

Employment Law & COVID-19: What You Need to Know



By Oliver Duchesne
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This post is available online [here](#).

The COVID-19 pandemic has created an unprecedented situation for businesses and their employees. We've received inquiries from a number of our in-house clients who are navigating thorny employment quandaries created by this virus. We asked two Priori network attorneys, **Sara Kula** and **Cody Jaffe**, to provide clarity on some of the most common questions we've received.



Sara is a New York-based employment specialist and former associate at Littler Mendelson, one of the country's top employment law firms. She was also the first employment counsel for a large publicly traded company and is a graduate of the University of Pennsylvania Law School.



Cody is a California-based practitioner who has exclusively practiced employment law for over twenty two years helping clients of all sizes and in all industries. Cody began his career at JacksonLewis, another of the country's top employment law firms. He is admitted to the California, Connecticut and New York bars and is a graduate of Columbia Law School.

Can companies require their employees to disclose information about their health status and symptoms, travel plans and history, non-work activities and possible risk of exposure to COVID-19?

Cody Jaffe:

Due to the risk of intruding on privacy rights and being accused of forms of discrimination, I would not recommend that an employer require an employee to disclose health conditions, symptoms they are experiencing, travel plans or history, non-work activities, or possible risk of exposure to COVID-19. However, employers can accomplish almost as much by expressing to all employees that they are concerned about the spread of COVID-19 amongst the workforce and their families, and urging all employees to: (1) abide by all local, state, and federal public health orders; (2) observe all recommended health practices like frequent and thorough hand washing, social distancing, and staying home when they feel ill; and (3) self-quarantine and notify their employer when they test positive for COVID-19, have been directly exposed to someone who tested positive, and/or are subject to a health care provider's order to self-quarantine.

Can a boss ask an employee to go somewhere or do something that might expose them to the virus? Can employees refuse?

Sara Kula:

The Occupational Safety and Health Administration (“OSHA”) permits an employee to refuse a request from his or her employer if the employee reasonably believes that he or she is in imminent danger. Imminent danger requires “a threat of death or serious physical harm,” and the “threat must be immediate or imminent,” meaning that the employee believes that death or serious physical harm could occur within a short time, for example before OSHA could investigate the problem. This is a high bar to reach and most workplaces in the United States would likely not (at least currently) meet this standard.

An employer should be mindful, however, that if multiple employees join together and refuse to come to work because of a safety concern, the National Labor Relations Board could consider that to be “protected concerted” activity under Section 7 of the National Labor Relations Act, and employers cannot take disciplinary action against employees for engaging in such protected concerted activity.

Do employers have a legal duty to provide additional sick leave to people who contract COVID-19?

Cody Jaffe:

Yes, the federal Families First Coronavirus Response Act (FFCRA) creates such a duty for some employers. In addition to whatever other sick leave laws a particular state or locality might have already had in place, the FFCRA will require, as of April 2, 2020, employers of fewer than 500 employees to provide up to 80 hours (or a proportional number of hours for part-time employees) of paid sick leave for any of the following categories of employees:

- 1) those subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- 2) those who have been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- 3) those experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- 4) those caring for an individual who is subject to an order as described in item (1) above or who have been advised as described in item (2) above;
- 5) those caring for a son or daughter (under 18 years old) whose school or place of care has been closed, or whose child care provider is unavailable, due to COVID-19 precautions; and
- 6) those who are experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Employees in categories (1) through (3) who go on paid sick leave will be entitled to their full regular rate of pay, but capped at \$511 per day and \$5,110 in the aggregate. Employees in categories (4) through (6) who go on paid sick leave will be entitled to two-thirds of their regular rate of pay, but capped at \$200 per day and \$2,000 in the aggregate. Note that employees who contract COVID-19 are likely to fall into one or more of categories (1) through (3) above.

Can a company order its employees to get tested?

Sara Kula:

Yes, if the employer reasonably believes that the employee has symptoms of COVID-19.

The Americans with Disabilities Act generally prohibits an employer from requiring medical examinations of employees, but provides an exception where an employer reasonably believes that the employee may pose a “direct threat” to the health and safety of others. A direct threat is a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The Equal Employment Opportunity Commission has advised that, “a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace at the current time.”

An assessment of whether a particular employee poses a direct threat requires an individualized assessment be based on objective, factual information. Relevant factors would include what symptoms the employee is exhibiting and whether the employee has any known exposure to the virus. An employer should also consider if the risk can be mitigated by permitting the employee to work remotely. An employer that reasonably believes, based on an individualized assessment, that an employee has symptoms of COVID-19 can require that employee to undergo medical testing to determine whether the employee, in fact, is infected.

If an employee is quarantining but not actually sick, is the employee entitled to sick leave?

Cody Jaffe:

Under some state and local paid sick leave laws that existed prior to the COVID-19 crisis, employees are eligible to use paid sick leave if they are caring for a sick family member while quarantining. Aside from that, yes, as described above, the FFCRA, effective April 2, 2020, does include among those employees eligible for up to 80 hours (or a proportional number of hours for part-time employees) of paid sick leave the following two categories of employees: (1) those subject to a federal, state, or local quarantine or isolation order related to COVID-19; and (2) those who have been advised by a health care provider to self-quarantine due to concerns related to COVID-19. Those two categories are not limited to individuals who are themselves sick. They could also be ordered or advised to quarantine due to exposure to others who had COVID-19, due to having been in a location known to have a high risk of exposure to COVID-19, or other reasons.

If you would like to speak to Sara, Cody or any other employment lawyers in the Priori network, please put in an RFP [here](#). If you have other COVID-related inquiries you'd like us to pose to our network of attorneys, please email them to oliver@priorilegal.com.

In the coming weeks Priori will be publishing information on matters relevant to the law and COVID-19. Sign up [here](#) to receive email updates directly to your inbox.

About Oliver Duchesne. Oliver is in Communications and Operations at [Priori](#). He holds a Bachelor of Arts (Philosophy) and Juris Doctor from the University of Sydney.