

## THE ASSOCIATION OF RIVERDALE COOPERATIVES & CONDOMINIUMS



Provided courtesy of Robert Sparer, of the firm *Clifton, Budd & DeMaria, LLP*  
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### COVID-19 & Related Issues for Employers/Employees

*This memorandum summarizes your labor and employment legal obligations and answers common questions regarding COVID-19 and your employees.*

#### COVID-19 OVERVIEW AND MINIMIZING RISK OF TRANSMISSION

A new virus was identified in Wuhan, China in late 2019 and has been spreading around the world. Current thinking from the news and governmental releases, give some insights into the virus:

- The coronavirus disease 2019, abbreviated as COVID-19, is not a flu but a pneumonia-like infection. The virus symptoms manifest as a mild to severe respiratory illness with fever, cough, and difficulty breathing. People can catch COVID-19 from others who have the virus.
- The disease can spread from person to person through small droplets from the nose or mouth which are spread when a person with COVID-19 coughs or exhales. These droplets also land on objects and surfaces around the person.
- Other people then catch COVID-19 by touching these objects or surfaces, then touching their eyes, nose, or mouth.
- It is important to stay more than 1 meter (3 feet) away from a person who is sick.
- The Center for Disease Control ("CDC") recommends as much as 6 feet.
- It is possible to catch the virus from someone even before they have symptoms, but little is known about this aspect of the virus at this time.

Obviously, employers should encourage hand-washing and respiratory etiquette by everyone in the workplace. Routine cleaning of commonly touched surfaces should be performed regularly. Some baseline measures (with links to CDC guidance) are below:

- Instruct employees to clean their hands often with an alcohol-based hand sanitizer that contains at least 60-95% alcohol or wash their hands with soap and water for at least 20 seconds. Soap and water should be used preferentially if hands are visibly dirty.
- Avoid touching your eyes, nose, and mouth with unwashed hands.
- Avoid shaking hands with others.
- Provide tissues and no-touch disposal receptacles for use by employees.
- Provide soap and water and alcohol-based hand rubs in the workplace. Ensure that adequate supplies are maintained. Place hand rubs in multiple locations or in conference rooms to encourage hand hygiene.
- Encourage employees who are sick to stay home.
- Place posters that [encourage staying home when sick](#), [cough and sneeze etiquette](#), and [hand hygiene](#) at the entrance to your workplace and in other workplace areas where they are likely to be seen.
- Visit the [coughing and sneezing etiquette](#) and [clean hands webpage](#) for more information.
- Routinely clean all frequently touched surfaces in the workplace, such as workstations, countertops, and doorknobs. Use the cleaning agents that are usually used in these areas and follow the directions on the label.
- Educate your employees about COVID-19, its symptoms, and the potential health concerns associated with any travel at this time.

- Have a single point of contact for employees for all concerns that arise relating to health and safety.
- Follow updates from the [CDC](#) and the [World Health Organization \(WHO\)](#) regarding additional precautions.

## **WORKPLACE SAFETY/OTHER ISSUES**

### **What should an employer do if an employee appears sick at work?**

If any employee presents themselves at work with a fever, cough, and/or difficulty in breathing, this indicates that they should seek medical evaluation. While these symptoms are not always associated with COVID-19 and the likelihood of an employee having COVID-19 is extremely low, it pays to err on the side of caution. Retrain supervisors on the importance of not overreacting to situations in the workplace potentially related to COVID-19 in order to prevent panic among the workforce.

### **Can an employer ask an employee to stay home or leave work if they exhibit symptoms of COVID-19?**

Yes, you are permitted to ask them to seek medical attention and under most circumstances, you can ask them to leave work. Employees who are sick can be required to stay home. However, determining whether employees are “sick” can be a challenging process unless the individual volunteers the information. Employers must take care not to make inquiries, for example, into pre-existing conditions that might make an employee more susceptible to COVID-19. As a best practice, employers should encourage employees to stay home if they are sick, have a fever, or show signs of a respiratory ailment.

### **What can I share about potential COVID-19 exposure by employees?**

All management personnel should keep confidential medical information about an employee and/or their family, and information about an employee’s travel and possible exposure to COVID-19. You must continue to comply with all protections afforded to employees under the Health Insurance Portability and Accountability Act (HIPAA).

If an employee is confirmed to have COVID-19 and was present at the workplace during the incubation period or thereafter, you should inform employees of possible exposure, but you should not identify the employee or share any of the employee’s health information with others.

### **Can an employer require employees to work from home?**

Employees can be required to work from home, as long as the work from home policy is consistently implemented. Written policies or communications regarding working from home should be explicit about when employees, or those with symptoms of COVID-19, will be allowed back in the workplace. Employers can issue a policy that employees may not be allowed to travel during the work from home period. Hourly employees must continue to record their time worked while working from home.

Work from home policies are not addressed for building service employees, due to the nature of building service work.

### **Can an employee wear a face mask while at work?**

The CDC does not recommend that individuals who are not experiencing symptoms of COVID-19 wear face masks. If an individual is exhibiting symptoms of COVID-19, they should be asked to leave the workplace and seek medical attention. However, people wear protective face masks for many reasons, including seasonal allergies, pollution or protecting those around them from a common cold. They should not be harassed or targeted for wearing one. It may be a reasonable accommodation to allow an employee to wear a facemask. This should be evaluated on a case-by-case basis.

### **Can an employer take an employee’s temperature at work to determine whether they might be infected?**

We do not recommend doing this. Taking an employee’s body temperature is a “medical examination” under the Americans with Disabilities Act (ADA). The ADA places restrictions on the inquiries that an employer can make into an employee’s medical status. It prohibits employers from requiring medical examinations and making disability-related inquiries unless (1) the employer can show that the inquiry or exam is job-related and consistent with business necessity, or (2) the employer has a reasonable belief

that the employee poses a “direct threat” to the health or safety of the individual or others that cannot otherwise be eliminated or reduced by reasonable accommodation.

Taking an employee’s temperature may be unlawful if is not job-related and consistent with business necessity. The inquiry and evaluation into whether taking a temperature is job-related and consistent with business necessity is fact-specific and will vary among employers and situations. Moreover, as a practical matter, an employee may be infected with COVID-19 without exhibiting symptoms like a fever, so temperature checks (even if recommended) may not be an effective method to prevent the spread of COVID-19.

### **Can an employer require employees who have been away from the workplace during a pandemic to provide a doctor’s note certifying fitness to return to work?**

Yes, however a pandemic has not been declared by the CDC at this time. If a pandemic were to be declared, such inquiries would be permitted under the ADA either because they would not be disability-related or, if the COVID-19 were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees.

In the event the employee is covered by the NYC Earned Safe and Sick Time Act, a note may not be requested for absences of less than three consecutive days. Employees covered by a collective bargaining agreement that waives the NYC Earned Safe and Sick Time Act may have different rules regarding doctor’s notes.

### **If an employee returns from vacation during this time, must an employer wait until the employee develops COVID-19 symptoms to ask about potential exposure during the trip?**

No. These would not be disability-related inquiries. If the CDC or state or local public health officials recommend that people who visit specified locations remain at home for several days until it is clear they do not have COVID-19 symptoms, an employer may ask whether employees are returning from these locations, even if the travel was personal.

### **In a residential building, what should we do if we suspect that a resident is impacted by COVID-19?**

Unless/until the government authorizes otherwise, it is important that boards and property managers refrain from making inquiries about the medical conditions of residents (or employees) that would violate the Americans with Disabilities Act (ADA), other state and local anti-discrimination laws, and/or laws regarding rights to privacy. Management, including the board should avoid asking anyone if they have been diagnosed with COVID-19. Management should not take any actions that would target anyone based on race, ethnicity, or national origin. Asking someone questions because he or she has a residence in China (for example) might implicate discrimination based on national origin or other protected characteristics, which should be avoided.

You can encourage anyone who is experiencing symptoms of COVID-19 (e.g., fever, cough, shortness of breath, and other breathing difficulties) to seek medical care, if necessary, by calling 911. You can encourage building employees and residents to self-report to management if they have tested positive for COVID-19, or may have been exposed to it, to help contain the spread of the virus within the building.

If a resident is confirmed to have COVID-19, you should communicate guidelines and expectations to the individual about their time in quarantine (for example, requesting that the individual not use amenities at the property, or be in common areas). You should keep other residents informed about their efforts to combat COVID-19. You do not need to report anyone who you think may have been exposed or be infected. The NYC Health Department is conducting thorough outreach and does not require assistance from the general public in identifying individuals.

Boards and management may notify employees and residents of known exposure risks in the building so long as the board does not release personal or medical information about any particular individual. If there

was a known exposure, it would be best to review any notification with legal counsel before disseminating it. You should review each situation on a case-by-case basis when deciding whether to allow building service employees to perform work in spaces that might be contaminated, or where an individual affected by COVID-19 is being quarantined.

## **DISCRIMINATION/HARASSMENT/EEO ISSUES**

Employers cannot select employees for disparate treatment or discriminate against employees based on national origin, race, or color. The CDC recently warned: “Do not show prejudice to people of Asian descent, because of fear of this new virus. Do not assume that someone of Asian descent is more likely to have COVID-19.”

***Employers will need to closely monitor any concerns that employees, customers, residents and tenants, their guests and other visitors of Asian/Italian descent are being subjected to disparate treatment, discriminated against, or harassed because of national origin, race, or color. This could include issues caused by employees avoiding other employees or customers, residents and tenants, their guests and other visitors because of their national origin, race, or color.***

An employer may not base a decision to bar an employee from the workplace on the employee’s national origin, race, or color. However, if an employee, regardless of their race, color, or national origin, was recently in China, Italy, Iran, South Korea, or other countries experiencing a rapidly spreading outbreak of COVID-19 and has symptoms of the COVID-19, you may have a legitimate reason to bar that employee from the workplace.

## **LABOR RELATIONS**

### **Is this addressed under the union contract?**

If there is a city-wide shut down or the government directs employees not to report to work, the employer may be liable for one day’s pay (the first full day affected by the common disaster). SEIU Local 32BJ has provided advisory guidance for employees regarding the outbreak.

### **Can an employee refuse to come to work because of fear of infection?**

Employees are only entitled to refuse to work if they believe they are in imminent danger. General concerns about contracting COVID-19 do not provide employees with a legal right to stay home. Section 13(a) of the Occupational Safety and Health Act (OSH Act) defines “imminent danger” to include “any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.” OSHA discusses imminent danger as where there is “threat of death or serious physical harm,” or “a reasonable expectation that toxic substances or other health hazards are present, and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency.”

The threat must be immediate or imminent, which means that an employee must believe that death or serious physical harm could occur within a short time, for example, before OSHA could investigate the problem. Requiring travel to [countries designated by the Department of State as experiencing outbreaks of COVID-19](#) or to work with patients in a medical setting without personal protective equipment at this time may rise to this threshold. Most work conditions in the United States, however, do not meet the elements required for an employee to refuse to work. This should be evaluated on a case-by-case basis.

In addition, Section 7 of the National Labor Relations Act (NLRA) extends broad-based statutory protection to those employees (in union and non-union settings alike) to engage in “protected concerted activity for mutual aid or protection.” Such activity has been defined to include circumstances in which two or more employees act together to improve their employment terms and conditions, although it has been extended to individual action expressly undertaken on behalf of co-workers.

On its own website, the National Labor Relations Board (NLRB) offers a number of examples, including, “talking with one or more employees about working conditions,” “participating in a concerted refusal to work in unsafe conditions,” and “joining with co-workers to talk to the media about problems in your workplace.” Employees are generally protected against discipline or discharge for engaging in such activity.

Whistleblower and anti-retaliation laws, which protect employees who make a good faith complaint that their workplace may be violating a law (for example, by harassment or failing to provide a safe workplace), may also apply.

There is not a simple “yes” or “no” answer. The resolution will depend on the facts of the situation.

## **PAY ISSUES**

### **Can employees use paid time off for a leave related to COVID-19?**

Yes, they can use sick leave. If an employee is sick but out of sick days, they could opt to request to use vacation leave to cover their time. Depending on the circumstances of the employee’s illness there may be pay under Worker’s Compensation or short-term disability laws. An employee who is sick from an on-the-job injury (or potential COVID-19 exposure) would be eligible for Workers’ Compensation benefits. An employee unable to come to work due to an off-the-job disability (or potential COVID-19 exposure) would be eligible for short-term disability benefits. If the person was quarantined, some government benefits might be available.

### **Are there additional leaves available under collective bargaining agreements?**

Additional leave may vary based on the applicable collective bargaining agreement. Under the SEIU Local 32BJ/Realty Advisory Board Apartment Building Agreement, for example, there is a medical leave and a personal leave available to employees (both unpaid).

### **Can an employee take unpaid time off?**

Neither the Apartment Building Agreement nor the law restrict an employer from granting more generous time off, with or without pay, in the employer’s discretion. Where employees are covered by a collective bargaining agreement, an employee may be eligible for other unpaid time off.

### **Does FMLA apply to this situation?**

Employees requesting leave could conceivably be protected by the Family and Medical Leave Act (FMLA) to the extent they otherwise meet FMLA-eligibility requirements either under the law or company policies.

### **Does the NY Paid Family Leave apply to this situation?**

Employees are not eligible to use New York Paid Family Leave (PFL) if the employee has COVID-19. However, an employee may be eligible for PFL to care for a family member with COVID-19.

As the circumstances with COVID-19 continue to change, unique situations and further complications may arise. Please let us know if you have additional questions.

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*This Update is not intended to be legal advice. It is intended to inform the reader of issues and recent developments in labor and employment law. If legal advice is required concerning a particular matter, you should consult with your attorney.*