

Return to Work Toolkit

Introduction

Many counties in Washington State are moving closer, or have already moved, to Phase 2 of the Governor’s Safe Start plan to return to the workplace after COVID-19 disruptions. This CH& Return to Work Toolkit is designed to help employers navigate the changing expectations and regulations related to welcoming employees back to the workplace. It pays special attention to the requirements for construction jobsites and office locations.

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Disclaimer

This Return to Work Toolkit represents the knowledge and recommendations of the authors based on the best information known as of the date of publication (June 2020). Information about implementation of the various re-entry Phases is consistently changing and may vary based on county and city policies. Businesses are strongly advised to stay independently abreast of the re-entry rules, policies, and procedures applicable to your industry and business location. The attorneys at Cairncross & Hempelmann remain ready to help you navigate this landscape. We encourage you to reach out with any questions.

About Cairncross & Hempelmann

Cairncross & Hempelmann is a full-service law firm with office in Seattle's historic Pioneer Square District. Founded in 1987, CH& advises companies and individuals in business, real estate, land use, and litigation. Our attorneys stand ready to help clients navigate through the workplace changes created by the COVID-19 pandemic and related announcements by government and health officials.

V. Monitor Employees for Compliance with Safety Procedures and Possible Symptoms

A. Monitor Employee Symptoms

A critical step in protecting employees, customers, visitors and others at a jobsite is the prompt identification and isolation of potentially infectious individuals. While employees should self-monitor and self-report for symptoms of COVID-19, employers should also have policies and procedures in place for identifying someone who may be sick with COVID-19.

Perform daily COVID-19 screening of employees. Before the start of each work shift, a supervisor or designated individual should ask each person upon arrival to the workplace if he or she has developed any of the following symptoms since their last day at the workplace:

- Cough
- Shortness of breath or difficulty breathing
- Or at least two of these symptoms:
 - Fever
 - Chills
 - Repeated shaking with chills
 - Muscle pain
 - Headache
 - Sore throat
 - New loss of taste or smell

If the answer is “yes” to any of those questions, the employee should not be permitted to enter the workplace, or the jobsite, and should return home. In addition, Governor Inslee’s Construction Working Group Recommendations for Phase 2 call for construction personnel to take their temperature before they enter the jobsite – either at their home before they head to the jobsite or upon their arrival at the jobsite. The workers can call in to their supervisor to report their temperatures and the screening questions can also be asked over the phone. Any worker with a temperature of 100.4°F or higher must be sent home.

If, during the course of the workday, an employee becomes ill or begins to experience symptoms of COVID-19, that person should report to their supervisor or other designated individual and be isolated away from other workers, customers, and visitors. The area for isolation should be a designated area with closable doors; the number of personnel entering the isolation area should be restricted. As soon as reasonably practical, the sick employee should go home and remain isolated until all of the following conditions are met: (1) more than seven days have passed since symptoms started; (2) more than 72 hours with no fever, no cough, and resolution of other symptoms; and (3) if seen by medical provider, cleared to return to work.

In addition to monitoring employee symptoms, it is also important to monitor whether your employees have been in close proximity to someone who tested positive or is presumed positive for COVID-19. Close proximity is defined as being inside six feet for more than five minutes. If an employee has been in close

proximity to someone with COVID-19, then that employee should self-quarantine for 14 days from their last contact. That employee should not return to the workplace during that timeframe.

Likewise, if a worker comes to work on a construction site in Washington from any non-contiguous state, then that worker must self-quarantine for 14 days to be eligible to perform construction work on a site in Washington.

Employers should also consider implementing a recordkeeping policy and practice for any individuals who become symptomatic while at the workplace. This could be, for example, by use of a data collection form that tracks the individual's name, contact information, symptoms, and date and time of which the symptoms were reported. See Data Collection Form located in **Materials**. As discussed below, these records will require special handling.

B. Ensure Compliance with ADA

One significant challenge for employers will be balancing the need to collect information to keep your employees safe, while also complying with the Americans with Disabilities Act (ADA) and Washington Law Against Discrimination (WLAD) (which mirrors the ADA in most respects), to ensure that the company is not overstepping in terms of the types of questions you pose to employees.

The ADA protects job applicants and employees from disability discrimination. This law is relevant to pandemic preparation in at least three major ways. First, the ADA regulates employers' disability-related inquiries and medical examinations for all applicants and employees. Second, the ADA prohibits covered employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a "direct threat" (*i.e.*, a significant risk of substantial harm even with reasonable accommodation). Third, the ADA requires reasonable accommodations for individuals with disabilities (absent undue hardship) during a pandemic.

The ADA prohibits an employer from making disability-related inquiries and requiring medical examinations of their employees, except under limited circumstances. "Disability-related" questions include any questions that are likely to elicit information about an underlying disability. For example, the Equal Employment Opportunity Commission (EEOC) has instructed that asking someone whether his or her immune system is compromised is disability related, as it is closely related with conditions such as cancer or HIV/AIDS. Whereas asking someone about their current symptoms for flu or cold is not likely to elicit information about a disability.

Employers may ask current employees "disability-related" questions or require a medical exam of their employees when the inquiry is job related and consistent with business necessity. This generally requires objective evidence that:

1. The employee's ability to perform essential job functions will be impaired by a medical condition;
or
2. The employee will pose a direct threat due to a medical condition.

The EEOC has concluded that, based on CDC guidelines, as of March 20, 2020, the COVID-19 pandemic meets the "direct threat" standard. Health agencies may revise this assessment at a later time, but currently, the EEOC has taken the position that these circumstances warrant allowing employers to ask employees COVID-19-related questions in order to maintain a safe workplace.

Be Careful: All information that you obtain from your employees regarding their medical conditions must be kept strictly confidential. Such information must be collected and maintained on separate forms and in separate medical files from other personnel records.

Below are some of the common questions that an employer may confront:

How much information may I request from an employee who calls in sick, in order to protect the rest of my workforce?

EEOC recommendations provide that you may ask employees who report feeling ill about their symptoms to determine whether they have COVID-19. Currently, those symptoms include, fever, chills, cough, shortness of breath, sore throat, red toes, and loss of smell.

When am I allowed to take a body temperature scan of my employees during this pandemic?

Generally, under the ADA, taking body temperature is considered a medical exam. However, given the current COVID-19 crisis, the EEOC recommends that employers be allowed to generally take temperatures to ensure workplace safety during this pandemic. Be sure to keep any record or information regarding employee body temperature or symptoms confidential, as with any other ADA-related information.

When employees do return to work, does the ADA allow me to require a doctor's note certifying their fitness to return?

Yes, you may require an employee to provide you with a doctor's note certifying that they are ready to return to work. As a practical matter, health care professionals may be too busy during the outbreak to provide their typical fitness-for-duty documentation. Thus, you may allow some flexibility here, by allowing an email or other informal form of confirmation from the employee's provider to confirm that they are no longer contagious or are otherwise cleared for work.

For more information, you can view a full version of the EEOC's ADA Guidance [here](#).