


Handbook Considerations in a COVID-19 Working Environment

July 27, 2020





Employee handbooks often serve as the employer’s central repository of policies and information regarding workplace behavior and employer expectations. They are also one of the first documents requested by plaintiff’s counsel in litigation. Therefore, it’s extremely important that employers keep their handbooks up-to-date and accurate. As employers grapple with the challenges and complexities of operating their business during the COVID-19 crisis, they have found themselves facing the need for new and modified workplace policies. We have developed this document to provide employers with tips and considerations as they modify and develop workplace policies.

GENERAL REMINDERS

Non-Harassment/Non-Discrimination – As the employee’s workplace location continues to be in-flux, this is a good time to remind employees of their obligations and conduct expectations under the non-harassment/non-discrimination policy. It’s especially important to do this for your remote workers. Oftentimes employees who work from home may become overly “comfortable” or casual with their coworkers which may lead to inappropriate comments or conversations with co-workers. Therefore, employers should consider reminding employees of the harassment policy and of the complaint procedure. Employers should also remind employees that workplace policies apply to their conduct and performance even when working from home.

The EEOC has reported an increase in complaints and charges of discrimination on the basis of national origin ([EEOC FAQ Section E](#)). Employers can help reduce the chance of harassment by explicitly communicating to the workforce that fear of the COVID-19 pandemic should not be misdirected against individuals because of a protected characteristic, including their [national origin, race](#), or other prohibited bases. The EEOC has likewise provided anti-harassment tools for small businesses:

- Anti-harassment [policy tips](#) for small businesses
- Select Task Force on the Study of Harassment in the Workplace (includes detailed recommendations and tools to aid in designing effective anti-harassment policies; developing training curricula; implementing complaint, reporting, and investigation procedures; creating an organizational culture in which harassment is not tolerated):
 - [report](#);
 - [checklists](#) for employers who want to reduce and address harassment in the workplace; and,
 - [chart](#) of risk factors that lead to harassment and appropriate responses.


Americans with Disabilities Act – There may be several ADA considerations that may arise in a COVID-19 working environment. Some diagnosed employees do not manifest significant symptoms and may be able to work remotely during the quarantine period. Likewise, it is possible that employees who do not experience serious symptoms of COVID-19 may not experience disabling condition as defined by the ADA. Additionally, employees with underlying medical conditions that make them “high risk” for COVID-19 may require an accommodation to perform the essential functions of their job. Therefore, it’s important that employers remind employees of their rights and obligations under the ADA and engage in the interactive process.

The EEOC suggests: Since responding to specific employee questions may be difficult, employers might find it helpful before such questions are raised to provide all employees with information about various laws that require employers to meet certain employee needs (e.g., the ADA and the Family and Medical Leave Act), while also requiring them to protect the privacy of employees. In providing general ADA information to employees, an employer may wish to highlight the obligation to provide reasonable accommodation (unless the accommodation poses undue hardship), including the interactive process and different types of reasonable accommodations, and the statute’s confidentiality protections. Such information could be delivered in orientation materials, employee handbooks, notices accompanying paystubs, and posted flyers.

Reporting/Recording Time and Hours Worked – During the COVID crisis, the risks associated with FLSA non-compliance is at an all-time-high. Carriers are already reporting unprecedented FLSA litigation – most especially “collective action” FLSA claims (a far more lenient process than a class action). Therefore, it’s imperative that employers update and reinforce their time and attendance/time reporting policies.

Employers should ensure that their wage and hour policies including provisions regarding:

- ✓ Hours worked
 - ✓ Time reporting
 - ✓ Overtime
 - ✓ Working off the clock
 - ✓ Time falsification
 - ✓ State and federal minimum wage and minimum salary
- Reporting absences and late/tardiness to work – Employers may need to modify these policies in particular with respect to COVID-19. Employers should be clear regarding their expectations for the nature of the information employees provide when calling in “sick”. Employers have a right to know why an employee is calling out of work. Most especially, employers have a right to know if an employee has exposure to, symptoms, or a diagnosis of COVID-19. Employers should also know if an employee is not coming to work because of fear of returning to work. Likewise, employers should also strive to understand the nature of



the employee's fear – most especially if that fear is because the employee or a household member is in a CDC “high-risk” category. The employer inquiries regarding an employee's reason for not coming to work may mean that the employer must address other employee matters such as ADA or FMLA.

- Employers should remind remote non-exempt employees that they are responsible for clocking in for all hours worked and clocking out when their shift/day/working time is complete. It's also important to remind remote employees of the overtime approval rules, prohibition of working off the clock and falsifying time records.

Employment Records – Employers who engage in employee screening for COVID-19 will obtain confidential medical information about its employees. The ADA has strict confidentiality rules that require employers to retain confidential medical records separately from the personnel file. Likewise, the employer may inform only those who “need to know” about both the employee's identity and the diagnosis/medical condition. “Need to know” is very narrowly and strictly construed. For example, an employee charged with “contract tracing” for positive COVID-19 employees would “need to know” the employees' identity. Conversely, employees who had contact with a COVID-19 positive employee would not “need to know” the identity of the employee, only the exposure to “someone” who tested positive. In other words, most often the employer would communicate the “what” (i.e. exposure) and not the “who” (i.e. the person's identity).

New Policies – Be clear (and put in writing) that any new policies are in addition to existing policies in the employee handbook (unless you update a complete policy with the intent of superseding and replacing all prior writings and policies).


Updated Policies – Be clear that any updates and modifications to existing policies supersede and replace any existing writings on the topic. Be sure to reference all writings on updated policies in the event that there are other writings on the topic that exist outside of the handbook (i.e. stand-alone policies, emails, memos and the like).

Duration of Policy – It's important to identify the effective date of the policy and to be sure that there is a cross reference/specific identifier for the most recent policy and the related acknowledgement document.

Right to Amend – It's important for employers to avoid an “expiration” or “end date” for their workplace policies. Likewise, employers should always be sure to include in their handbook the right to amend or modify workplace policies at any time with or without notice.

“Acknowledgements” Best Practices – If an employer distributes new or updated policies to employees they should likewise require the employees to sign an acknowledgement that includes:

- ✓ The obligation to read and comply with the policies
- ✓ The consequences for failure to comply
- ✓ A reminder that they are employed “at will”

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- ✓ A reminder that the handbook does provide a guarantee of continued employment and only a specific and designated role (person) in the company may vary the “at will” status (i.e. CHRO, CEO, COO, CFO)

Handbook Distribution - To limit risk and exposure, employers should consider leveraging their technology to deliver employee communications including new/updated handbooks and/or policies. Most HR, payroll and/or learning management systems have electronic distribution and signature features. Alternatively, employers without intranets or other electronic communication/distribution options may distribute policies/updated handbook via email with voting buttons or read receipt functionality.

Employee Discipline – Employers must hold employees who fail to comply with new and updated workplace policies accountable. Given the seriousness of the COVID-19 crisis, there should be consequences for an employee’s failure to follow the rules. Employee accountability should spelled out in the handbook and workplace policies. Likewise, employer should provide employees with documented disciplinary actions including documentation that follows the best practices of discipline including the following details:

- 1) Specific work rule that has been broken
- 2) Prohibited behavior
- 3) Desired behavior
- 4) Reason prohibited behavior is problematic or the risk it creates
- 5) Consequences for continued violations

Like an acknowledgement, disciplinary action should be delivered in writing and should include a signature statement that reminds the employee of his/her “at will” status. Additionally, if holding a disciplinary/coaching meeting, there should always be an employer-witness present on the call or in the room.

NEW POLICY PROVISIONS/CONSIDERATIONS

Safety, Standards of Conduct, and Work Rules

- **Return to Work Policy** – The [CDC has developed comprehensive guidance](#) for employers regarding employees who become symptomatic and/or are diagnosed with COVID-19. Note: [the CDC Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019](#) (COVID-19), May 2020 refers employers to its guidance: [Discontinuation of Isolation for Persons with COVID -19 Not in Healthcare Settings](#). Likewise, HUB has developed a robust eBook ([Back to Business Playbook](#)) for employers providing guidance and checklists for returning and/or managing an onsite workforce during the COVID-19 crisis. The CDC has also created industry specific decision trees: [schools](#), [workplaces](#), [camps](#), [childcare](#), [mass transit](#), [restaurants and bars](#).
- **Employee Safety Protocols** – Employers should identify the safety protocols and standards of conduct for employees as part of their overall COVID-19 safety program. The employer’s rules should be memorialized in a policy, should be clear and easy to understand, and distributed to employees. Employees should be held accountable for compliance with these work rules (like any other employer work rule such as dress code, attendance, or harassment in the workplace) (see disciplinary and acknowledgement tips above). The employer’s safety program may contain protocols and expectations including:
 - [Personal Protective Equipment](#) – Employers should decide whether they will require employees (and likewise visitors, vendors, customers etc.) to wear PPE, under what circumstances (such in their own cube/office, common areas, hallways etc.), and who will provide the materials.
 - [Social Distancing](#) – This should include employee exposure to each other and visitors, vendors, customers etc. - policies regarding use of office space, meetings in employee’s own cube/office, common areas, break rooms, conference rooms and in-person meetings
 - [Cleaning and Disinfecting](#) – Employee’s obligations to clean and disinfect various items in the office before and after use such as:
 - Office equipment
 - Shared office supplies such as pens and staplers
 - Work areas
 - Employee’s own work space
 - Copy, mail and/or break room equipment

- Sharing of Workplace Materials and Equipment – Will employees be allowed to share certain office equipment and supplies such as telephone hand and headsets, and office supplies such as pens and staplers? If yes, under what circumstances and what are their cleaning and disinfecting obligations (see above).
- Breakroom and Other Public Areas Etiquette – Employee’s obligations to wash their hands and wipe down areas before and after use
- Shared Documents – Employers that have workplace materials (and even customer-facing materials like menus) may want to consider laminating those materials and creating required protocols for wiping down and disinfecting those documents after each use.

- **Workplace Hygiene** - As employers implement new safety and health protocols the emphasis on workplace hygiene, like so many things, is unprecedented. Of the most basic ways to avoid community spread of COVID-19 is to enforce workplace hygiene protocols. Hand-washing (for at least 20 seconds), cleaning and disinfecting the workspace along with commonly used areas/equipment, and sneezing/coughing into your arm, are all examples of behavior that employers may want to include in a workplace hygiene policy.

Note Regarding Medical Questions: Based on guidance of the CDC and public health authorities as of March 2020, the COVID-19 pandemic meets the direct threat standard. The CDC and public health authorities have acknowledged community spread of COVID-19 in the United States and have issued precautions to slow the spread, such as significant restrictions on public gatherings. The EEOC has stated that COVID-19 poses a “direct threat” to the health of others.

- **COVID-19 Screening** - Employers (and their vendors on their behalf) may perform COVID-19 employee COVID-19 medical screening for as long as the EEOC deems COVID-19 a “direct threat” ([EEOC FAQ Section A](#)). *Note: once the EEOC declares that COVID-19 is no longer a “direct threat” employers’ ability to screen and medically test employees for COVID-19 will be subject to the default ADA standards (job related and consistent with business necessity).*

Employers should identify under what conditions an applicant ([EEOC FAQ Section C](#)) and/or employee may be screened, and the consequences for failure to comply. Additionally, employers should specify the methodology of the screening (in person, self-reporting etc.) and provide an assurance that the information will be kept confidential. More specifically, employers will need to determine their employee screening and testing protocols including:

- Screening – Will the employer screen employees for symptoms and/or temperatures? If so, when, where, and how frequently?

- Testing – Will the employer perform diagnostic test of employees to determine if the employee has the COVID-19 virus? If employers choose to incorporate applicant and/or employee testing as a mandatory part of their COVID-19 risk management program, they should document the requirements clearly in a policy provided to employees.

Employers may adopt several different screening approaches to determine each individual employee's risk to the workplace:

- Daily Live Employee Pre-Screening – For the period during which the EEOC declares COVID-19 a “direct threat,” employers may ask employee health questions regarding the symptoms and/or exposure to COVID-19. See the HUB “Back to Business” eBook which lays this out in more detail along with a form that employers may use. Employers may choose to conduct daily screening conducted by an employee on site. It's important that if the employer chooses the “live screening” approach that the designated “screeener” it provides the screener with the appropriate PPE. Likewise, the screener must know the confidentiality rules for the medical information.
- Employee Self Reporting Screening - While prescreening employees each day is one approach, employers may also require employees to proactively self-identify in the event the experience any of the CDC specified COVID-19 symptoms. This may occur under at least two circumstances.
 - Employees may report by exception – meaning employees may report to the employer only when they fit any of the CDC criteria (either symptoms or exposure)
 - Employees may be required to complete a self-report that they provide to the employer before arriving to work each day.

Regardless of the employer's approach, they should create new and clear policies that set forth the employee's standards of conduct and safety protocols. Likewise, employers must be sure that they enforce their policies consistently and retain related documentation. In all circumstances, employers should consider requiring employees to immediately self-identify any symptoms or exposure – regardless of daily pre-screening. Employees who fail to self-identify or hide their symptoms from their employer may face consequences such as discipline up through and including termination of employment (see disciplinary and acknowledgement tips above).

- **Employee Testing** – Likewise, since the emergence of the COVID19 crisis – the [Equal Employment Opportunity Commission \(“EEOC”\) has issued guidance](#) expanding the scope of medical information to which an employer may be entitled, under certain and specific circumstances. Consequently, employers may take steps to determine if employees entering the workplace have COVID-19 because an individual with the virus

will pose a direct threat to the health of others ([EEOC FAQ A.6](#)). Therefore, an employer may choose to administer COVID-19 diagnostic testing to employee.

Employers should determine if they will employ a diagnostic testing strategy for their employees and develop specific policies that set forth, among other things:

- When testing will occur and under which circumstances (i.e. pre-employment, regular interval, based on symptoms or “suspicion”)
 - The testing process – self-administered or vendor administered
 - Treatment of testing information and records
- **Employee Screening/Testing Response** – Employers should have clear response protocols in place for employees that fall into each of the following categories ([see July 20, 2020 updated CDC guidance](#)):
 - Tested positive for COVID-19
 - Symptoms of COVID-19
 - Exposed to someone with Symptoms or testing positive for COVID-19
 - High-risk employees with underlying health conditions (see ADA section above)
 - Employees living with someone that is high-risk

The [CDC](#) and [OSHA](#) have each provided guidance to assist employers with their preventative and responsive policies. Likewise, HUB has created a comprehensive “[Back to Business Playbook](#)” regarding return to work. Both of these resources will provide employers with guidance language to include in these policies.

The decision to discontinue home isolation for persons with confirmed or suspected COVID-19 should be made in the context of local circumstances. Options include a symptom-based (i.e., time-since-illness-onset and time-since-recovery strategy) or a test-based strategy. However, on July 20th, the [CDC updated its guidance](#) stating that it no longer recommends the test-based strategy and instead employers should generally rely on the symptom-based strategy.¹

Managing returning employees to work after a COVID-19 related experience (exposure, symptoms, and/or diagnosis) can be tricky. Employers are grappling with various

¹ RT-PCR testing for detection of SARS-CoV-2 RNA for discontinuing isolation could be considered for persons who are severely immunocompromised¹, in consultation with infectious disease experts. For all others, a test-based strategy is no longer recommended except to discontinue isolation or other precautions earlier than would occur under the symptom-based strategy outlined above. The test-based strategy requires negative results using RT-PCR for detection of SARS-CoV-2 RNA under an FDA Emergency Use Authorization (EUA) for COVID-19 from at least two consecutive respiratory specimens collected ≥24 hours apart (total of two negative specimens). <https://www.cdc.gov/coronavirus/2019-ncov/hcp/disposition-in-home-patients.html>


employee COVID-19 scenarios including employees with symptoms, without symptoms, and employee positively diagnosed with COVID-19. Employers should develop a comprehensive return to work policy that comports with above referenced CDC guidance. Employer protocols should be clear, easy to understand, and easy for managers to follow.

- **Personal Visitors** – Employers will likely continue to face certain social distancing limitations and requirements for some time. This means that not only must they limit the number of employees in the workplace, but also visitors. Employers should be clear about a workplace personal visitor policy including bringing children to work. Each additional person in the workplace may impact the social distancing. For example, an employee’s spouse may wait in the car when picking up or dropping off the employee. Likewise, employees may be prohibited from bringing children into the workplace.
- **Whistleblower/Anti-Retaliation Policies** – In late April, OSHA issued a [news release](#) reminding employers that they cannot retaliate against employees that report unsafe conditions during the COVID-19 pandemic. Employees have the right to safe and healthy workplaces,” said Principal Deputy Assistant Secretary Loren Sweatt. “Any worker who believes that their employer is retaliating against them for reporting unsafe working conditions should contact OSHA immediately.” Workers have the right to file a whistleblower complaint online with OSHA (or 1-800-321-OSHA) if they believe their employer has retaliated against them for exercising their rights under the whistleblower protection laws enforced by the agency.

Employers should consider developing (or refining) their complaint procedures to ensure that employees know how to make an internal complaint. Likewise, employers should take these complaints seriously and work with the employee and their relevant teams to ensure that they have an appropriate response plan for these complaints. Finally, employers should be sure that they train their managers about their obligations to not retaliate against these employees.

Wage and Hour and Scheduling

- **Working Hours and Schedule** – As employers strive to create socially distanced workspaces they may implement new and creative employee scheduling. For example, employers may create staggered shifts to limit the number of people in the workplace at the same time. Likewise, employees may have to arrive to work earlier than their regular start-time to wait for medical screening. Employers should be sure to capture schedule changes to time-keeping rules. For example, employers should address whether non-exempt employees are required to capture time spent waiting for medical screening each day.
- **Modified Work Schedules** - To achieve social distancing standards, employers may have to establish creative employee schedules and work-shifts. For example, employers may create staggered schedules in combination with and working from home to ensure that their onsite employee population never exceeds social distancing standards. In some



cases, employers may create staggered shifts for employees assigned to a specific team to limit exposure. New reporting and scheduling protocols should be set forth in a clear and well-organized policy identifying specific changes to teams, departments, divisions etc. Employers will also have to determine how they will respond to employees who may object to new work schedules or shifts.

- **Punctuality and Attendance** - When calling in sick or late employers may consider requiring employees to answer the COVID-19 symptoms and exposure questions. Determining if an employee is late or absent because of COVID-19 symptoms or exposure will dictate the employer's return to work protocols for that employee. Employers should remember that they may require only medical information regarding COVID-19 and/or information regarding the employee's ability to perform the essential functions of his/her job.
- **FLSA Safe Harbor Policies** – Many employers have had to make unprecedented staffing and scheduling changes to their workforce. In doing so, employees' jobs and compensation have likewise changed. For instance, employers may have reduced employee's compensation – both exempt and non-exempt. In some cases, employers may have reduced exempt employee's pay based on the hours/days worked each week. Reducing an exempt employee's pay by days or hours worked would jeopardize the employee's exempt status.

Fortunately, the FLSA regulations allow for a "[Safe Harbor](#)" to protect an exempt employee's status. If an employer (1) has a clearly communicated policy prohibiting improper deductions and including a complaint mechanism, (2) reimburses employees for any improper deductions, and (3) makes a good faith commitment to comply in the future, the employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing the improper deductions after receiving employee complaints. Employers should be sure that they have a compliant and complete safe harbor policy in their handbook and otherwise distributed to its employees.

FLSA Requirements Note: The FLSA requires that most employers pay their employees at least the federal minimum wage for all hours worked and overtime pay at not less than time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.


However, the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales and certain computer employees. These exemptions are often called the "white-collar" or "EAP" exemptions. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than \$684 each week. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations.

Wage Replacement Benefits

- **Vacation Time** – As employers sent employees home on unpaid furloughs, employees wondered whether they could or were required to use their unused vacation and/or paid time off balances. In most cases, employers’ policies were silent with respect to the requirement to use accrued time off if the employee were to be furloughed. Likewise, employers that reduced employee’s hours were left wondering whether they had to allow employees to supplement their wages with accrued time off (see wage and hour section for a discussion of FLSA rules). Generally, we recommend that employers include in their leave of absence policy language that employees are required to use available accrued time off during any unpaid portion of leave. Today, in light of this COVID-19 crisis, employers may want to consider expanding their policies to specify the employees’ obligation to use accrued time off during *any* unpaid leave of absences, including furlough, or reduction in hours.
- **Sick Leave** – As a threshold matter, employers should be sure that their time-off policies encourage employees to take time off when they feel ill. Employers should encourage employees to remain home if they are ill and should build their programs to encourage this behavior. Oftentimes employers design their sick leave policies to provide time off solely for the employee’s own illness. However, considering the COVID-19 crisis, many employees have needed time off to care for sick family members, but the employer’s policy did not allow “sick time” for this reason. Additionally, the time off to care for the sick family member is often not otherwise compensable under other benefits programs such as a disability plan or EPLS/EFMLA for large employers (500 or more employees – see below).

If an employer provides sick leave on their own accord, meaning, the employer is not subject to statutorily required sick leave(see below), they may want to consider revising/expanding their sick leave policies to allow time off to care for a sick family member. In this case, employers may design the program and define “family member” in its own terms.

- **Government Mandated Programs** – Federal, State, and Municipal legislation has been passed or revised across the country in response to COVID-19, including:
 - Families First Coronavirus Response Act (*applicable to employers with less than 500 employees*) – The Families First Coronavirus Response Act (FFCRA), which includes Emergency Paid Sick Leave (EPLS) and Emergency FMLA entitlements to employees. While the Department of Labor has been silent on if a separate policy outlining FFCRA is required, employers who fall under FFCRA’s requirements may find it useful to add a separate FFCRA policy to their handbook outlining the specific eligibility, entitlement, procedure for requesting leave, required documentation, and its coordination with existing leave entitlements.
 - State/Municipal Sick Leave – Several states and local municipalities have updated their previous paid sick leave laws or enacted new sick leave legislation to



specifically include certain pandemic-related or public health emergency-related reasons for use. It is important to review each sick leave law that may apply, as each state/local law may differ for qualified leave reasons.

- Statutory Disability/Paid Family Medical Leave Programs – As with sick leave, many states with preexisting state disability and/or paid family leave programs have expanded the qualified reasons to include COVID-related absences. Again, each state can differ so it is important to ensure compliance with each applicable state’s requirements.
- **Bereavement Leave** – Some employers have expanded bereavement leave policies most especially in areas hardest hit by COVID-19. In some instances, employers are expanding the definition of “immediate family” and in others they are expanding the number of days that employees may take for bereavement leave.

Other Policy Considerations

- **Direct Deposit** – While most states prohibit employers from requiring direct-deposit, employers may encourage employees who are getting live checks today to switch to direct deposit for health and safety reasons. Direct deposit may eliminate at least one contact point between the employer and employee.
- **Job Postings** – While online job postings and recruitment have been a significant strategy for recruitment for some time, employers may need to reexamine their approach to the extent that any component required in-person applications and/or interviews. Employers should update their recruitment policies and procedures to ensure as much as the process as possible is virtual and remote. Employers should also consider how they will communicate their safety protocols and expectations of any candidates that visit the workplace for interviews and when they arrive at work for their first day of employment. Likewise, employers should be sure to communicate any pre-screening requirements for new hires.



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