

Employer Guidelines

Responding to Higher Risk Employees Regarding COVID-19

Employees may refuse to work and/or seek leaves from work because they are at higher risk of complications from COVID-19 than other employees and fearful of exposure. For essential businesses that are continuing their on-site operations, these issues are especially acute as absenteeism may adversely affect operations.

WHO IS AT HIGHER RISK?

According to the latest guidance from the Centers for Disease Control and Prevention (CDC), based on early information out of China where COVID-19 first started, those at higher risk of getting very sick from this illness include **older adults** and people who have serious **chronic medical conditions** like:

- Heart disease
- Diabetes
- Lung disease

Given this risk, the CDC recommends that those at higher risk take specific actions to reduce their risk of getting COVID-19, including:

- Take everyday precautions to keep space between oneself and others;
- When in public, keep away from others who are sick, limit close contact and wash hands often;
- Avoid crowds as much as possible; and
- During a COVID-19 outbreak in one's community, the CDC recommends that at-risk individuals stay home as much as possible.

See Resources, CDC: "If You Are at Higher Risk."

To those at higher risk, many of these precautions may seem inconsistent with the notion of coming to work, where there is a heightened risk of exposure due to the proximity of coworkers, customers, and others present in the workplace.

ARE THERE STEPS AN EMPLOYER CAN TAKE TO HELP MINIMIZE EXPOSURE RISKS FOR HIGHER RISK INDIVIDUALS?

Yes. In addition to the precautions employers are taking generally regarding hygiene and environmental measures, the CDC recommends actions that a higher risk individual can take. Employers can communicate to higher risk individuals that they can and should take these actions when at work.

- If an employee has symptoms of COVID-19, send them home to avoid contact with other employees, including higher risk individuals.
- Provide higher risk individuals with the CDC handout – How to Protect Yourself (see Resources).

- Encourage all employees, but especially higher risk individuals, to wash their hands often with soap and water for at least 20 seconds, especially after blowing one's nose, coughing, or sneezing, or having been in a public place.
- Reassure higher risk employees that they will not be penalized for taking more breaks to engage in hygiene-related measures.
- Provide a supply of hand sanitizer and tissues to each higher risk employee to keep in their workspace (at least 60 percent alcohol).
- Adopt a higher frequency schedule of cleaning and disinfection for surfaces with which higher risk individuals may come in contact (e.g., desks, tables, doorknobs, light switches, handles, toilets, faucets, sinks, etc.).
- Consider whether the higher risk individual's workspace can be reconfigured or relocated to limit exposure to coworkers within six feet.
- Suggest that the higher risk individual advise coworkers to maintain a distance of at least six feet from their workspace, if feasible.
- Do not require higher risk individuals to meet or work in and around crowded spaces, especially those that are poorly ventilated or closed-in settings with little air circulation.
- Educate the workforce generally that some people may be at higher risk for severe illness, such as older adults and those with chronic medical conditions, and that higher risk individual may maintain a distance from coworkers for this reason.

Each situation should be assessed on its own, and it may not be necessary to undertake all of these activities. For more information, see Resources, CDC: "If You Are at Higher Risk."

ARE HIGHER RISK EMPLOYEES ENTITLED TO REFUSE TO COME TO WORK, EVEN IF THE ONLY REASON IS THAT THEY FEAR EXPOSURE TO COVID-19 IN THE WORKPLACE?

The Occupational Safety and Health Administration (OSHA) regulations address when an employee may refuse to work due to concerns about health and safety issues. 29 C.F.R. § 1977.12(b)(2). OSHA permits employees to refuse to engage in "dangerous work" if the following conditions are met:

- Where possible, the employee has asked the employer to eliminate the danger, and the employer failed to do so;
- The employee refused to work in "good faith" (the employee genuinely believes an imminent danger exists);
- A reasonable person would agree that there is a real danger of death or serious injury; and
- There isn't enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.

This is a fact-specific assessment which depends on the higher risk individual's situation, the nature of the job and the work, and the measures the employer has taken to address potential workplace exposures.

WHAT SHOULD EMPLOYERS DO IF HIGHER RISK EMPLOYEES ASK FOR LEAVE BECAUSE THEY FEAR EXPOSURE AT WORK?

If higher risk employees have concerns about exposure at work, they should speak to Human Resources. HR can facilitate a dialogue with the employee about their concerns and options. The assessment should include consideration of OSHA implications, Americans with Disabilities Act (ADA) reasonable accommodation and leave options, including Family and Medical Leave Act (FMLA).



Some employers recently announced that higher risk workers should not come to work any longer. For example, it was publicly reported on March 16, 2020, that UnitedHealth Group advised its workforce that employees should report to work “unless they have self-identified as being at higher risk for serious covid-19 illness” or are experiencing symptoms of the virus. See Resources: Washington Post Article.

ARE HIGHER RISK INDIVIDUALS COVERED BY THE ADA AS “DISABLED”?

Potentially, yes. If an individual is at higher risk because of an underlying serious health condition, such as heart disease, diabetes, or lung disease, it is likely they have an ADA disability. The employee may feel that coming to work during the pandemic poses a “direct threat” to their own health. Such concerns or fears about working may trigger the duty to undertake the interactive dialogue about reasonable accommodation.

The dialogue should focus on how the individual can be accommodated to perform the essential functions of the job, while minimizing the risk of exposure. Of course, accommodation may include granting a leave of absence of a finite duration, which may be the form of accommodation sought by the higher risk employee. This should be considered as one option, but is not necessarily the only option. Remember that a disabled employee is not entitled to their *preferred* accommodation, but rather to an *effective* accommodation.

You also may consider having the employee complete a medical questionnaire to seek input from the treating health care provider as to whether the employee’s presence in the workplace poses a direct threat to the individual and/or whether steps can be taken to reduce or mitigate that threat other than leave. A sample medical questionnaire appears in the Ballard Spahr Resource Center under “Labor and Employment.”

ARE HIGHER RISK INDIVIDUALS ENTITLED TO FMLA LEAVE?

The answer depends on whether they have a serious health condition creating a period of incapacity that necessitates leave and whether the incapacity renders them unable to perform at least one essential function of the job.

If a higher risk individual is not incapacitated, but merely fears exposure to COVID-19 at work, it is unlikely they are entitled to FMLA leave. (See below for a discussion of an employee caring for a high risk family member.) HR should address these issues as part of the dialogue with the employee and, if uncertainty remains about whether the employee qualifies for FMLA leave, ask the employee to complete a medical certification. Remember, however, that the employee is eligible for FMLA leave on a provisional basis pending receipt of the medical certification.

DO STATE AND LOCAL LEAVE LAWS COVER HIGHER RISK EMPLOYEES?

Paid sick leave laws may cover an individual whose condition precludes them from working. If the individual is not presently sick, but fears becoming sick, most state and local paid leave laws are unlikely to apply. However, some laws expand the circumstances when leave may be taken due to a public health emergency declaration. Employers should consult counsel for an analysis of applicable leave laws. See Resources: Ballard Spahr FAQs for Employers.

WILL FEDERAL LEGISLATION CREATE NEW LEAVE RIGHTS FOR HIGHER RISK INDIVIDUALS?

If enacted, it seems likely the current version of the Families First Coronavirus Response Act, passed by the House of Representatives on March 16, 2020, provides for up to 80 hours of sick leave for employees of private sector employers with fewer than 500 employees. This leave can be taken, among other reasons, to comply with the recommendation of a health care provider to self-isolate. See Resources: Ballard Spahr Alerts on HR 6201.

HOW DOES THE ANALYSIS CHANGE IF THE HIGH RISK INDIVIDUAL IS A FAMILY MEMBER OF THE EMPLOYEE, RATHER THAN THE EMPLOYEE HIM/HERSELF?

This is not an ADA issue requiring assessment of reasonable accommodation. It may present an FMLA situation in that the employee is seeking leave to care for a qualifying family member with a serious health condition (child, parent, spouse). The employee also may qualify for leave under any applicable state or local family care law.

DOES THE ANALYSIS CHANGE IF THERE IS A POSITIVE CASE OF COVID-19 IN THE WORKPLACE?

It may. The risk of exposure for a higher risk individual becomes more significant once there is a reported case of COVID-19 by a coworker. The extent to which a higher risk employee should stop working will depend on whether their job and work location created a greater risk of exposure.

RESOURCES FOR EMPLOYERS

Ballard Spahr FAQs for Employers

<https://www.ballardspahr.com/alertspublications/legalalerts/2020-03-12-coronavirus-covid-19-and-the-workplace-faqs>

Ballard Spahr Alerts on House Resolution 6201

<https://www.ballardspahr.com/alertspublications/legalalerts/2020-03-18-last-minute-changes-to-hr-6201-reduces-scope-of-paid-sick-leave>

<https://www.ballardspahr.com/alertspublications/legalalerts/2020-03-16-fed-leg-would-provide-paid-sick-leave-and-paid-family-and-med-leave-to-eligible-workers>

CDC: If You Are at Higher Risk

https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fhigh-risk%2Fhigh-risk-complications.html

CDC: How to Protect Yourself

https://www.cdc.gov/coronavirus/2019-ncov/prepare/prevention.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fabout%2Fprevention.html

CDC: Interim Guidance for Businesses and Employers

<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

Washington Post: UnitedHealth Group tells employees to go to work unless they are in a high-risk group, have covid-19 symptoms or meet other exceptions

<https://www.washingtonpost.com/business/2020/03/16/unitedhealth-group-tells-employees-go-work-unless-they-are-high-risk-group-have-symptoms-or-meet-other-exceptions/>

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