

COVID-19: Guidance for Hospitality Employers

The recent spread of the novel coronavirus (COVID-19) around the world has caused employers to become increasingly concerned regarding the implications on their workforces and businesses. Public health authorities, such as the Centers for Disease Control and Prevention (CDC), the [World Health Organization](#) (WHO), and the U.S. [Occupational Safety and Health Administration](#) (OSHA) have issued guidance for employers. Employers in the hospitality industry continue to have many questions regarding the impact of COVID-19. Below are answers to some of the most common questions from employers in the hospitality industry:

- **What should employers do?**

Make sure you have a plan in place in case of an outbreak in your area. Ensure that key individuals in your organization are aware of the plan and its contingencies. You should also review your current human resources policies, particularly leave policies, and consider providing flexibility consistent with public health guidance and local and state laws. If policies are modified, inform your employees.

- **What should I do if an employee is sick, but I am not sure it is COVID-19?**

If an employee is exhibiting symptoms of COVID-19, you may send that employee home, as long as you apply this policy uniformly and not in a manner that discriminates based on any protected characteristic. In fact, the CDC recommends that all employers encourage actively sick employees to stay home. If you use a third party to provide staffing support, ensure that company is also actively encouraging sick employees to stay home. The same applies to any vendors or other third parties that routinely visit your property.

- **Do I have to pay an employee that has been sent home?**

An employee (1) with COVID-19, (2) who is not exhibiting COVID-19 symptoms but has been in contact with an individual with COVID-19, or (3) an individual in the potential incubation period can be required to use vacation time and/or other paid time off for an absence, subject to the provisions of the employer's current vacation time, paid time off (PTO), and other applicable policies, and any state

laws (e.g., implied contract of employment) restricting an employer's ability to interpret or amend those policies.

For exempt employees, vacation time and/or other paid time off can be applied consistent with policy and applicable state and local laws, and should be applied uniformly. Please note that while an employer is not required to provide paid time off for a non-exempt employee who has exhausted all vacation time and/or other paid time off, the analysis for an exempt employee will depend on whether the absence is initiated by the employee or the employer. If the absence is initiated by the employee (including for his or her own illness or that of someone for whom he or she is caring), the employer may dock the exempt employee for full-day absences only. If the absence is initiated by the employer (e.g., the employee must stay home for a mandatory quarantine period, even though he or she is asymptomatic and willing to come to work), the employer may dock the exempt employee only for full seven-day absences that coincide with the employer's pay week.

Employers may also consider advancing vacation and/or other paid time off to cover COVID-19 absences. If policies are modified during this time, the policy should be in a writing distributed to employees, containing agreements that employees are required to repay advanced time off first from newly earned vacation time or other paid time off. Where not otherwise prohibited by state law, employers may be able to deduct any advanced time off from a departing employee's vacation time/PTO payout or final paychecks.

Depending on your jurisdiction and the reason for the absence, some COVID-19 absences may also be covered by applicable state or local paid sick leave laws. Be sure to understand the laws applicable to your jurisdiction.

Employers may also consider voluntarily paying employees, even if a policy does not provide for paid leave. Again, any such modification should be in writing and including specifics as to how and when it will apply. Ensure that any such policy is consistently applied.

Overall, employers should carefully consider the employee relations implications of pay policies during this time, and also the impact unpaid leave will have on whether employees will continue to voluntarily stay at home when they feel sick,

disclose that they feel sick, or disclose that they have traveled to a high-risk area, if there is a perception that they will suffer a financial consequence for doing so.

- **When can I allow an employee that was sent home to return to work?**

The CDC indicates that in non-healthcare settings where individuals in the workplace are not at a greater risk of contracting COVID-19, employees may return to work at least 24 hours after no longer having or exhibiting (a) a fever (defined by the CDC as a temperature greater than 100.4° F or 37.8° C), (b) signs of a fever, and (c) any other symptoms, without the aid of fever-reducing medicines (e.g., anything containing ibuprofen or acetaminophen) or other symptom-masking medicines (e.g., cough suppressants).

If an employee has a confirmed COVID-19 diagnosis, this timeline will vary. You should consult legal counsel, the CDC, and local and other public health authorities for guidance at the time, as it is an evolving situation.

Employers should use these recommendations as a guideline, but in some cases, should be prepared to be flexible with return to work decisions. Employers should take into account any specific restrictions or instructions provided by a public health authority or a medical provider. Employers should also consider an over-arching goal to minimize the risk of spreading a virus at work. Finally, employers should consider implications of the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA) in making a determination. Above all, ensure that decisions are made uniformly.

- **What should I do if an employee refuses to come to work for fear of becoming infected with COVID-19?**

Employees may be protected from retaliation under the Occupational Safety and Health Act (OSH Act) in certain circumstances when they refuse to perform work as directed. Specifically, an employee may refuse an assignment that involves “a risk of death or serious physical harm” if the following conditions apply: (1) the employee has “asked the employer to eliminate the danger and the employer failed to do so”; (2) the employee “refused to work in ‘good faith’” (a genuine belief that “an imminent danger exists”); (3) “[a] reasonable person would agree that there is real danger of death or serious injury”; and (4) “[t]here isn’t enough time, due to the urgency of the hazard, to get it corrected the hazard through regular enforcement channels, such as requesting an OSHA inspection.” While

each situation is different, and a generalized fear of contracting COVID-19 is not likely to justify a work refusal in most cases, employers may want to conduct a thorough review of the facts before any disciplinary action is taken against an employee who refuses to perform his or her job for fear of exposure to COVID-19.

Guidance and recommendations regarding COVID-19 are rapidly evolving. Hospitality employers are encouraged to stay up to date as to local, state, and federal developments impacting their businesses.



Vanessa Patel helps business owners and employers navigate laws regulating workplace behavior. She is an attorney with the international firm Ogletree, Deakins, Nash, Smoak & Stewart, P.C., based in the firm's Tampa, Florida office. She regularly guides and defends employers throughout the country. For questions regarding COVID-19 or questions related to employer issues in general, please contact Ms. Patel at vanessa.patel@ogletreedeakins.com or 813-221-7440.