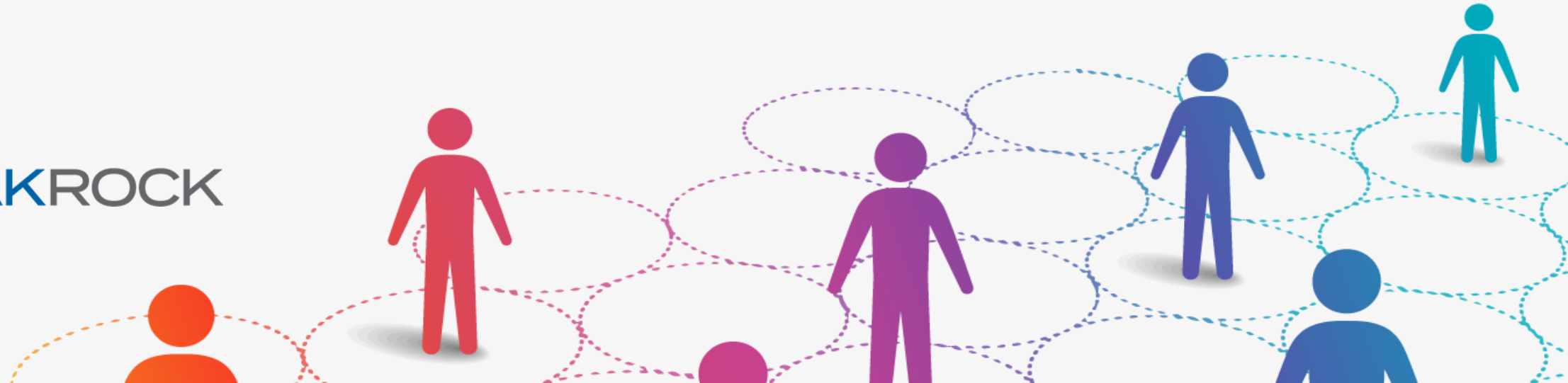


Back to Business – An Employer’s Guide to Reopening Safely

KUTAKROCK

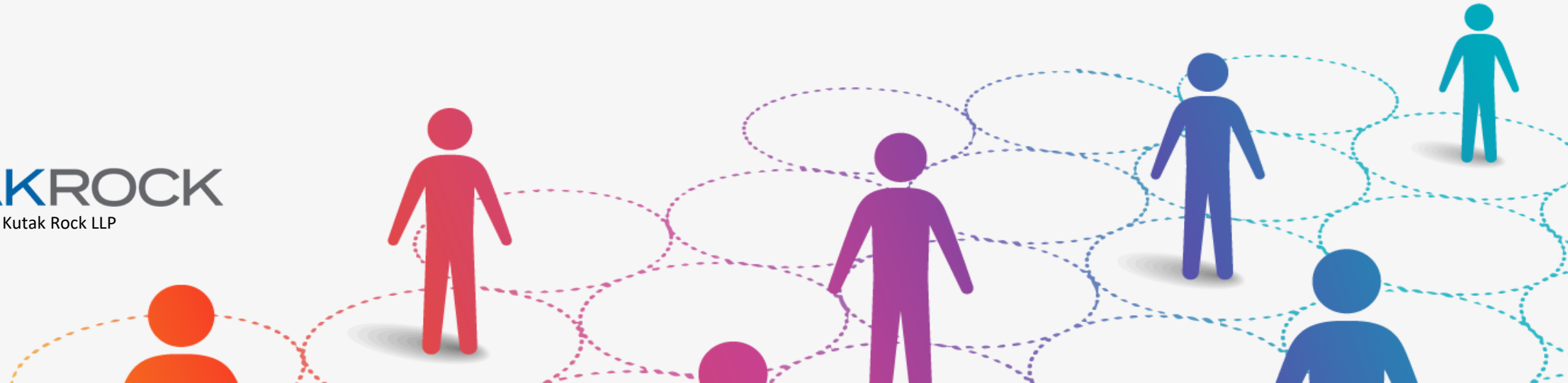


LEGAL DISCLAIMER

The information provided on these slides and during this presentation are not intended to constitute legal advice. All information, content and materials are for general purposes only. Information may not constitute the most up-to-date information. Individuals should contact an attorney to obtain advise with respect to any particular legal matter. Use of, or access to, these slides and presentation do not create an attorney-client relationship. The choice of a lawyer is an important decision and should not be based solely upon advertisements.

KUTAKROCK

© 2020 Kutak Rock LLP



COVID-19 – Recordable Illness

- OSHA considers COVID-19 a recordable illness so it is not exempted from reporting and recordkeeping requirements.
- Employers are responsible for recording cases of COVID-19 on their OSHA Form 300 if:
 - There is a confirmed case of COVID-19, as defined by the Centers for Disease Control and Prevention (CDC);
 - The case is **work-related**, as defined by 29 CFR 1904.5; and
 - The case involves one or more of the general recording criteria set forth in 29 CFR 1904.7 (e.g., death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness).



Work-Relatedness Determination

- Generally, employers must make work-relatedness determinations.
- Under 29 CFR § 1904.5, an employer must consider an injury or illness to be “work-related” if:
 - An event or exposure in the work environment caused or contributed to the resulting condition; or
 - An event or exposure in the work environment significantly aggravated a pre-existing injury or illness.



Work-Relatedness Determination (cont.)

- OSHA is exercising enforcement discretion to assess an employer's efforts in making work-related determinations:
 - The reasonableness of the employer's investigation into work-relatedness:
 - (1) Ask employee how he believes he contracted the COVID-19 illness;
 - (2) Ask employee about activities that may have led to the COVID-19 illness; and
 - (3) Review employee's work environment for potential SARS-CoV-2 exposure.
 - The evidence available to the employer.
 - The evidence that a COVID-19 illness was contracted at work.



Work-Relatedness Determination (cont.)

Circumstances that OSHA would consider presumptive indicators that COVID-19 was contracted at work:

1. COVID-19 illnesses are likely work-related when several cases develop among workers who work closely together and there is no alternative explanation.
2. An employee's COVID-19 illness is likely work-related if it is contracted shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case of COVID-19 and there is no alternative explanation.
3. An employee's COVID-19 illness is likely work-related if his job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation.



Work-Relatedness Determination (cont.)

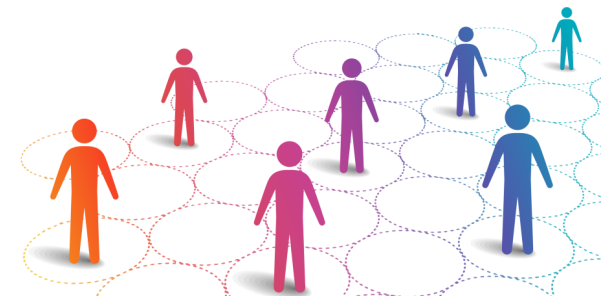
Circumstances that OSHA would not consider presumptive indicators that COVID-19 was contracted at work:

4. An employee's COVID-19 illness is likely **not** work-related if she is the only worker to contract COVID-19 in her vicinity and her job duties do not include having frequent contact with the general public, regardless of the rate of community spread.
5. An employee's COVID-19 illness is likely **not** work-related if he, outside the workplace, closely and frequently associates with someone (e.g., a family member, significant other, or close friend) who (1) has COVID-19; (2) is not a coworker, and (3) exposes the employee during the period in which the individual is likely infectious.



Work-Relatedness Determination (cont.)

- After a reasonable and good faith inquiry by the employer, if the employer cannot determine whether it is **more likely than not** that exposure in the workplace played a causal role with respect to a particular case of COVID-19, the employer does not need to record that COVID-19 illness.



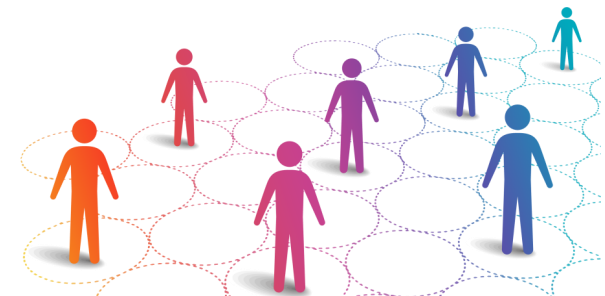
Work-Relatedness Tips and Reminders

- COVID-19 is a respiratory illness and should be coded as such on the OSHA Form 300.
 - Because COVID-19 is an illness, if an employee voluntarily requests that his or her name not be entered on the log, the employer must comply.
- OSHA understands that it may be difficult to determine whether a COVID-19 illness is work-related.
- OSHA recommends employers give due weight to any evidence of causation provided by medical providers, public health authorities, or the employee herself.



Work-Relatedness Tips and Reminders

- OSHA reminds employers that recording a COVID-19 illness does not, of itself, mean an employer has violated any OSHA standard.
- Under the regulations, recording exemptions may apply to certain employers.
 - Employees with 10 or fewer employees during the last calendar year.
 - Employers in certain low hazard industries.
 - No recording obligations. Need only report work-related COVID-19 illnesses that result in a fatality, hospitalization, amputation, or loss of an eye.



OSHA – General Duty Clause

- Employers have a general duty to keep employees safe in the workplace under Section 5(a)(1) of the Occupational Safety and Health (OSH) Act of 1970 (29 USC 654(a)(1)).
- OSHA Enforcement under General Duty Clause:
 - Failure to act reasonably to address known COVID-19-related risks.
 - May subject employer to violations and penalties.



OSHA and CDC Recommendations

1. Encourage workers to stay home if they are sick.
2. Continue teleworking arrangements where possible.
3. Limit worksite access to only essential workers, if possible.
4. Promote frequent and thorough hand washing, including by providing workers, customers, and worksite visitors with a place to wash their hands.
5. Encourage respiratory etiquette, including covering coughs and sneezes.
6. Discourage workers from sharing workers' assigned phones, desks, offices, or other work tools and equipment.
7. Maintain regular housekeeping practices, including routine cleaning and disinfecting of surfaces, equipment, and other elements of the work environment.



OSHA and CDC Recommendations (cont.)

8. Wear a face mask or cloth covering, if feasible and available.
 - a. Remember OSHA's Personal Protective Equipment (PPE) standards in general industry (29 CFR 1910 Subpart I) requires using gloves, eye and face protection, and respiratory protection when job hazards warrant it.
9. Encourage social distancing between workers, including:
 - a. Allow employees to maintain distance from one another (6 ft. apart);
 - b. Replace face-to-face meetings/trainings with virtual communications;
 - c. Reduce the number of employees in the workplace at one time (e.g., staggered shifts, flexible work hours, additional shifts); or
 - d. Redesign workflow, workstations, or cubicles to minimize commingling.
10. Encourage workers to report any safety and health concerns.



COVID-19 Preparedness and Response Plans

- Mandatory health screenings/temperature screenings
- Plan for how employees communicate illness to employer
- Plan for employee handwashing and face masks
- Regulate ride sharing in company vehicles
- Install foot-push openings for doors
- Plan for social distancing
 - Increased physical distance
 - Use of barriers/plexiglass screens
 - Traffic patterns
- Prohibit customers or non-essential visitors from entering workplace, and set up protocol for prearranging outdoor drop-off, pick-up and delivery for customers



COVID-19 Preparedness and Response Plans

(cont.)

- Prohibit on-site food preparation and sharing
- Close lunch rooms or stagger meal and rest break times; restrict number of employees to gather and encourage seating restrictions
- Limit occupancy in conference rooms and ensure employees can sit at least six feet apart.
- Educate and train employees on COVID-19 risk factors, infection control, and hygiene practices



SYMPTOMS OF CORONAVIRUS DISEASE 2019

Patients with COVID-19 have experienced mild to severe respiratory illness.

Symptoms* can include

FEVER

COUGH

*Symptoms may appear 2-14 days after exposure.

SHORTNESS OF BREATH

Seek medical advice if you develop symptoms, and have been in close contact with a person known to have COVID-19 or if you live in or have recently been in an area with ongoing spread of COVID-19.



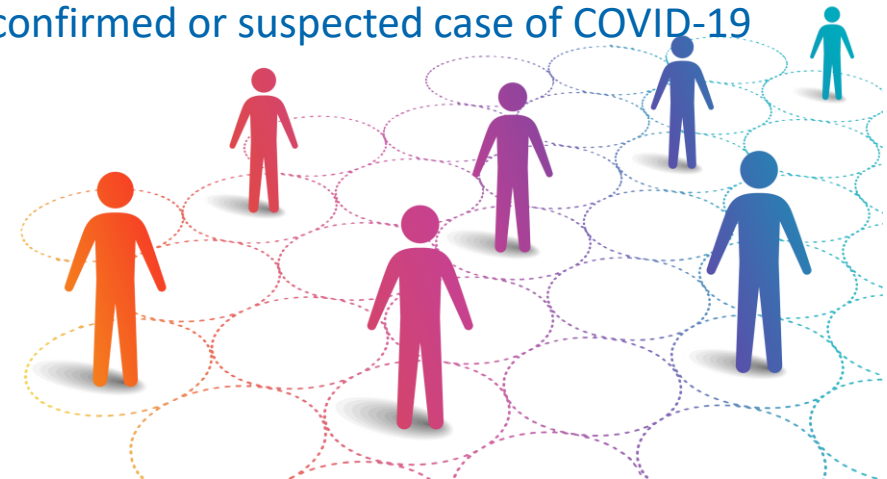
[cdc.gov/COVID19-symptoms](https://www.cdc.gov/COVID19-symptoms)

KUTAKROCK

© 2020 Kutak Rock LLP

Employee Screening Before Work

- Employees stay home if sick
 - Fever
 - Cough
 - Shortness of breath
 - Chills
 - Muscle pains
 - Sore throat
 - New loss of taste or smell
- Employees self-report of possible exposure
 - Travel internationally in the past 14 days
 - Travel to a highly affected area within the US in the past 14 days
 - Exposed to a person with confirmed or suspected case of COVID-19

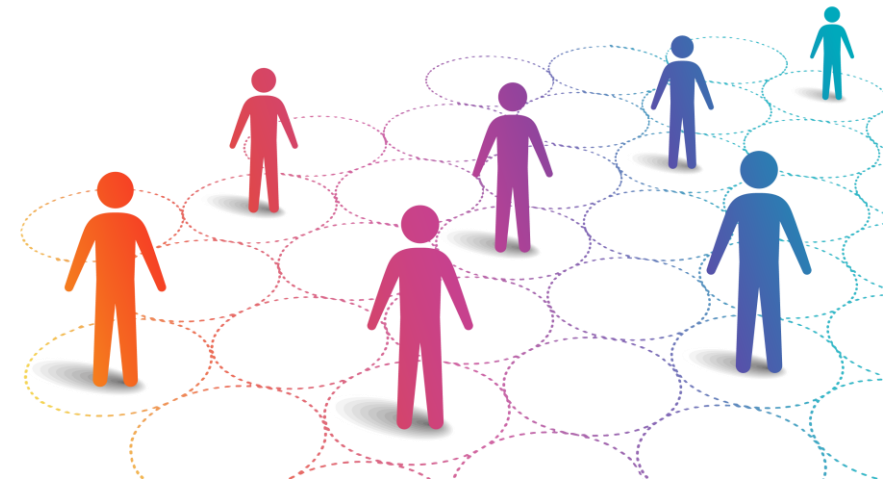


Screening Measures



Can an employer take an employee's temperature? Yes.

- Privacy, if at work; take precautions if taken by others (gloves, mask, infrared thermometer, social distance, barriers)
- Record actual temperature – 100.4° - send home
- Notice to employees about privacy and recording; get consent to disclose as needed to protect health of employees and public
- Keep records for 3 months (CO); separate from personnel file; limited to need to know



If an employee has tested positive for COVID-19

At Workplace / Send Home

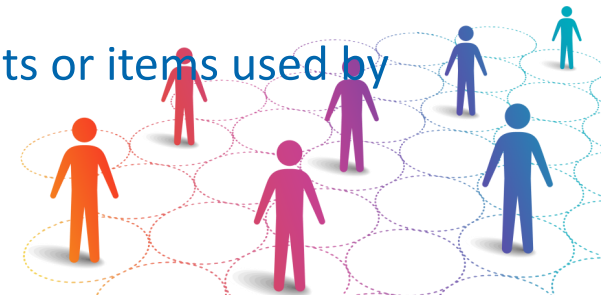
- Local health authorities might dictate contact tracing methods
- Identify all who worked in close proximity (<6 feet) for a prolonged period of time (≥10 minutes) within 48 hours before onset of COVID-19 symptoms
- Inform company and exposed co-workers
- Maintain confidentiality of sick employee
- Isolate contaminated area
 - If less than 7 days, wait 24 hours, if possible, perform enhanced cleaning, increase ventilation
 - If more than 7 days, routine cleaning and disinfection
- Advise customers, vendors, if exposed based upon criteria above
- Employer not required to report COVID-19 case to public health authorities (healthcare provider does), but EEOC permits disclosure of positive COVID-19
- Some states require report of “outbreak” - 2 or more cases at workplace within 14 days



If an employee has tested positive for COVID-19

What happens to exposed employees?

- Non-Critical Infrastructure:
 - Sent home to self-monitor for symptoms for 14 days, social distance, avoid Vulnerable Individuals, telework if possible
- Critical Infrastructure:
 - Allowed to remain at work
 - Take employee's temperature and assess symptoms before they start work
 - If employee becomes sick during the day, send home immediately
 - Require use of face masks (14 days) provided by employer or approve employee's; employer should test mask to make sure it does not interfere with workflow
 - Increase air exchange in the building
 - Increase frequency of cleaning commonly touched surfaces
 - Encourage employees to social distance during breaks, don't share headsets or items used by their faces



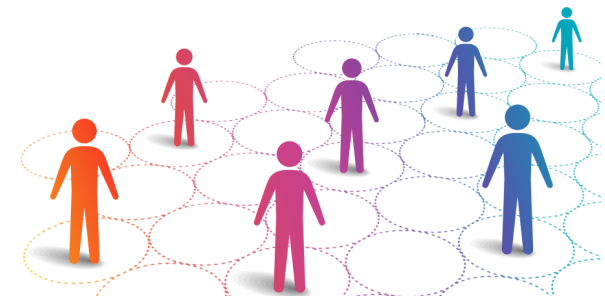
When can an employee who was sick with COVID-19 symptoms return?

- If employee was not tested:
 - ✓ No fever - at least 72 hours (without use of fever-reducing medicine)
AND
 - ✓ Other symptoms have improved
AND
 - ✓ At least 10 days have passed since symptoms first appeared
- If employee was tested:
 - ✓ No fever - at least 72 hours (without use of fever-reducing medicine)
AND
 - ✓ Other symptoms have improved
AND
 - ✓ At least two negative tests at least 24 hours apart



Can an employer screen new employees for COVID-19?

- After a conditional job offer, employer can take an applicant's temperature and screen for conditions, if done for all applicants.
- Employer can delay start of employment for 14 days of symptomatic or withdraw offer if need employee to start immediately.
- Employer could require COVID-19 test and require quarantine, but consider whether required to pay employees for time (non-exempt v. exempt)



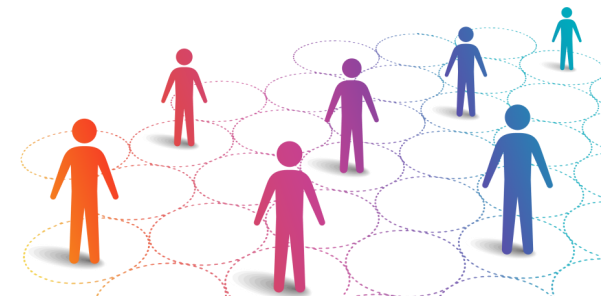
Employees Refusing to Return to Work

- Under OSHA, an employee can refuse to work only if:
 - (1) The employee genuinely believes an “imminent danger” is present;
 - (2) A reasonable person would agree a danger of death or serious injury exists;
 - (3) The employee has asked the employer to eliminate the danger, it is possible to eliminate it, and the employer failed to do so; and
 - (4) Regular enforcement is not an option.
- “Imminent danger” requires an “immediate or imminent” threat of death or serious physical harm.”
- Employers should implement and stay current on all reasonable (and required) safety measures from all agencies, government sources and regulators.



Employees Who Request Accommodations

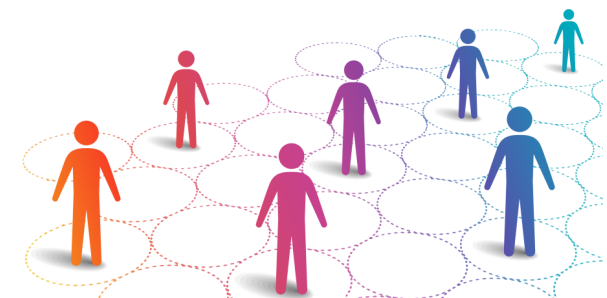
- The Equal Employment Opportunity Commission (EEOC) has issued COVID-19 guidance at: <https://www.eeoc.gov/coronavirus>
- Centers for Disease Control and Prevention (CDC): <https://www.cdc.gov>
- U.S. Department of Labor: <https://www.dol.gov>
- Local or state laws: <https://springfieldmo.gov>
- Kutak Rock Legal Resource COVID-19 Portal: <https://kutakrock.com>



“People Who Are at Higher Risk for Severe Illness” From COVID-19 As Defined by the CDC Include:

- Older adults (65 and older)
- People of any age who have serious underlying medical conditions:
 - People with chronic lung disease or moderate to severe asthma
 - People who have serious heart conditions
 - People who are immunocompromised
 - People with severe obesity (body mass index [BMI] of 40 or higher)
 - People with diabetes
 - People with chronic kidney disease undergoing dialysis
 - People with liver disease

See <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>



The COVID-19 Accommodation Process

- It is the same as the pre-COVID-19 accommodation process:
 - Employee or a third party (i.e., doctor) must notify of an accommodation need due to an underlying medical condition that puts the employee at higher risk.
 - Request may be verbal, informal and does not need to refer to a “reasonable accommodation.”
 - Employers must engage in the interactive process, or waive it and grant the accommodation.
 - Employers may ask questions and request medical documentation to confirm the disability (if not obvious) and to support the need for accommodation.
 - Employees should evaluate if there is a reasonable accommodation to reduce or eliminate risk to the employee that does not impose undue hardship.



The EEOC Identifies the Following Possible Accommodations to Eliminate or Reduce Risk:

- Telework/remote work is ideal, if an option for the position at issue
- Additional/enhanced protective personal equipment (PPE), including gowns, masks, gloves or other equipment
- Additional/enhanced protective measures, such as erecting physical barriers or increasing space between employees
- Eliminating “marginal” job functions (i.e., less critical or incidental job duties as distinguished from the “essential” functions of a position)
- Temporarily modifying work schedules to reduce contact with others
- Relocating workspaces to increase social distancing
- Transferring the requesting employee to a different/open role that presents less risk or allows for telework
- Leaves of absence and/or use of paid leave available to the employee



Undue Hardship – The EEOC’s Relaxed Standard Due to COVID-19

- Employers do not have to grant an accommodation that would cause an "undue hardship."
- Defined normally by the EEOC as "significant difficulty or expense" and identified as a very high standard to meet.
- Per the EEOC, an accommodation that might not have been an undue hardship before COVID-19, may be one now, examples include:
 - More difficulty conducting a needs assessment or ability to acquire certain items, due to employees working remotely and/or delivery delays.
 - Difficulty giving temporary assignments, removing marginal functions, or hiring temps.
 - Financial challenges caused by COVID-19-related reduction in business or closures.
- A hardship argument without an actual assessment of company finances and actual demonstrated financial difficulty is not likely to be sufficient.
- Employers also must determine if there may be an alternative, effective accommodation that does not pose a hardship.



For COVID-19 Telework Arrangements - Emphasize Temporary Nature & Limited Purpose

- Prior temporary or intermittent arrangements are often used by plaintiffs to argue that a requested accommodation is reasonable and not an undue burden
- Thus, employers that liberally grant/granted telework solely due to COVID-19 may have difficulty later claiming a particular position cannot be performed remotely or that telework in a given position would be an undue burden
- To reduce this risk, if employees were/are allowed to telework solely because of the virus, make clear (in writing) that:
 - Telework is/was granted solely to reduce the spread of COVID-19;
 - The essential functions of the position(s) normally require onsite presence, and will again require onsite attendance after the pandemic ends or the threat of the virus is reduced; and
 - An undue burden associated with telework normally exists, but was/is being voluntarily assumed by the employer solely in the interest of employee safety.
- Track and preserve evidence of difficulties, operational and management challenges and complaints caused by telework allowed during the pandemic



Employees Who Become Ill After Returning to Work or While at Work

- The CDC states that employees who become ill with symptoms of COVID-19 should leave the workplace.
- The ADA does not interfere with employers following this advice.
- When employees return to work, the ADA allows employers to require a doctor's note certifying fitness for duty.
- Follow the CDC guidance for what would constitute a sufficient release depending on the relevant circumstances (testing or no testing).



Most Likely Legal Risks

- Workers' Compensation – Employee burden to show contracted at work/in course of employment
- Negligence/Wrongful Death
- Discrimination/Retaliation – Recall everyone
- Workplace Privacy

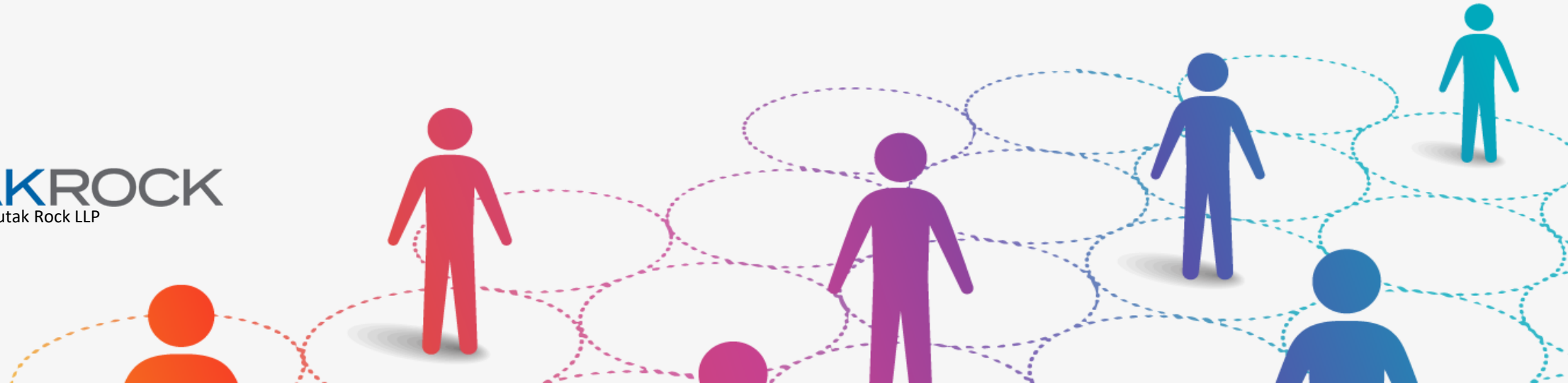


Lawsuit

Taylor v. Five Star Senior Living Inc. – Greene County

Plaintiff was fired after informing employer she had been directly exposed to COVID-19 and needed to self-quarantine, to which they objected.

KUTAKROCK
© 2020 Kutak Rock LLP



Thank you!

KUTAKROCK

Amanda Cochran

amanda.cochran@kutakrock.com

417-755-7222



Joshua Christensen

joshua.christensen@kutakrock.com

417-755-7221

