

## **NJRHA Advisory on How to Respond to the Challenges of the COVID-19 Pandemic**

Dear Member: the existence and potential spread of the COVID-19 virus has begun to take on epic proportions. This is largely unprecedented, and it challenges each and every person in our society, including our Members of the New Jersey Restaurant and Hospitality Association. Our response as businesspeople must be tempered by the rule of law while our response to our fellow human beings must reflect empathy and humanism. To the greatest extent possible, panic and other understandable but undesirable human impulses must be ameliorated by the law and other elevating influences.

Every day and almost by the hour, new announced limitations, directives and advisories are being published by governmental authorities. In implementing such requirements, whether mandated or simply recommended, Restaurant and Hospitality Employers should consider the following:

- Key HR and business challenges
- Compliance considerations (Legal and Policy Mandates)
- Leading practices
- Reliable sources of information
- Employment Law Essentials for a Pandemic
  - Don't discriminate. The earliest incidences of COVID-19 occurred in Asia, and some individuals are wrongly associating the disease with persons of Chinese national origin. Just because COVID-19 outbreaks have been concentrated in certain regions, employers may not discriminate on the basis of national origin, ethnicity, disabilities, or other protected categories.
  - Be careful about inquiries into underlying medical conditions or disabilities.
  - Do not disclose employee medical information or mix with personnel files.
  - Don't forget about paid or unpaid leave rights under legally mandated paid or unpaid leave periods (such as but not limited to NJ Paid Sick Leave).

This being said, here some suggested answers to questions that you, your employees and your patrons may have:

### **What can I ask my employee when they call in sick?**

Employers may ask whether the employee's symptoms are consistent with COVID-19, including cough, shortness of breath or a fever. **All information about the employee's illness must be received confidentially, and if in written form, must be maintained in a confidential medical record that is separate from the employee personnel file (as per the requirements of HIPAA).**

### **My employee is exhibiting symptoms commonly associated with COVID-19; what do I do now?**

If an employee calls in sick, instruct them to **stay home from work** until they and any other person residing in their home has been free of symptoms for the duration of the incubation period. According to the Centers for Disease Control and Prevention ("CDC"), the longest incubation period is expected to be 14 days. If an employee reports to the workplace with symptoms, privately instruct them to go home and seek medical advice. **Be respectful when doing so and mindful of any embarrassment they might feel.** Make sure you keep all medical information and the employee's identity **confidential**. Once you direct the affected employee from your workplace, you should clean and disinfect the employee's work area and other common areas

(bathrooms, break room, etc.) and do so in a manner that helps to minimize exposure for others. You may also have an obligation to report the symptoms to local public health agencies.

**What do I do if my employee or their family member has contracted COVID-19 but the employee does not have paid sick leave to cover the absence?**

Depending on the severity and other circumstances, for larger employers (typically with at least 30 employees under New Jersey law and 50 under federal law) COVID-19 might constitute a serious health condition that qualifies for up to 12 weeks of unpaid leave for the employee to care for their serious health condition or that of an immediate family member. The NJ Paid Sick Leave Act provides for up to five (5) days paid sick time each calendar year for the Employee or his/her family members. If the employee's leave may qualify for unpaid leave, be sure to timely provide all notices regarding eligibility for leave, any required medical certification and leave designation.

**What if my employee wants to come to work even though they are sick?**

Recent governmental declarations make clear that social distancing and other measures **must be employed to break the infection cycle**. Furthermore, the Occupational Safety and Health Act (OSH Act) and state law equivalents require employers to generally provide employees with a workplace that is free from recognized hazards that are causing or are likely to cause death or serious physical harm. This can include unreasonable exposure to contagious or infectious diseases. For all of these reasons, **you may order an employee to stay away from the workplace if they are displaying symptoms of a contagious disease, such as COVID-19**. Note that if an employee is infected by COVID-19 on the job, that is a recordable illness that must be reported on OSHA300, OSHA301, and OSHA300A forms.

**Must I pay my employee when they are out sick due to COVID-19 after they have exhausted their paid time off?**

Presently, no. However, Congress appears to be on the verge of passing legislation that should provide various forms of economic relief for both employers and employees who are adversely affected by required quarantine and other forms of social distancing. You are always permitted to do more than what is mandated. Be sure that any such latitude stands up against the test of illegal discrimination.

**My employee is staying home on quarantine. Do I need to pay them?**

If a quarantined employee is working at home, then, yes, you need to compensate them for their work. If they are not working while quarantined, which would presumably include most of your employees in our industry, then you can require the employee to exhaust available paid time off, such as vacation time and paid sick leave, while they are away from work. If an employee is staying home, not working, and out of available paid leave, whether you have to pay the employee depends on their status as an exempt or non-exempt employee under the Fair Labor Standards Act (FLSA) and corresponding state law. Generally, if the employee is non-exempt, such as an hourly employee, they are not entitled to be paid when not working. If the employee is classified as exempt under the FLSA, the employee must be paid their full salary if they perform any work during a workweek. However, if the exempt employee performs no work during a workweek they may not be entitled to pay for that week. Further, the FLSA may provide for some salary reduction corresponding to full-day absences occasioned by sickness where they have exhausted all available sick leave. Be careful before making any salary deduction, however, because an impermissible deduction could jeopardize the employee's exempt status. Overall, it would be

prudent to consult with your attorney before withholding pay for employees who are quarantined and not working.

**My company does not normally have a work-from-home policy, but my employee says they he/she is at a high risk of contracting COVID-19 (due to age or compromised immune system) and requests permission to work from home. What do I do now?**

Although the CDC and medical professionals predict that most individuals who catch COVID-19 will weather it without incident (and may not even know they have the virus), the public is warned that certain groups of individuals have a heightened risk if they are older or have weakened immune systems or underlying serious health conditions. If an employee reports that they are at increased risk for contracting the disease because, for example, they take medication that suppresses their immune system, then you should engage in the interactive process under the ADA and/or the New Jersey Law Against Discrimination) and explore whether you should provide a reasonable accommodation such as permitting work from home.

**Can I order my employees to wash their hands more often?**

Absolutely! This is a norm of our industry which becomes even more of a requirement under these circumstances. The Equal Employment Opportunity Commission (EEOC) has confirmed that requiring additional infection control practices, such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal, does not violate the ADA.

**My employee was out of work with symptoms of COVID-19 and wants to return to work. Can I require a doctor's note before letting them return?**

Yes. You can require a note that confirms the employee is no longer infected and does not otherwise pose a threat to the health of your workforce or patrons. But that's different than whether this is realistic. If the pandemic reaches the proportions that some predict, doctor's offices will be stretched to their limit, and employees may not be able to get in to see their doctor. In such case, a middle-ground solution may be necessary.

**My employee has been actually diagnosed with COVID-19. Should I require a doctor's note before they come back to work?**

Yes, and because they have actually been diagnosed, it is reasonable to require a doctor's note before they return.

**My employee is refusing to come to work because they claim they are afraid of catching COVID-19 and they do not think I'm doing enough to keep the workplace virus-free. Can I discipline them?**

In most cases, yes, but it is important to review the situation with legal counsel. It must be recognized that this is not an unreasonable fear if acted upon in good faith. If there is a reasonable basis for claiming that your workplace environment presents an objective risk of imminent danger, you might find yourself facing allegations that you have retaliated against the employee unlawfully. If the employee expresses a reasonable concern, this may be characterized as a concerted activity that it is protected by the National Labor Relations Act.

**My employee wants to know how to keep from contracting COVID-19. What should I say?**

This is a good question for which many answers are only developing as the world learns to deal with this issue. Only licensed and trained medical professionals should give medical advice. You can share with your employees the steps you are taking to keep employees and patrons safe at your business premises, including more frequency sanitizing of hard surfaces; providing tissues, hand sanitizers, and disinfectant wipes also help. Public health agencies, like the CDC, have helpful resources as well that can be shared with employees and your business invitees.

**What should I do when my employee just returned from a country where the CDC has reported a heightened risk of contracting COVID-19?**

Follow CDC guidance and remember your general duty under the OSH Act to keep your employees safe. This may mean ordering the employee to stay home for at least a 14-day quarantine period.

**I don't want to refuse paid sick leave to my employee who is sick, but I can't afford to give infinite paid sick leave. Is there anything else that I can do?**

There is no easy answer to this question. We must all hope for the break in the cycle of new infections. In the interim, it appears that federal and state governments may provide some economic relief.

**One of my employees has COVID-19. What should I tell my other employees?** You should tell potentially affected employees that they may have been exposed to COVID-19, but without disclosing medical information about the specific employee infected with COVID-19, including his/her identity.

**Can I ask my employee about their travel plans and tell them not to travel?** The travel ban imposed by the federal government has provided an answer to this question. Business and personal travel plans are temporarily restricted.

**What about patrons and other visitors at our workplace?**

While continuing to welcome patrons and other business invitees to your restaurant or hotel, you may find it necessary to limit access by vendors and other third parties. Review your contracts with any vendors to see if there are any notice requirements. Communicating these limitations in advance is important. You should study how you may institute "social distancing" while maintaining a continuing but reduced patronage of your establishment.

I hear that companies may establish Pandemic Response Plans. Where do I start?

Governmental agencies will assist in formulating Pandemic Response Plans which generally include provisions regarding the assessment of risk, delegation of authority, contingency planning, succession planning, communication strategies, and variations in personnel policies to be triggered during a pandemic.