FAQS: Key Employment-Related Questions For Reopening Medical Offices

Insights
6.22.20

As medical offices, clinics, and surgical centers re-open, employers will not only face questions about clinical protocols and recommended steps for disinfecting and safeguarding the workplace from COVID-19, but must also respond to questions from employees about your expectations and their related fears and concerns. Members of our Healthcare Practice Group have assembled the most common questions medical offices are asking and provided best practices and key recommendations below. Keep in mind that the following guidance is general and may not apply to your factual situation.

Please note that circumstances and rules related to the COVID-19 crisis are continually evolving. When making decisions, practices should confer with counsel to ensure that they are aware of the most current guidance.

1. Can one of our employees refuse to return to work?

- From a legal standpoint, you can probably require most employees to return to work, but clear and open communication is vital to helping employees function effectively under the current circumstances. Employees are only entitled to refuse to work if they believe they are in imminent danger from an identifiable threat. This would include a situation where, "a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the... danger can be eliminated through the enforcement procedures" otherwise available under OSHA.
- To refuse to work, the employee must believe that death or serious physical harm could occur within a short time, for example, before OSHA could investigate the problem. Requiring employees to work with patients in a medical setting ***without PPE and proper training*** at this time could rise to this threshold, however. Most work conditions in the United States do not meet the elements required for an employee to refuse to work.
- You should follow all relevant guidance issued by the CDC and OSHA to ensure employees are not in imminent danger. Once again, this guidance is general, and you must determine whether specific, unusual circumstances exist in your workplace before deciding which employees, if any, may refuse to work.
- Keep in mind that if a practice terminates an employee who refuses to work where there is no imminent danger to its employees, the employee may still file an OSHA whistleblower claim. If

your practice can establish that there was no imminent hazard to employees by demonstrating its compliance with OSHA and CDC guidelines, and that the employee's refusal to work was not reasonable, the whistleblower claim is more likely to be dismissed.

2. Can a practice employee refuse to return to work if they are above 65 years old and feel unsafe?

- Possibly, if the employee reasonably believes they will be in imminent danger as explained above. The federal "Opening Up America Again" plan, and many state and local government orders, identify the elderly as vulnerable individuals for whom special precautions should be considered. Because most plans recommend that vulnerable individuals continue to shelter in place during the early recovery stages, this suggests that an elderly employee could refuse to return to a worksite during these phases.

3. If an employee who is under 65 states that they have an underlying condition such as congestive heart failure, asthma or another condition that makes them particularly vulnerable to COVID-19, but their duties cannot be performed remotely, what should the practice do?

- If an employee is seeking emergency paid sick leave pursuant to the FFCRA because a health care provider advised the employee to self-quarantine because the provider believes the employee is particularly vulnerable to COVID-19, your practice should require documentation of the date(s) the employee is requesting leave; the above-referenced reason for the request; a statement that the employee cannot work or telework for that reason; and the name of the healthcare provider who advised the employee to self-quarantine.
- Additionally, regardless of the individual's age, employees with conditions such as this may be protected by the Americans with Disabilities Act (ADA), which applies to companies with 15 or more employees. Therefore, notwithstanding the OSHA issues mentioned above, the employee may be entitled to a reasonable accommodation pursuant to the ADA (or applicable state law), if the accommodation would enable the employee to perform the essential functions of the applicable job. If the employee cannot perform essential job functions remotely, a leave of absence may be a required reasonable accommodation.
- Communications with employees under these circumstances must be confidential and interactive. If the employee is seeking an accommodation pursuant to the ADA, your practice may require supporting documentation from the employee's healthcare provider. The ultimate solution to this scenario is very fact-specific.

4. What actions can our practice take if an employee is exhibiting flu-like or COVID-19-like symptoms but refuses to leave the workplace?

- Try to maintain a collaborative approach. Remind the employee that you are asking them to leave. Try to make them understand the reasons why their departure is necessary to maintain the health and safety of the entire workplace. If there are benefits available — such as paid sick leave, accrued vacation, or something else that may help them — you should explain these

benefits and how to use them. Your applicable policies should be up-to-date and in writing. Your practice should also clearly document all such communications.

5. Can practices require an employee to notify management if they have been exposed, have symptoms, and/or have tested positive for the COVID-19 coronavirus?

- Yes. You should require the employee to notify their supervisor right away if they begin experiencing COVID-19 symptoms. If an employee begins experiencing symptoms while not at work, has been exposed to someone that is exhibiting symptoms, or has tested positive, the employee should contact their supervisor by telephone or email and should not report to work. Employees who are suffering from symptoms should be instructed to remain at home until they are they are released by a medical provider or, if that is not an option, until they are symptom-free for at least three days without fever, achieved without medication, and no respiratory issues, and ten days after symptoms first appeared.

6. Has the CDC relaxed essential worker return-to-work standards after confirmed or suspected COVID-19 exposure?

Yes. To ensure continuity of operations, the CDC has advised that certain critical infrastructure workers may be permitted to continue to work following potential COVID-19 exposure, *provided they remain asymptomatic and additional precautions are implemented*.

- Potential exposure incudes household contact or having close contact within 6 feet of someone with confirmed or suspected COVID-19, including the time frame of 48 hours before the individual became symptomatic. These guidelines require:
- Prescreening (temperature and symptom checks before the employee starts works, preferably before entering the facility);
- Regular monitoring for symptoms, including fever;
- Wearing a face mask for 14 days after exposure; maintaining social distancing in the workplace; and
- Routinely cleaning and disinfecting all areas such as offices, bathrooms, common areas and shared equipment.

If an employee becomes sick, they must be sent home immediately, surfaces in their workspace must be cleaned and disinfected, and information on persons with whom the employee had contact during the previous 48 hours must be compiled for follow up.

7. The CDC has issued more particularized return to work criteria for *healthcare workers* with confirmed or suspected COVID-19. What is that guidance?

Taking local circumstances into account, either a test-based or symptom-based strategy may be used to determine when a practice's employees may return to the workplace. Specifically, for symptomatic employees:

- *Symptom-based strategy. Exclude from work until:*
  - At least three days (72 hours) have passed since recovery defined as resolution of fever without the use of fever-reducing medications **and** improvement in respiratory symptoms (e.g., cough, shortness of breath); **and**
  - At least 10 days have passed since symptoms first appeared.
- *Test-based strategy. Exclude from work until:*
  - 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 COVID-19 molecular assay for detection of SARS-CoV-2 RNA from at least two consecutive respiratory specimens collected ≥24 hours apart (total of two negative specimens). See Interim Guidelines for Collecting, Handling, and Testing Clinical Specimens for 2019 Novel Coronavirus (2019-nCoV). Of note, there have been reports of prolonged detection of RNA without direct correlation to viral culture.

8. For employees of healthcare providers with laboratory-confirmed COVID-19 test but who have not had any symptoms, employers can deploy either strategy depending on local circumstances:

- *Time-based strategy.* In these cases, you can exclude the worker until 10 days have passed since the date of their first positive COVID-19 diagnostic test assuming they have not subsequently developed symptoms since their positive test. If they develop symptoms, then the symptom-based or test-based strategy should be used. Note, however, that because symptoms cannot be used to gauge where these individuals are in the course of their illness, it is possible that the duration of viral shedding could be longer or shorter than 10 days after their first positive test.
- *Test-based strategy.* Here you can exclude from work until the employee receives negative results of an FDA Emergency Use Authorized COVID-19 molecular assay for detection of SARS-CoV-2 RNA from at least two consecutive respiratory specimens collected ≥24 hours apart (total of two negative specimens). Note, however, that because of the absence of symptoms, it is not possible to gauge where these individuals are in the course of their illness. There have been reports of prolonged detection of RNA without direct correlation to viral culture.

Upon return to work, healthcare workers should wear a facemask while in the facility until all symptoms are completely resolved or at baseline. A facemask instead of a cloth face covering should be used by these providers for source control during this time period while in the facility. After this time period, these individuals should revert to the facility policy regarding universal source control regarding during the pandemic. A facemask for source control does not replace the need to wear an N95 or higher-level respirator (or other recommended PPE) when indicated, including when caring for patients with suspected or confirmed COVID-19. Of note, N95 or other respirators with an exhaust valve might not provide source control. Healthcare workers should also

respirators with an exhaust valve might not provide source control. Healthcare workers should also self-monitor for symptoms and seek re-evaluation from a healthcare provider if respiratory symptoms recur or worsen.

9. Can a practice take an employee's temperature at work to determine whether they might be infected?
Yes, preferably before the employee enters the facility. In fact, some state and local authorities have mandated daily temperature checks of employees.

Your practice should monitor circumstances as they evolve, but under the current pandemic circumstances, you can (and as noted, *may be required to*) take employee temperatures daily as a screening tool. You should also consider asking employees, at least once a week, whether they are experiencing cough; shortness of breath or difficulty breathing; or at least two of the following symptoms: fever; chills; repeated shaking with chills; muscle pain; headache; sore throat; or new loss of taste or smell.

As stated above, some state and local authorities are mandating these regular symptom screenings for employees. There is no specified format for documenting this screening information, but it must be treated as confidential and should never be placed in an employee's personnel file. It may be retained in a separate, confidential medical file or in a central COVID-19 screening file. Explain to employees that this information is being obtained privately in order to maintain a safe workplace.

10. Should the practice collect additional medical information from employees when taking their temperatures or screening for COVID-19 symptoms?
No, unless otherwise required by authorities, no additional medical information should be obtained.

11. What precautions are needed for individuals who are taking the temperatures of employees, applicants, or other patients/visitors?
The safest approach would be to assume the testers are going to be exposed potentially to someone who is infected who may cough or sneeze during their interaction. You must therefore determine what mitigation efforts can be taken to protect the employee by eliminating or minimizing the hazard, including PPE.

Different types of devices can take temperature without exposure to bodily fluids. Further, the tester could have a face shield in case someone sneezes or coughs. Consult OSHA, the CDC, or other authoritative sources for information regarding recommended PPE.

12. Do any OSHA requirements apply when practice employees wear face coverings?
In a practice setting, these standards are not new. If you require employees to wear the face coverings or other PPEs, then OSHA's PPE standard will apply. OSHA's standard applies to "all protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers." Before you can require an employee to use PPE, your practice must, among other things,

- Perform a hazard assessment, referring to OSHA guidance;
- Consider other alternative options to protect employees;
- Identify and provide appropriate PPE for employees;
- Train employees in the use and care of PPE;
- Train employees how to clean and maintain PPE, including replacing worn or damaged PPE; and

Prepare a plan that is periodically reviewed, among other steps, including employee specific requirements.

13. Should practices have staff sign or attest to anything in order to protect the staff and office?
To educate patients and improve compliance, your office should prominently post summaries of new COVID-19 protocols that you have adopted, such as screening and limiting visitors, handwashing or sanitizing practices that visitors may be required to follow, in addition to your distancing practices. Such postings will also serve as reminders for office staff.

Additionally, in support of documented training that the practice provides to its staff, your office should consider posting reminders about the availability and proper use of personal protective equipment (PPE) and any other new protocols adopted as a result of the COVID-19 crisis. Your practice should focus on training staff to comply consistently with all of your OSHA and CDC-compliant policies and to notify the practice administrator promptly of all questions or concerns.

Conclusion
Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, any attorney in our Healthcare Practice Group, or any member of our Post-Pandemic Strategy Group Roster. You can also review our FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers and our FP Resource Center For Employers.

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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