

The logo for Pierce Atwood LLP, featuring the company name in a dark teal font with a stylized white and teal graphic element above the text.

PIERCE ATWOOD 

# Beyond Hand Washing: What Employers Should Be Doing Now

*Presented by:*  
**Suzanne W. King**  
**Pierce Atwood LLP**  
**617.488.8159**  
**[sking@pierceatwood.com](mailto:sking@pierceatwood.com)**

**March 17, 2020**

PORTLAND, ME

BOSTON, MA

PORTSMOUTH, NH

PROVIDENCE, RI

AUGUSTA, ME

STOCKHOLM, SE

WASHINGTON, DC

## Agenda

### Employees

- Who should be excluded from the workplace?
- When can they return?
- What about pay?

### Visitors

- Exclude or screen?

### Furloughs and Layoffs

- WARN
- Vacation payout
- Benefits

## Employees: Who Should Be Excluded?

- Employees who are sick
  - Yes, you can send them home if they have symptoms
  - Yes, you can probably take an employee's temperature at work if warranted
  - Yes, you can require disclosure of fact of COVID-19 test and, ultimately, results
  - Not realistic to *require* a test right now, that may change in the coming days
- Any employee who has a household member who has been diagnosed with COVID-19
- Any employee who personally has or whose household member has traveled internationally or who has traveled domestically to high risk areas
  - Any employee who has been on a cruise or whose family member has been on a cruise
- Any employee who has had contact with an individual who has tested positive or who has been directed to self-isolate pending a test

## EEOC Guidance on Pandemics

**Q. During a pandemic, how much information may an ADA-covered employer request from employees who report feeling ill at work or who call in sick?**

- A. ADA-covered employers may ask such employees if they are experiencing influenza-like symptoms, such as fever or chills and a cough or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

If pandemic influenza is like seasonal influenza or spring/summer 2009 H1N1, these inquiries are not disability-related. If pandemic influenza becomes severe, the inquiries, even if disability-related, are justified by a reasonable belief based on objective evidence that the severe form of pandemic influenza poses a direct threat.

**Q. During a pandemic, may an ADA-covered employer take its employees' temperatures to determine whether they have a fever?**

- A. Generally, measuring an employee's body temperature is a medical examination. If pandemic influenza symptoms become more severe than the seasonal flu or the H1N1 virus in the spring/summer of 2009, or if pandemic influenza becomes widespread in the community as assessed by state or local health authorities or the CDC, then employers may measure employees' body temperature. However, employers should be aware that some people with influenza, including the 2009 H1N1 virus, do not have a fever.

## Coronavirus Policy

- Issue policy or guidelines
  - Require disclosure of travel, exposure, symptoms
  - Consolidate disclosure in HR or one/small group of designated individual(s)
  - Consider using a form for disclosure so there is no room for confusion
  - Identify obligations: how long out of work, notifications, use of leave, etc.
  - Identify process for requests to work from home for anyone with a medical condition that places them at higher risk

## Excluded Employees: How Long?

- If no symptoms, generally 2 weeks from exposure or travel
- If employee has symptoms that align with the virus:
  - CDC: Patients with confirmed COVID-19 should remain home under home isolation precautions until the risk of secondary transmission to others is thought to be low. The decision to discontinue home isolation precautions should be made on a case-by-case basis in consultation with healthcare providers and state and local health departments.

6

## Employees Who Test Positive for COVID-19

- A matter of when, not if
- Establish timeline (including last date in workplace, date of onset of symptoms)
- If your workplace is still open, notify all employees of potential exposure
  - Do not identify the ill employee by name
  - Be specific about timing of potential exposure
  - Encourage all employees to consult with medical professional
- Until testing glitches are worked out, consider notification to all employees if individual has the symptoms of coronavirus, flu is ruled out, and the individual does not qualify for a COVID-19 test

7

## Employees: What About Pay?

- Employer policies
  - PTO
  - Sick leave
  - Vacation/personal
- Workers' Comp
  - Wage replacement and medical costs, but proving exposure at work may be difficult
- Unemployment
- Families First

8

## Unemployment

- Federal guidance
  - States should consider waiving one-week waiting period
  - Unemployment not intended to be used as paid sick leave
  - Scenarios where unemployment should be available:
    - Employer temporarily ceases operations and employee will return when business resumes
    - Individual is quarantined and will return to employer
- All states are working on expanding unemployment

9

## Families First Coronavirus Response

- Has not passed Senate yet
- Applies to employers with <500 employees
- Employee must have worked for employer for 30 days
- Covers employees who have to comply with recommendation of public health official or health care provider not to be present on the job; employee needs to take care of family member who is sick or exposed; employee needs to care for child if school is closed
- After 14 days, paid leave for up to 80 hours; paid at 2/3 of employee's regular rate

## Visitors: Exclude or Screen?

- Create inventory of regular visitors/vendors
  - Consider ability to postpone visit/work
- If work/visit is necessary, conduct simple screening:
  - Ask about travel anywhere in last 2 weeks
  - Ask about contact with anyone who has tested positive or is sick with symptoms aligned with virus
  - Ask about personal symptoms
  - Written form is best and get name/date/signature

## Furloughs and Layoffs

### Furlough:

- Employees remain employed
- Health benefits? Check your policy!
  - COBRA likely applies if furloughed employees ineligible for health insurance under plan
  - Unemployment benefits available
  - Vacation payout not required in MA because no termination; but likely can permit use of accrued vacation

12

## Furloughs and Layoffs

### Layoffs:

- WARN
  - Unforeseeable business circumstances exception to the notice requirement
  - But, give as much notice as possible
- State WARN laws
  - Maine and NH also have an exception if the need for notice was not reasonably foreseeable at the time the notice would have been required

13

## Final Thought

If everything gets canceled  
and you have to stay home  
and NOTHING HAPPENS,  
please try to remember:  
THAT'S THE POINT!

Questions???



## Presenter

Suzanne W. King

sking@pierceatwood.com  
100 Summer Street  
22nd Floor  
Boston, MA 02110

One New Hampshire Avenue  
Suite 350  
Portsmouth, NH 03801

PH / 617.488.8159