

# COVID-19 RESPONSE Employment Compliance Considerations for Re-opening the Workplace

April 30, 2020

**Webinar will start at 2 p.m. ET**  
**Today's presentation slides and recording will be posted to**  
**our COVID-19 response page: [www.sunlife.com/coronavirus](http://www.sunlife.com/coronavirus)**



Marjory Robertson,  
AVP & Senior Counsel

This content is not to be considered legal advice. We recommend Clients speak with legal counsel specializing in labor and employment law to ensure your organization meets requirements.

# Introduction



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# Agenda

- Overview of key legal issues: OSHA, ADA and more
  - Overview of federal, state and local Reopening Requirements/Recommendations: \*
    - Temperature checks
    - Other screening measures
    - Personal protective equipment
    - Workplace safety measures
    - What to do if an employee has COVID-19 symptoms at work
  - Accommodating disabilities and employee fears
  - Responding to complaints about workplace safety
- \***Soon on [www.sunlife.com/coronavirus](http://www.sunlife.com/coronavirus): Summaries of individual federal, state and local orders/recommendations**

# This presentation is only a summary

- This presentation is a summary of various federal, state and local orders and guidance regarding safety measures required or recommended in the workplace because of COVID-19
- Sun Life is not endorsing any particular measures
- Sun Life is also not representing that any of these measures will effectively eliminate risks associated with COVID-19
- Employers should consult their own safety and legal experts on these issues
- We have created a separate slide deck that includes source references to federal, state and local orders and guidance. ***It will be available on [sunlife.com/coronavirus](https://sunlife.com/coronavirus)***

# Overview of key legal issues

# Occupational Safety & Health Act (OSHA)

- OSHA imposes *a general duty of care* that requires employers (ERs) to provide *a safe and healthy working environment*
- OSHA can require:
  - Cleaning and sanitation
  - Screening of employees (EEs) and on-site visitors
  - Social distancing
  - Appropriate personal protective equipment
  - Safety measures if someone at work displays COVID-19 symptoms

# Americans with Disabilities Act (ADA)

- ADA permits some medical inquiries because COVID-19 has been declared a *pandemic*
  - EEOC permits ERs to *follow guidance from the CDC* and other reputable medical sources in responding to this direct threat to safety
  - Must focus on *exposure* and *symptoms*
- *Medical information* obtained from EEs must be *kept confidential*
- EEs with disabilities may be entitled to *reasonable accommodations*
  - *Including:* leave; remote work; reassignment of duties; job transfers and more
  - *Duty to accommodate* applies to EEs who are *working on-site* and EEs who are *telecommuting* because of COVID-19



# Federal, State and Local COVID-19 Orders



- Many states, counties and cities are issuing orders pertaining to COVID-19 workplace safety requirements
- Before you start to bring EEs back into the workplace, make sure you are fully aware of *federal, state and local orders and requirements* that may impact your work location and/or industry
  - Are you allowed to reopen?
  - If so, what are the rules?

# Temperature checks

# Temperature checks are permitted

- *EEOC Pandemic Guidance* permits temperature checks
- Communicate the process in writing:
  - *Be aware of local legal requirements:*
  - *California law* requires advance written notice advising EE that you will collect body temperature and purposes for which information will be used
- Establish *threshold temperature* over which an EE or other person will not be admitted entrance
  - *CDC: 100.4 degrees Fahrenheit, or higher*

# How to take temperatures

- Testing should be the *least invasive way possible*:
  - Touchless devices are best
- A *trained, qualified individual* must *administer* the temperature checks
- You may have to provide adequate *personal protective equipment for individual administering the checks*
  - Masks, gloves, sanitizer, access to soap and water
- You must ensure that the *equipment is sanitized*

# Prepare the temperature taking location

- Plan for *social distancing* at temperature taking location
- Take temperatures in *private location* so that results are *confidential* and can be *discussed discreetly* with the EE or visitor
- Think about how to have *EE or visitor whose temperature exceeds the threshold* leave the worksite to *minimize both potential exposure and embarrassment*

# Additional temperature-taking considerations

- Consent *is not* required.
  - Make clear in writing that having a temperature taken is required for admission to the building
- If you decide to *keep the results, you must store results* in *confidential* and *secure* manner
- *Consider paying your nonexempt EEs* as they wait for and go through the temperature-taking process
  - In some states (e.g., CA), you may have to pay a minimum amount of time if EE is not admitted to the building because of elevated temperature

# Self-administered temperature checks

- ERs can require EEs and others to self-administer temperature checks on a daily basis and to verify in writing results of those tests before entering worksite each day
- *May be less reliable, though less costly*
- Consider requiring home self-administered tests *even if* you take temperatures at worksite in order to reduce exposure/surprise at workplace
- If you challenge veracity of self-reported results, be mindful of potential for discrimination claims

# Other screening measures



# Ask questions about potential exposure and symptoms

- You *may ask* EEs and visitors:
  - Symptoms
  - Diagnosis
  - Exposure
- *You must keep medical information confidential*
  - Medical information must be *stored separately* from other personnel information

# What questions are okay?

- Questions about symptoms of EE or family or household member with whom EE lives or has close contact
- According to CDC, symptoms include:
  - Fever
  - Cough
  - Shortness of breath
  - Loss of sense of taste and/or smell
  - Chills
  - Gastrointestinal problems such as nausea, diarrhea and vomiting
  - Sore throat
  - Headache



**Symptoms are evolving:**  
follow CDC guidelines

# What questions are not okay?

- *Do not ask* age
- *Do not ask* about underlying health conditions
- *Do not ask* about pregnancy
- *Do not* make return-to-workplace decision based on *age* or your *belief/perception about underlying medical conditions*
  - EEs may ask for accommodations because of these conditions but do not presume

# Testing as a screening device

- Tests are being developed to evaluate:
  - Whether a person *has COVID-19* or
  - Has *previously had COVID-19* and now has *antibodies* that could protect the EE from COVID-19
  - Has been exposed to COVID-19 (*contact tracing*)
    - There may be privacy limitations on asking for *non-workplace contacts*
- On 4/23/2020, EEOC advised that ERs may conduct tests before allowing EEs to enter worksite
  - [https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm)
- If a *vaccine* is developed, ER may be able to require EEs to become vaccinated
  - ERs will have to evaluate accommodations for religious beliefs and/or disabilities

# Personal protective equipment

# OSHA & personal protective equipment (PPE)

- When a hazard exists:
  - ERs can mandate that EEs use PPE *and*
  - EEs have the right to demand PPE
- *Examples:* Face masks, gloves, goggles, face shields, respiratory protection
- What rules govern PPE? *ER must:*
  - Perform a hazard assessment
  - Consider other alternative options to protect EEs
  - Identify and provide appropriate PPE
  - Train EEs in use, care, cleaning, and replacement of PPE
  - Prepare a plan that is periodically reviewed

# When is PPE required for EEs with regard to COVID-19?

- *Originally*, CDC was *only* recommending the use of PPE for *health care workers who have greater exposure*
- But, there is more and more evidence of asymptomatic spread
- CDC *revised its guidance*:
  - CDC now recommends that even non-health care personnel should wear *a cloth face covering*, which can be home-made from household items
  - These cloth coverings must be *kept clean through washing*
  - *Main purpose* of cloth face covering is to prevent spread of COVID-19 from wearer to others

# Orders requiring or recommending face coverings

- States and local governments have adopted orders regarding face coverings
- *Variations:*
  - Some are *mandatory* and some are *recommendations*
  - Some apply to *all individuals in public*/outside of residence
  - Some apply to *only “essential” businesses*
  - Some apply only to *public-facing businesses*, e.g., retail stores, pharmacies, food service enterprises, public transit, etc.
  - Some *require ERs to pay for* the face coverings
  - Some also require that EEs be provided with *disposable gloves*
  - Some contain *other requirements* (e.g., mandatory breaks to wash hands)



# Are *cloth face coverings* considered *PPE* under OSHA?

- OSHA guidance:
  - “Allow” workers to wear masks to help prevent spread
  - If ER mandates face covering, is it deemed PPE?
- Cloth face coverings provide little protection to EE
- Who pays for cloth face coverings?
  - OSHA requires ERs to provide PPE free of charge
  - OSHA does not require ER to pay for:
    - Everyday clothing
    - Normal work boots
    - Weather protection, e.g., winter coats, jackets, gloves, raincoats, ordinary sunglasses, sunscreen
  - ERs cannot require EEs to use their own PPE (must be voluntary)
  - Many new state and local mandates require ERs to pay for face coverings

# Summary of federal and state workplace safety measures

# Considerations to maintain and reinforce Social Distancing

- Limit occupancy
- One-way aisles
- Plexiglass
- Placement of tables or other physical barriers to create distance
- Contactless delivery options
- Place floor tape to mark 6-foot distances
- Limitations on elevator usage



# Other workplace considerations



- Create distance between desks and workstations
- Modify open floor plans with partitions
- Make only certain workstations available (e.g., every other)
- Close or modify common areas and conference rooms
- Create touchless entries and devices
- Improve air flow and ventilation
- Improve signage to remind EEs and others to:
  - Maintain social distance
  - Avoid touching surfaces unnecessarily
  - Maintain regular and proper hand washing
  - Wear a face covering

# Potential changes in workplace behavior

- Hold fewer in-person meetings and use video conferences instead
- Limit size of in-person gatherings
- Instruct EEs not to use other EEs' workspaces or equipment
- Develop a crowd control plan
- Establish restrictions regarding travel
- Set staggered or spaced meal and break schedules
- Set staggered shifts, alternating teams, continued telework
- Prohibit nonessential visitors

# Examples of cleaning measures

- Require infection control practices, such as regular hand washing, coughing and sneezing etiquette and proper tissue disposal
- Have ample supplies of cloth face coverings, gloves and sanitation materials, including wipes and sanitizers in all common areas and work areas
- Frequent sanitization of high-touch areas including restrooms, countertops, door knobs
- Frequent breaks for EEs for handwashing

# Accommodating disabilities & employee fears

# Accommodations related to COVID-19 safety measures



- Non-latex gloves for EEs with latex allergies
- Alternatives to cloth face coverings for those with respiratory conditions
- Sign language assistance and/or clear face masks for hearing impaired who rely on lip reading
- Some state/local orders say you cannot ask for documentation of medical condition
- *Can you send someone home who cannot wear a face covering because of medical condition?*
  - Not if there is reasonable alternative accommodation such as social distancing and/or clear face masks



# Accommodations for high-risk EEs

- Under ADA *if EE has disability*, ER needs to evaluate reasonable accommodations and engage in the interactive process
- In some states, ERs must also make *accommodations for pregnant EEs*
- Accommodations *must be granted unless* accommodation would:
  - Create an undue burden
  - Relieve an EE from performing an essential job function
  - Create a direct threat to safety of EE or others
- **WA State:** ERs must make *special efforts to accommodate high-risk EEs*

# Accommodating fear of COVID-19

- No legal duty to accommodate generalized fear that is not based on evidence of hazards in workplace
- However, if EE has underlying disability that contributes to fear, you may have to accommodate under ADA
  - It is possible that psychological impairment may qualify as disability that needs accommodation
- Be mindful of OSHA issues
  - *Are you taking appropriate steps to keep your workplace safe?*

# What to do if an employee shows signs of COVID-19 at work

# CDC Guidance if EE shows symptoms at work



- If EE *becomes sick* during the day:
  - EE should be isolated and sent home immediately
  - Surfaces in their workspace need to be cleaned and disinfected
- ER should compile information on persons who had contact with ill EE during the time the employee had symptoms and 2 days prior to that and notify those individuals of exposure (but maintain confidentiality)

# CDC guidance on entry to work for **Critical Infrastructure Workers** exposed to COVID-19

- Permits EEs to *continue to work on-site even if exposed* to COVID-19 if asymptomatic *and* ER takes additional precautions to protect them and the community at large
- Potential exposure is: *household contact or close contact within 6 feet of any individual with confirmed or suspected COVID-19*
- The period of time *includes the 48-hour period before* individual became *symptomatic*

# Additional CDC guidance on Exposed Employees

- Additional requirements to permit EEs who have had exposure but remain asymptomatic to work on-site:
  - ER must screen EEs by measuring temperature and assessing symptoms
  - EE should self-monitor under supervision of ER's occupational health program
  - EE must wear face covering at all times for 14 days after last exposure
  - EE should maintain social distance of at least 6 feet
  - ER should clean and disinfect frequently and routinely

# CDC guidance on return to workplace after having COVID-19

- At least 3 days (72 hours) have passed since recovery which includes:
  - Resolution of fever without fever-reducing medications *and*
  - Improvement of respiratory symptoms (e.g. cough, shortness of breath) *and*
  - At least 7 days have passed since symptoms first appeared
- **Test-based approach:**
  - Resolution of fever without the use of fever-reducing medications *and*
  - Improvement in respiratory symptoms (e.g., cough, shortness of breath) *and*
  - Negative results of an FDA Emergency Use Authorized Molecular Assay for COVID-19 from at least 2 consecutive nasopharyngeal swab specimens collected  $\geq 24$  hours apart\*\*\* (total of 2 negative specimens)

\*\*\*All test results should be final before isolation is ended. Testing guidance is based upon limited information and is subject to change as more information becomes available.

# Responding to employee concerns about workplace safety



# Take employee concerns seriously and address



- Under *OSHA*, ERs can be held liable:
  - If they do not properly and promptly address and alleviate dangerous conditions
  - If they retaliate against an EE for raising a concern about workplace safety
- The *National Labor Relations Act (NLRA)* protects concerted activity to address workplace safety
  - ER can be held liable for retaliating against an EE engaged in protected concerted activity
  - Union activity is also protected
- State *Whistleblower* laws
- Federal and state *Discrimination* laws

# OSHA – Refusal to work

- EEs may refuse to do work if *all of the following conditions* are met:
  1. Where possible, EE asked ER to eliminate danger and ER failed to do so; *and*
  2. EE refused to work in “good faith” (i.e., EE genuinely believed that an imminent danger exists); *and*
  3. A reasonable person would agree that there a real danger of death or serious injury; *and*
  4. There isn’t enough time due to urgency of hazard to get it corrected through regular enforcement channels such as an OSHA inspection

# Looking ahead



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# How will your needs change?

- Will you need to engage employees differently this enrollment season?
- Are you making tough decisions about your employees' livelihoods?
- Are you experiencing leave and accommodation challenges?

## UPCOMING COVID-19 RESPONSE WEBINARS

**May 7, 2020 at 2 p.m.**

### **Virtual enrollments: Getting employees the benefits they need**

- Flexible enrollment strategies to engage employees wherever they may be located
- Online enrollment on your platform or ours
- Maxwell Health, Sun Life's benefits administration technology platform

**Week of May 11**

### **Your benefits plan and COVID-19: Your top questions answered**

- Help for furloughed workers to keep their pre-COVID-19 benefits
- Extended grace period, COVID-19 Critical Illness benefit, and more
- How to work with us easily any time, from anywhere digitally

# We're here to help you navigate this crisis

**Visit us at [sunlife.com/coronavirus](https://sunlife.com/coronavirus) for information about how we support you in this new environment and more**

For information about Sun Life products and services, contact your Sun Life Employee Benefits Representative or your Client Relationship Executive. You may also call Client Services Support at 800-247-6875, Mon - Fri, 8 a.m. to 8 p.m. ET.

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# Questions?

- Visit us at [sunlife.com/coronavirus](https://sunlife.com/coronavirus)
- We are posting webinar slides and slides that highlight federal, state and local requirements on Reopening Workplaces

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*Thank you*

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