who is at high risk (over 60, immunocompromised, lung disease, etc.) and this person does not wish to care for residents who may have COVID-19, do we have to accommodate the staff person? What if we are short-staffed?**

   Yes — we would treat this as a request for a reasonable accommodation. The employer needs to engage in the interactive process with the employee and look for a reasonable accommodation that will allow the employee to perform the essential functions of their job, which could include leave or reassignment.

9. **If staff reports they can't come to work because they have a sick family member, can we discipline the person or require them to come to work?**

   No — this may qualify as protected leave under any number of laws (including sick leave to take care of a sick family member, may be family leave under the Washington State Paid Family and Medical Leave, and FMLA).

10. **Can we, as a nursing home or assisted living facility, force our employees to test for COVID-19?**

    EEOC COVID-19 guidance expressly states that employers can require employees to participate in COVID-19 testing before they are allowed to enter the workplace, even if they do not exhibit symptoms of the virus. This guidance signals to employers that mandatory COVID-19 testing, when carried out in accordance with the requirements of the guidance, will likely not run afoul of the Americans with Disabilities Act (ADA). The EEOC cautioned employers to ensure that they use tests that are "accurate and reliable." In the guidance, employers are urged to review guidance from the FDA, the CDC and other public health authorities about what may or may not be considered safe and accurate testing, and to check regularly for updates.

    In Oregon and Washington, all staff in nursing homes and assisted living facilities must be tested for COVID-19, with limited exceptions, and be screened at the start of each shift.

11. **Can we require employees who are caring for potentially sick residents or those residents with the virus to use N95 respirators or do we need to conduct a medical evaluation first?**

    An N95 FFR is a type of respirator which removes particles from the air that are breathed through it. These respirators filter out at least 95% of very small (0.3 micron) particles. N95 FFRs are capable of filtering out all types of particles, including bacteria and viruses. This is the type of mask that the CDC recommends health care personnel use. The CDC updated its guidance to indicate that surgical masks are an acceptable alternative to N95 masks when the supply chain of respirators cannot meet the demand.

    Not everyone is able to wear a respirator due to medical conditions that may be made worse when breathing through a respirator. Before using a respirator or getting fit-tested, workers must have a medical evaluation to make sure that they are able to wear a respirator safely.