

## **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. 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 China 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. Once again, this guidance is general, and employers must determine when this unusual state exists in your workplace before determining whether it is permissible for employees to refuse to work.

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.

## **What steps can we take to minimize risk of transmission?**

Repeatedly, creatively, and aggressively encourage employees and others to avoid exposure. The messages you should be giving to your employees are:

- Wash your hands often with soap and water for at least 20 seconds. If soap and water are not available, use an alcohol-based hand sanitizer.
- Avoid touching your eyes, nose, and mouth with unwashed hands.
- Avoid close contact with others, especially those who are sick.
- Refrain from shaking hands with others for the time being.
- Cover your cough or sneeze with a tissue, then throw the tissue in the trash.
- Clean and disinfect frequently touched objects and surfaces.
- Perhaps the most important message you can give to employees: stay home when you are sick.

As an employer, you should be doing the following:

- Ensure that employees have ample facilities to wash their hands, including tepid water and soap, and provide alcohol-based hand rubs containing at least 60% alcohol where hand-washing is not available.
- Accelerate your third-party cleaning/custodial schedules.
- Evaluate your remote work capacities and policies (see later section on Remote Work for more information). Teleconference or use other remote work tools in lieu of meeting in person if available.
- Limit worksite access to only essential workers, if possible.
- Consider staggering employee starting and departing times, along with lunch and break periods, to minimize overcrowding in common areas such as elevators, break rooms, etc.
- Have a single point of contact for employees for all concerns that arise relating to health and safety, and encourage workers to report any safety and health concerns.
- Discourage workers from using other workers' phones, desks, or other work tools and equipment.
- Regularly clean and disinfect surfaces, equipment, and other elements of the work environment.

## Can an employee refuse to work without a mask?

OSHA has addressed the common question of whether an employee can simply refuse to work in unsafe conditions. The safety agency provides the following guidance, which wouldn't require the use of a mask or respirator in most situations. An employee's right to refuse to do a task is protected if all of the following conditions are met:

Where possible, you have asked the employer to eliminate the danger, and the employer failed to do so;

You refused to work in "good faith." This means that you must genuinely believe that 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.

Given the consensus that face masks are only necessary when treating someone who is infected with the COVID-19 coronavirus or influenza, masks are likely not necessary to protect the health of most employees. Therefore, most employers do not have to provide, or allow employees to wear, a surgical mask or respirator to protect against the spread of the COVID-19 coronavirus or influenza. The use of the word "may" in OSHA's respiratory protection standard makes it clear that when a respirator is not necessary to protect the health of an employee, it is within the discretion of the employer to allow employees to use a respirator. Accordingly, you are well within the applicable OSHA standard to deny an employee's request to wear a surgical mask or a respirator in almost all situations.

However, in light of the CDC's recent guidance recommending that people wear cloth face coverings in public settings, it's not recommended that you refuse an employee's request to wear a mask at work. However, you should recommend that the employee wear a cloth face covering instead of a surgical mask. As the CDC notes, the cloth face coverings recommended are not surgical masks or N-95 respirators. The cloth face coverings are not subject to OSHA's respiratory protection standard.

## WORKERS' COMPENSATION

### UPDATED QUESTION & ANSWER (March 9, 2020)

#### **My employee alleges that they contracted the coronavirus while at work. Will this result in a compensable workers' compensation claim?**

It depends. If the employee is a health care worker or first responder, the answer is likely yes (subject to variations in state law). For other categories of employees, a compensable workers' compensation claim is possible, but the analysis would be very fact-specific.

It is important to note that the workers' compensation system is a no-fault system, meaning that an employee claiming a work-related injury does not need to prove negligence on the part of the employer. Instead, the employee need only prove that the injury occurred at work and was proximately caused by their employment. Additionally, the virus is not an "injury" but is instead analyzed under state law to determine if it is an "occupational disease." To be an occupational disease (again subject to state law variations), an employee must generally show two things:

the illness or disease must be "occupational," meaning that it arose out of and was in the course of employment; and

the illness or disease must arise out of or be caused by conditions peculiar to the work and creates a risk of contracting the disease in a greater degree and in a different manner than in the public generally.

The general test in determining whether an injury "arises out of and in the course of employment" is whether the employee was involved in some activity where they were benefitting the employer and was exposed to the virus. Importantly, special consideration will be given to health care workers and first responders, as these employees will likely enjoy a presumption that any communicable disease was contracted as the result of employment. This would also include plant nurses and physicians who are exposed to the virus while at the worksite.

As for other categories of employees, compensability for a workers' compensation claim will be determined on a case-by-case basis. The key point will be whether the employee contracted the virus at work and whether the contraction of the disease was "peculiar" to their employment. Even if the employer takes all of the right steps to protect the employees from exposure, a compensable claim may be determined where the employee can show that they contracted the virus after an exposure, the exposure was peculiar to the work, and there are no alternative means of exposure demonstrated.

Absent state legislation on this topic, an employee seeking workers' compensation benefits for a coronavirus infection will still have to provide medical evidence to support the claim. Employers who seek to contest such a claim may be able to challenge the allowance if there is another alternative exposure or if the employee's medical evidence is merely speculative.

Finally, employers should be aware that states are taking action on this issue. For instance, Washington Governor Jay Inslee recently directed his Department of Labor and Industries to "ensure" workers' compensation protections for health care workers and first responders. The

directive instructs the Department to change its policies regarding coverage for these two groups and to “provide benefits to these workers during the time they’re quarantined after being exposed to COVID-129 on the job.” We expect other states to follow Washington’s lead.