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COVID-19 – What Happens When Employees Return to Work Frequently Asked Questions

Marc A. Fishel
Fishel Downey Albrecht Riepenhoff, LLP
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Most employers have never dealt with the multitude of challenges presented by the COVID-19 pandemic. Those challenges are about to take a different turn as employees begin returning to work under Governor DeWine's easing of the stay-at-home order. This document presents frequently asked questions about return to work issues and provides legal answers and best practices based on current information. As with most aspects of the pandemic, counties must remain flexible and be prepared to address changes in circumstances on the national, state and local levels.

This document is designed to provide general guidance to counties. The answers to these questions depend on specific facts. As always, counties should be consulting with their legal counsel and human resources department as they deal with these issues.

1. Can an appointing authority require employees to wear masks?

Answer: Under current guidance, employees must be required to wear masks while at work. This requirement leads to several additional issues. First, if an employee is isolated in a workspace such as an office or cubicle, employers can allow employees to remove masks provided they wear them in public spaces and when they are or may come into contact with others. Second, employers will have to figure out whether it can provide masks or if employees will be required or permitted to provide their own. Third, employers need to decide what will be sufficient to constitute a mask. Fourth, the State of Ohio has also exempted masks when:

- An employee in a particular position is prohibited by a law or regulation from wearing a face covering while on the job
- Wearing a face covering on the job is against documented industry best practices
- If wearing a face covering is a violation of a company's safety policies
- There is a practical reason a face covering cannot be worn by an employee

Upon request, employers must provide written justification explaining why an employee is not required to wear a mask.

2. Can employers exempt employees from wearing a mask?

Answer: Yes, but only in limited circumstances. Employees who have a medical condition that prevents them from wearing a mask can be exempted from this requirement as a reasonable accommodation under the Americans with Disabilities Act (ADA). As with any ADA issue, the employer is entitled to documentation supporting the medical condition and must engage in the interactive process with the employee to determine what a reasonable accommodation may be. Remember, employees are entitled to a reasonable accommodation under the circumstances, not necessarily the best or desired accommodation. A reasonable accommodation may not work for every employee who claims a physical or mental impairment prevents them from wearing a mask. These situations must be considered on a case by case basis.

Employers are cautioned not to permit employees to refrain from wearing a mask based on personal preference or because it is "uncomfortable". Once an employer begins to make exceptions other than where legally required, it will be difficult to enforce. In addition, employers should remember the main reason to wear masks is to reduce the possibility of spreading COVID-19. While some employees may be uncomfortable wearing a mask, others may be uncomfortable if co-workers are not wearing a mask.

3. Can employers require employees to wear gloves?

Answer: Yes, although employers should recognize gloves must be used properly to be effective. For example, gloves should be changed frequently and are not a replacement for washing hands. Employers expecting employees to wear gloves should be prepared to provide the gloves. As with masks, employers need to address any ADA issues if an employee claims a medical condition preventing them from wearing gloves. Employers can simply permit employees to wear gloves if they so choose or require employees to wear gloves when they are performing certain tasks such as opening mail.

4. Can employers require customers and members of the public coming to their offices or facilities to wear masks?

Answer: Yes. Under the current State of Ohio orders, employers have the option to require or not require members of the public to wear masks. As with employees, a member of the public could have protection under the ADA if they have a physical or mental impairment that prevents them from wearing a mask. As a reminder, unlike

employees, it is not mandatory for customers to wear masks but an employer, including a county, may require this practice.

5. Can employers require employees returning to work following a physician's recommendation to self-quarantine to provide a note certifying their fitness to return to work?

Answer: Yes. Employers are permitted under the ADA to require such certifications. However, it may not be possible or prudent to do so given the capacity of hospitals, limitations of reaching physicians, and potential exposures by requiring employees to enter healthcare facilities. The EEOC suggests using alternative certification methods, such as using local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the virus.

6. Can employers require employees to fill out questionnaires prior to their return to work?

Answer: Yes, as long as the questionnaire's inquiries are not disability related. Employers can ask employees whether they will be unable to come to work due to caring for a child out of school or day care, need to care for other dependents, and/or if the employee faces transportation issues. Employers can also ask if employees have travelled outside the state, if they have come into contact with someone who has been diagnosed with COVID-19, or if they have recently experienced any symptoms of COVID-19. Employers can also continue checking employee temperatures prior to starting work each day. However, employers generally may not ask an employee if they have any underlying conditions, such as a compromised immune system or a chronic health condition, that puts them at higher-risk of COVID-19.

7. Can counties require employees to undergo a test to diagnose COVID-19?

Answer: Probably. The Equal Employment Opportunity Commission (EEOC) has issued guidance stating such tests do not violate the Americans with Disabilities Act. Of course, if the employer is requiring such testing, it needs to ensure employees can access the test. Unlike private employers, counties must also be mindful of potential constitutional issues. The Fourth Amendment of the U.S. Constitution regulates the government's ability for searches and seizures. A COVID-19 test likely falls within the parameters of the 4th Amendment when required by the government. While such a test may not be a per se violation of the 4th Amendment, counties should consult with legal counsel before imposing such a requirement.

An appointing authority requiring COVID-19 testing of its employees must be aware of other potential issues. For example, it is possible an employee may have an ADA related reason why they cannot undergo such testing. Similarly, some employees may assert a religious reason why they do not want to be tested. In these instances, the appointing authority must work with the employee to determine if the excuse is

legitimate and whether there is a reasonable accommodation that can be applied. Again, in these scenarios, it is crucial for counties to consult with legal counsel.

8. Can counties require employees to undergo the anti-body test for COVID-19?

Answer: At this point, counties probably cannot require employees to take the test for antibodies for COVID-19. The EEOC has not issued guidance indicating such a test is lawful as it has for the diagnostic test. Moreover, these tests require a blood draw which is intrusive. In addition, the current antibody tests are not necessarily reliable. Under the ADA, a medical test must be required by business necessity. It is difficult to articulate a business necessity that would support this test at this point. Therefore, such tests could be a violation of the ADA. There are also potential 4th Amendment concerns for blood tests under these circumstances. These tests could potentially implicate the Genetic Information Non-Disclosure Act (GINA) which prohibits employers from obtaining certain genetic-related medical information about employees.

The answer to this question could change over time depending on technology and EEOC guidance. Due to the complicated legal issues associated with this type of testing, counties should consult with legal counsel.

9. How should employers treat employees with certain underlying medical conditions or who are 65 years old or older?

Answer: It appears to be a scientific fact that individuals with certain underlying medical conditions or those who are 65 and older may be more susceptible to the coronavirus. As a result, counties should be prepared to excuse employees in these categories from work at this point if so requested.

First, employers should not prohibit employees who fall within these categories from working. These employees should be treated the same as other employees unless they raise concerns about working for one of these reasons.

Second, employees who claim an underlying medical condition can be required to provide documentation of the condition.

Third, the employer can offer or even require telework to these employees if feasible. Telework is not necessarily mandated and should be considered on a case by case basis.

Fourth, employees in these categories who cannot work are entitled to use sick leave or vacation leave. These employees may also be entitled to leave under the FFCRA. For employees with an underlying medical condition, the time off work should be designated as FMLA leave as well.

10. What happens if an otherwise healthy employee under 65 years old does not want to work?

Answer: Generally, employees in this group can be required and expected to work. An employer is under no obligation to allow employees to stay home because they have concerns about coronavirus that are not based on age or medical factors. In these situations, employers should discuss the employee's concerns. An employer is not required to allow an employee to take leave under these circumstances and can order an employee to return to work. Employers should be careful in excusing employees from work in this situation because it will be difficult to deny requests from other employees to be excused. An employee who is ordered to return but fails to do so may be subject to discipline, up to and including termination. Employers should be mindful of due process considerations when implementing discipline as well as other requirements under civil service law and collective bargaining agreements.

11. How should I treat employees who leave the State on vacation leave?

Answer: Under the April 30, 2020 Stay Safe Ohio order from the Ohio Department of Health, out of state travel is not prohibited. The order states that it is advisable that, upon return to the state, individuals self-quarantine for 14 days. Based on this order, employers may, but are not mandated, to require employees to stay away from work upon return to the state.

An employer who desires to require employees to stay at home for 14 days after returning from out of state should have a policy informing employees of this expectation. When an employee requests vacation leave, the employer may ask the employee of their intended destination and should remind employees of this requirement. Employees can be required to use vacation leave, personal leave or comp time during the quarantine period or be placed on leave without pay. Absent an actual illness this time likely would not qualify for sick leave or FMLA leave.

12. Is a county required to offer telework to its employees?

Answer: Telework has been offered to allow employees to continue working during the stay at home part of the pandemic. Even with the April 30, 2020 order, many employers are continuing to require/allow telework. The decision to permit employees to telework is almost exclusively at the discretion of the employer. Telework only should be offered if it is feasible and productive. Employers can offer partial telework which can include some time in the office as employees transition back to work. This alternative can be a way to minimize contact among employees.

In limited circumstances, employers may be required to offer telework as a reasonable accommodation under the ADA. These situations can arise during or after the state of emergency relating to the pandemic. Employers should consult with legal counsel if telework is being considered as a reasonable accommodation.

13. What are teleworking best practices?

Answer: Historically, teleworking has not been common among counties. The COVID-19 pandemic has resulted in substantially more telework opportunities. It is important for employers to implement and enforce telework policies to ensure maximum efficiency among employees and reduce potential liability. Aspects of a teleworking policy should include:

- Requiring a work area that can be productive
- Employees must be available for phone calls and emails
- Employees must report starting and quitting times
- A statement that employees are not authorized to work overtime
- Employer not responsible for internet connection, etc.
- Employees must take adequate measures to protect confidential information

14. What if an employee complains about safety concerns?

Answer: A public employer has specific obligations about responding to allegations of unsafe working conditions. The employer's response depends on how and when an employee makes a complaint. First, many collective bargaining agreements include provisions about health and safety. Counties should check their collective bargaining agreements for specific language about workplace safety complaints and their obligations to respond.

Second, O.R.C. section 124.341 provides a mechanism for complaints by classified and unclassified employees. Under this statute, employees who become aware in the course of employment of a violation of state or federal statutes, rules, or regulations or the misuse of public resources, and the employee's supervisor or appointing authority has authority to correct the violation or misuse, the employee may file a written report identifying the violation or misuse with the supervisor or appointing authority.

An employee is required to make a reasonable effort to determine the accuracy of any information they report under this statute. The employee is subject to disciplinary action, including suspension or removal, as determined by the appointing authority, for purposely, knowingly, or recklessly reporting false information. An appointing authority is prohibited from retaliating against an employee making a report in good faith under this statute. An employee can appeal any alleged retaliation to the State Personnel Board of Review.

Third, employees can report alleged safety violations pursuant to O.R.C. section 4113.52. Under this statute, if an employee becomes aware in the course of the employee's employment of a violation of any state or federal statute or any ordinance or regulation of a political subdivision that the employee's employer has authority to correct, and the employee reasonably believes that the violation is a criminal offense that is likely to cause an imminent risk of physical harm to persons or a hazard to public

health or safety, a felony, or an improper solicitation for a contribution, the employee orally shall notify the employee's supervisor or other responsible officer of the employee's employer of the violation and subsequently shall file with that supervisor or officer a written report that provides sufficient detail to identify and describe the violation. This statute is less likely to be implicated in COVID-19 situations than O.R.C. section 124.341.

Employers cannot retaliate against employees reporting a violation in good faith under O.R.C. section 4113.52. Employees claiming unlawful retaliation can file a lawsuit within 180 days of the alleged violation.

In any of these situations, an employer should investigate the allegation as soon as possible. Some investigations will be lengthy and others can be accomplished more quickly. Employers should keep employees apprised of the investigation and let them know the outcome.

15. What are some best practices making a workplace safe for returning employees?

Answer: There are several steps a county can take to prepare the workplace for returning employees, some of which may have already implemented. First, employers should require employees to conduct a daily self-assessment before coming into work. This can include self-temperature checks and requirements that employees report any COVID-19 symptoms they are experiencing. If an employee is diagnosed with COVID-19 after returning to work, employers should prohibit the employee from returning to work until they have been symptom free for 72 hours (three full days) and at least seven days have passed since symptoms first began.

Employers should require their employees to remain six feet apart wherever possible. This may include limiting the number of total employees and members of the public allowed in county facilities or buildings. If physical separation is not possible, employers should consider barriers (such as plexiglass or shower curtains) to separate employees from each other or members of the public. Employers should also consider closing breakrooms or common areas to help prevent employees from congregating in these areas. If possible, employers should require employees to obtain approval before scheduling meetings with members of the public or employees of another office and should eliminate work travel.

Employers should implement daily cleaning policies to keep workspaces as hygienic as possible. This could include requiring employees to sanitize their workspaces on a daily basis, wiping down high-touch or high-traffic surfaces and shared office equipment (e.g. copiers, phones, staplers, refrigerator handles, microwaves, etc.), eliminate sharing equipment where possible and prohibiting employees from using employer-owned utensils and coffee mugs.

16. What role does the Union have regarding return to work issues?

Answer: Under Ohio law, a public employer has the duty to bargain with the union concerning anything that affects wages, hours or terms and conditions of employment. This is a very broad standard. Counties should remember, however, this standard only requires an employer to bargain in good faith. Depending on the circumstances, it does not necessarily mean the parties must reach an agreement. In general, the employer should let the union know of changes being made to wages, hours or terms and conditions of employment in response to the COVID-19 pandemic. Some common issues during the pandemic include work hours, schedules, overtime, approval or denial of leave and aspects of teleworking. Issues relating to layoffs also may present bargaining obligations.

In general, employers should have a plan for how they want to address potential changes in terms and conditions affecting bargaining unit employees. Employers should communicate those potential changes to the union and, if requested by the union, engage in good faith bargaining about the changes with the union.

17. What are best practices for bargaining in a time of economic uncertainty?

Answer: There is no right or wrong way to bargain for a successor collective bargaining agreement when money is a problem. In the current environment, public employers should consider the following:

- Don't claim a lack of funds unless the appointing authority is experiencing or expecting a lack of funds. The economic impact from COVID-19 may be uneven and impact different public employers and regions in different ways.
- Share economic information with the union and employees. There is a tendency for employers to assume unions must understand the economic realities and for unions to distrust employers' claims about economic issues.
- Consider withdrawing any current proposals in order to modify them to reflect changing circumstances related to COVID-19.

Employers should also remember that they have certain emergency powers during the pandemic. In *SERB v. Toledo City Sch. Dist. Bd. of Edn.*, Case No. 2000-ULP-05-0274, the State Employment Relations Board held that a party cannot modify an existing collective bargaining agreement without the negotiation by and agreement of both parties unless immediate action is required due to: (1) exigent circumstances that were unforeseen at the time of negotiations; or (2) legislative action taken by a higher-level legislative body after the agreement became effective that requires a change to conform to the statute. Again, counties should consult with legal counsel before taking any action affecting wages, hours or terms and conditions of employment.

18. Can a county allow more than 10 individuals into a meeting/hearing room for a public meeting?

Answer: No. As of the date of this document, Governor DeWine has stated that the restriction on gatherings of 10-or-more people remains effective until at least May 29, 2020. However, House Bill 197 amended the Open Meetings Act and permits counties to hold meetings and hearings virtually under most situations. A county need only provide access to the content of a public meeting, but the law still requires a public body holding a virtual public hearing to provide a way for the public to access the meeting, as well as for interested parties to provide input, review materials, and ask questions of witnesses. Counties should consult with legal counsel before holding a virtual public meeting to ensure all requirements have been met.