

## **COVID-19: Q&A Specific to Staffing**

### **Pre-Hire and Hiring**

1. **If a candidate comes into an office to fill out an application and they are clearly sick, can a staffing firm tell the worker to leave the premises and come back later?**  
Yes. A staffing firm may prohibit access to applicants exhibiting symptoms of COVID-19.
2. **If internal staff is working remotely, can temporary workers' Form I-9 employment verification documents be viewed remotely by Skype, FaceTime, etc.?**  
Yes. See [this update](#) from the Department of Homeland Security.
3. **May a staffing firm or client use a prescreening questionnaire before letting employees/visitors/applicants into the workplace?**  
Yes. It is permissible to ask these groups of visitors screening questions about symptoms, travel, and exposures that reflect risk of potential exposure to COVID-19.
4. **What COVID-19 questions are staffing firms permitted to ask of candidates and new employees? For example, can a staffing firm ask**
  - a. **whether a candidate has traveled to specific, high-risk areas?**  
Yes. No law prohibits inquiries into travel to specific areas.
  - b. **whether a candidate had a recent fever and/or other specific symptoms?**  
Yes. Medical inquiries are permissible as to COVID-19 symptoms, including fever, coughing, and shortness of breath.
  - c. **whether a candidate tested positive for the virus?**  
Yes. At this point, inquiries about COVID-19 test results are permissible.
  - d. **whether a candidate lives with, or has recently been around, someone who tested positive or is presently quarantined?**  
Yes. No law prohibits inquiries into whether an individual lives with, or has recently been around, someone who tested positive or is presently quarantined.
  - e. **Can a staffing firm refuse to place a worker who answers yes to any of these questions?**

Yes. Answering yes to any of these questions is a valid basis for temporarily denying access to the facility or refusing to place a worker on assignment. However, the staffing firm should emphasize the temporary nature of the denial and that it does not preclude the worker from seeking opportunities later.

**f. Can a staffing firm require the candidate to sign an affidavit or other statement attesting to the answers?**

Yes. These inquiries are permissible and they can be in writing. To the extent the answers contain specific health information regarding symptoms or diagnoses, they must be maintained confidentially.

**5. Can a staffing firm refuse to accept clients/job reqs if they are in specific geographic areas or involve large gatherings of more than 500 people?**

Yes. There is no prohibition against deciding to decline a business opportunity due to a potential health risk to your workers. However, to the extent the client relationship is memorialized in a contract/staffing services agreement, that document should be reviewed before declining the opportunity, to make certain doing so does not violate the terms of the contract.

**6. Can a staffing firm ban workers from traveling either domestically or internationally—either for work or personal travel?**

A staffing firm may restrict business travel as it chooses. While a staffing firm may not prohibit workers from traveling to certain destinations for personal travel, it may require those workers to self-quarantine for 14 days upon return. Staffing firms should advise workers contemplating travel of this possibility.

### **While on Assignment**

**1. Can a staffing firm ask a client whether it has had a recent case of the virus, and whether a temporary worker is being requested to fill in for a sick worker?**

Yes. Staffing firms can and should make inquiries to determine whether they are sending their workers to a safe and healthful work environment. The potential for exposure to COVID-19 is an inquiry that staffing firms should make before assigning a worker to a client site. In addition, inquiries into the client's protocols for preventing spread of COVID-19 in its workplace are appropriate.

**2. Can a staffing firm mandate a 14-day quarantine for workers**

**a. if they demonstrate symptoms of the virus? What if the worker claims that “it’s allergies”?**

Yes. A staffing firm may require an employee demonstrating symptoms of COVID-19 to stay at home if the employee exhibits symptoms associated with the disease. Whether the staffing firm may impose a 14-day duration on self-quarantine or instruct the worker to stay home until symptom-free for 24 hours will depend on the circumstances.

**b. if they've recently traveled to particular areas where the virus is widespread?**

Yes. A staffing firm may require a quarantine following travel to areas with sustained spread of the virus as reflected on the CDC website.

**c. if they've returned from a cruise?**

Yes. A staffing firm may require a worker to self-quarantine following cruise travel. This is consistent with CDC guidance.

**d. if they've traveled at all?**

Yes. A staffing firm may require a worker to self-quarantine following travel, although that precaution is not among those recommended by the CDC.

**3. Can a staffing firm require temporary employees to seek medical attention and/or a COVID-19 test if it believes the employees are showing virus symptoms? Can temporary employees be terminated or dismissed from future assignments if they fail to do so?**

No. Employers cannot force employees to seek medical attention or obtain a COVID-19 test, although they can encourage them to do so. They can, however, require employees to demonstrate fitness for duty as a condition of returning to work.

**4. If a client sends a worker home simply because the client believes the worker has been exposed through a family member or travel, what obligations does the staffing firm have toward that worker? Can the worker be reassigned to a different client?**

The staffing firm should make its own inquiry to determine if circumstances suggest a potential exposure. If the worker was exposed to an infected person or if the worker traveled to a location identified by the CDC as having sustained spread, it is advisable to have the employee self-quarantine for 14 days and return with a doctor's note. However, a doctor's note or other documentation demonstrating fitness for duty may not always be feasible. Those situations should be addressed on a case-by-case basis.

**5. If a worker is sent home to quarantine, can staffing firms require a medical release or doctor's note before permitting the worker to return to work?**

Yes. However, obtaining a note may be difficult due to an overwhelmed health care system during the crisis. Accordingly, some flexibility may be necessary.

**6. If an employee is out of work due to an undisclosed illness, can the staffing firm require testing, medical release, or a doctor's note stating the illness was not COVID-19-related before permitting the worker to return to work?**

A staffing firm can require employees to obtain a doctor's note before permitting them to return to work.

**7. Is a staffing firm required to cover any costs associated with testing?**

No. But testing may be covered under insurance policies or the recently enacted Families First Act.

**8. Can a staffing firm refuse to place, or client refuse to accept, an employee that has one or some symptoms of the virus?**

Yes. A staffing firm or its client may send a worker home if he or she exhibits symptoms of COVID-19.

**9. Can a staffing firm ask employees about a specific diagnosis, or just their symptoms?**

Yes. In the context of the COVID-19 pandemic, such inquiries are permissible. Any information about an employee's diagnosis must be kept confidential. Also, while the inquiry may be permissible currently, it is because of the current public health emergency. This is not an inquiry staffing firms should ordinarily make.

**10. If a worker contracts the COVID-19 virus while on assignment, does the staffing firm or client have a duty to place a worker back on assignment after a quarantine and/or recovery period?**

It is recommended, yes. If the employee is eligible for leave under the Family and Medical Leave Act (or state equivalent), the employee would be entitled to reinstatement upon return from leave. Also, even if the FMLA does not apply, a short leave of absence and return to the position may be a reasonable accommodation under the ADA.

**11. Can a client refuse to accept a worker that had the virus but has since recovered?**

No. Refusing to accept a worker who no longer poses a threat to the workplace based on the employee's previous COVID-19 diagnosis likely violates the ADA and similar state laws.

**12. If a worker shares that he has some symptoms of the virus, but has not yet tested positive, does a staffing firm need to advise coworkers and/or clients?**

No. While the CDC recommends that such employees be sent home until asymptomatic, it is not necessary (or advisable) to notify others simply because the worker exhibited one or more symptoms of COVID-19.

**13. What are a staffing firm's obligations if a worker tests positive for the virus and there are coworkers who may or may not have been exposed? In the cases of temporary workers, is there an obligation to advise the client? Is there a duty to disclose the identity of the specific worker(s)? What privacy concerns/issues, if any, are involved?**

If a staffing firm worker tests positive for COVID-19, the staffing firm should advise those who have been in contact with the worker that an individual with whom they may have had contact has been diagnosed with COVID-19. Those coworkers who had close contact with the infected worker should be instructed to self-quarantine for 14 days. Clients also should receive similar notifications. The name of the infected worker MAY NOT be divulged without the infected worker's consent.

**14. Can a staffing firm and/or client require workers to take their temperatures before beginning work each day? Conversely, can a staffing firm refuse to allow clients to take temperatures of temporary workers in areas where the virus is not widespread?**

Yes. As the pandemic has progressed, the Equal Employment Opportunity Commission has issued additional guidance stating that employers may take employee temperatures without

violating the ADA. See the EEOC's [updated guidance](#). A staffing firm could still refuse to allow a client to take temperatures of the staffing firm's workers, but that may result in such workers being denied entry to the client site.

**15. Can employers require employees to wear masks?**

An employer may furnish loose-fitting masks (non-respiratory protection) for voluntary use. The CDC does not recommend these masks for workers attempting to avoid infection, unless they are in the health care industry. Employers may not furnish negative pressure respirators, including N-95 respirators, unless they comply with applicable Occupational Safety and Health Administration standards governing respiratory protection.

**16. Generally speaking (not referring to FMLA), is there any duty to reinstate temporary workers to their former positions if a job site closes temporarily and then reopens?**

It depends. Just because the FMLA (as it existed prior to the enactment of the Families First Act) is not applicable does not mean the employer will not have reinstatement obligations following a closure due to this public health emergency. Laws and executive orders being passed in direct response to the pandemic may have reinstatement obligations that apply in this circumstance. For example, the FFA and similar state and local laws enacted in response to the pandemic cover a range of absences necessitated by public health emergencies (in addition to those traditionally covered by the FMLA and/or related state laws) and require reinstatement following such absences in certain circumstances. In turn, staffing firms should follow developments in this area carefully to ensure compliance with rapidly changing requirements.

## **OSHA**

**1. What client work site job hazard assessment is required, if any, as it relates to COVID-19? What if a client has banned visitors, including staffing firm representatives (but not temporary employees), from its sites?**

Generally, staffing firms have an obligation to take reasonable steps to determine that they are sending temporary workers to a safe work environment. Staffing firms ordinarily achieve this objective through interactions with the client about its safety and health programs, the nature of the work temporary employees will be expected to perform, and what the client does to protect workers from related hazards. As it relates to COVID-19, staffing firms should inquire with clients about their plans to prevent the spread of COVID-19 in the workplace and confirm that those plans align with (or exceed) CDC guidance. Staffing firms should confirm that any COVID-19-related practices of clients also apply to temporary workers. While a client ban on visitors—including account managers and others—might be alarming, in the context of a pandemic that could happen as a precautionary measure. In those situations, the staffing firm should actively communicate with the client through other means.

**2. How do OSHA rules/regulations apply to independent contractors?**

Liability under the OSH Act does not, in every instance, require an employer/employee relationship. Consequently, a business that uses independent contractors can be liable for violating OSHA standards if it acts or fails to act in a way that exposes the independent

contractor to workplace hazards.

**3. What OSHA rules/regulations apply, if any, in the event a temporary worker comes down with the virus while working at the client site? Is this a reportable injury on OSHA logs? Who reports it?**

Generally speaking, an illness is not “reportable” in a federal OSHA jurisdiction unless the disease was contracted while at work through an occupational exposure AND results in either hospitalization or death. An illness would not be recordable on OSHA 300 logs absent information suggesting it arose from occupational exposure and certain other criteria were met. In most instances, connecting an infection to occupational exposure is not likely. However, occupational exposure may be more apparent in certain fields such as healthcare, death care, laboratory operations, nursing homes, and emergency responders. In such cases, reportable and/or recordable illnesses are more prevalent.

**4. Are there any legal risks associated with not mandating quarantine or requiring removal of sick workers?**

Yes. There could be OSHA liability for violation of the general duty clause under which an employer must provide a workplace free from recognized hazards exposure to which will likely cause serious injury or death. Moreover, allowing potentially infected workers to remain in the workplace could generate workers’ compensation and tort liability if doing so causes others to become infected with COVID-19.

**5. Is a staffing firm required to remove all workers at a jobsite where a coworker tested positive?**

No. In the event of a confirmed positive, the staffing firm and its client should work together to identify those workers who came into “close contact” with the infected worker. Those employees should be self-quarantined for 14 days. Others who may have had lesser contact with the infected worker should be notified and instructed to self-monitor. Remember, the name of the infected employee MAY NOT be disclosed in such notifications. In addition, certain states require employers to notify state or local public health authorities if an employee tests positive. As a general rule, a staffing firm should work with its client on decisions about notifications to state and local health authorities when a temporary worker tests positive and had contact with others in the workplace.

**6. Are there any OSHA obligations for employees that are working remotely?**

Employers are required to ensure a safe work environment for employees who work from home, just as they must for those who work in traditional workplaces. As a practical matter, this does not typically require employer inspections of remote work arrangements, though some employers take that step. Instead, safety of home or remote work environments are typically addressed through communications and policies geared to maintain a safe remote work environment.

**7. OSHA prohibits retaliation against workers that perceive a threat at the work site. How reasonable does the employee’s belief need to be?**

An employee has a limited protected right to refuse to perform an assigned task because of an objectively reasonable apprehension of death or serious injury, coupled with a reasonable belief

that no less drastic alternative than refusal to perform is available. Generally speaking, there is no protected right to walk off the job entirely. A mere apprehension of community transmission of COVID-19 likely is not a reasonable basis for refusal to perform work. While an employee may believe he is in imminent danger, objectively, this likely is not the case—so long as the employer is following CDC guidance and the most recent OSHA guidance on protecting workers from COVID-19.

This scenario may also implicate ADA accommodation obligations where an employee objects to performing certain tasks or coming to the workplace because he/she is more vulnerable to becoming seriously ill due to an underlying health condition or advanced age. These situations may require the employer to consider and provide reasonable accommodations to the worker to avoid potential exposures to COVID-19.

**8. What are the risks associated with accepting jobs where workers' duties involve cleaning the job site as a result of either a positive COVID-19 case or as preventative measures?**

There is some evidence that the virus can be spread through touching a surface that someone sneezed or coughed on and then touching the face. The harder the surface, the longer the virus can survive. The CDC estimates the timeframe as minutes to an hour on soft surfaces and hours to a day on hard surfaces. There is a risk of employees cleaning surfaces being exposed to surface-borne virus. However, these hazards can be abated by using gloves, disinfectant, and proper hand washing procedures (supplemented with hand sanitizer), consistent with CDC recommendations. Cleaning chemicals also pose chemical hazards that must be addressed with the hazard communication program, in the hazard assessment, and with appropriate personal protective equipment.

## **Workers' Compensation and Unemployment Insurance**

**1. How does workers' compensation apply to COVID-19 cases?**

Workers' compensation may apply to COVID-19 illnesses if the employee's exposure can be shown to have arisen out of and in the course of his/her employment. In most situations, an employee would not be able to make a connection between the work environment and a COVID-19 infection given the many other potential sources for infection. However, in some occupations, such as those in healthcare, death care, emergency services, or testing laboratories, establishing that the exposure occurred in the workplace is more likely.

**2. Would an employee have to fall ill while at work/on the jobsite or contract the virus from another worker in order to be entitled to workers' compensation benefits?**

No. The key inquiry is whether the exposure occurred in the workplace, not where the symptoms manifest themselves.

**3. Are there any workers' compensation considerations with employees working remotely/at home?**

As it relates specifically to COVID-19 infection, no. While an employer is generally responsible for ensuring a safe work environment for employees who work at home, it would be difficult for an employee to show that an infection contracted at home arose out of and in the course of his

or her work.

**4. If a worker refuses to work out of fear of contracting the virus, can they lawfully apply for unemployment insurance benefits?**

Potentially. As the pandemic has evolved, states have expanded the circumstances under which employees may receive unemployment insurance benefits. The law is evolving rapidly in this area and staffing firms should coordinate with their unemployment insurance business partners to determine how changes might impact their claims. However, in most instances, unemployment insurance benefits would only apply in an employer or government-mandated closure.

**5. Are there other types of insurance staffing firms should consider in light of the pandemic?**

Additional types of insurance that may be implicated during a pandemic are business interruption insurance, supply chain insurance, event cancellation insurance, and liability insurance. As part of pandemic business contingency planning, staffing firms should consult with their insurers to determine the extent to which policies may cover losses arising from the pandemic.

## **FMLA and ADA**

**1. Are days in quarantine considered FMLA-qualifying? What if the employee self-quarantined and did not have the virus? What if a worker is caring for a sick family member? What job protection exists in these circumstances?**

COVID-19 would qualify as a “serious health condition” under FMLA, allowing an employee to take FMLA leave if either the employee contracts the disease and is in quarantine/receiving treatment, or if an immediate family member contracts the disease. The employee would be entitled to job reinstatement as well. At present, days in self-quarantine without illness are not FMLA-qualifying.

**2. What documentation should staffing firms request of sick/returning workers?**

Though the CDC’s guidance urges against requiring a return-to-work note, if the employee’s illness is a “serious health condition” under the FMLA (and COVID-19 would qualify as a “serious health condition”), then a staffing firm would also be able to require a return-to-work note if the staffing firm complies with the FMLA’s guidelines for requiring such documentation, including, among others, notifying the employee in the initial determination that fitness-for-duty notes will be required and consistently applying the requirement to all FMLA leaves.

**3. Is it permissible for workers to use short-term disability?**

If a COVID-19 infection results in an employee being unable to perform his/her job due to the severity of the illness, short term disability benefits may be available. The employer’s plan will govern qualifying conditions. In addition, some states (i.e., California) have state-run disability insurance benefits that may be available in cases involving COVID-19 illnesses.

**4. Can an employer require workers to exhaust vacation/sick/PTO leave before using FMLA or other paid leave programs?**

Generally, an employer can require the use of vacation/PTO banks at its discretion. However, in most instances, an employer cannot require an employee to use mandatory paid sick leave. That is generally the employee's choice. Additionally, to the extent a staffing firm is a covered employer under the new Families First Act, there may be additional restrictions on the extent to which the staffing firm can require use of vacation, non-mandatory sick leave, and/or PTO before use of FFA leave.

## **Paid Leave and Remote Work Issues**

### **1. What are the current state and federal laws regarding mandated paid leave for COVID-19?**

This is a rapidly evolving issue and should be carefully monitored by staffing firms. At the time this document was prepared, the federal Families First Act had been enacted. New York state has the framework for a COVID-19-related paid leave law that is expected to become law very soon. Colorado also enacted a paid leave law in reaction to the COVID-19 pandemic. Many other states and municipalities have paid sick leave laws that predate the pandemic, but that may provide paid sick leave for certain absences arising from the pandemic.

### **2. Are staffing firms required to pay workers that cannot work due to child care obligations as a result of school closures?**

Staffing firms covered by the Families First Act and/or state or local paid sick leave laws may be required to provide paid leave to employees who must care for children due to school closures. The FFA includes school closures as a qualifying reason to use paid leave. Similarly, many state and local paid leave laws also cover absences due to school closures and "preventative care," which may encompass school closures.

### **3. Are staffing firms obligated to reimburse costs associated with Internet and cell phone use, etc. for workers working remotely?**

A number of states require employers to reimburse expenses incurred by employees for tools, equipment, and the like that are "necessary" to the performance of their job duties. Staffing firms concerned about liabilities for expense reimbursement under state law during the pandemic should consult with counsel to explore strategies for administering reimbursement.

### **4. Under which of these circumstances does a staffing firm have obligation to pay the employee for time not working?**

#### **a. If a worker becomes ill with the virus**

Applicable paid sick leave laws may be implicated. In situations where no paid leave requirement applies, a nonexempt worker need not be paid for hours he or she does not work. With some limited exceptions, exempt employees are entitled to their full salary in weeks in which they perform "any" work.

#### **b. If a worker is simply exposed to the virus**

If exposure to the virus requires self-quarantine or other employer-mandated absence, applicable paid sick leave laws may be implicated. In situations where no paid leave requirement applies, a nonexempt worker need not be paid for hours he or she does not work. With some limited exceptions, exempt employees are entitled to their full salary for weeks in which they perform "any" work.

#### **c. If a worker feels unsafe on the job site**

Generally, no.

**5. What documentation should staffing firms require of employees who take sick leave, but do not end up having the virus?**

In situations in which an employee's absence relates to his or her own illness (even if not for a COVID-19 diagnosis), employer-mandated quarantine, or to care for an ill family member, staffing firms may require a doctor's note prior to return to work. Some absences permitted under various sick and family leave laws may not warrant requiring documentation as a condition of returning to work, such as government-mandated closures of businesses or schools.

**6. If a client's employees are permitted to work remotely, are their temporary workers required to have the same opportunity?**

No. Whether or not to permit remote work is within the discretion of the staffing firm's client.

**7. If some clients want to pay temporary workers who are unable to work either due to illness or job site closures, are staffing firms required to pay workers on other client assignments?**

No, a client paying temporary workers does not obligate the staffing firm to pay other workers on other client assignments.

**8. If workers are exempt under FLSA, what paid leave obligations does an employer have?**

Exempt or nonexempt status under the FLSA generally does not drive paid leave obligations.

**9. In the event of required layoffs, which laws do staffing firms need to be aware of?**

When layoffs are necessary, staffing firms should consider a variety of potential obligations, including

- Payout of accrued, but unused, vacation or paid time off where required. Many states require employers to pay for unused vacation upon separation.
- The timing of final pay. Some states (most notably California) have final pay obligations governing the timing of final pay at separation.
- Federal and state Worker Adjustment and Retraining Notification Act obligations. These obligations may require notice when a certain number of employment losses arise during a mass layoff or plant closing. Note that, generally, WARN Acts have exceptions for unforeseeable business circumstances that may apply, particularly in situations involving government-ordered quarantines and/or shutdowns that happen with little to no notice.
- Unemployment insurance. Consider the availability of UI benefits to employees following layoff.
- Severance. Although sudden shutdowns resulting from efforts to contain spread of the virus are not triggering severance payments for most employers, longer term workforce planning may result in reductions in force or other programs that traditionally include separation payments.

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