

COVID-19 Employment FAQ's for Long Term Care and Senior Living Providers

Lane Powell compiled a list of most frequently asked employment questions for senior living and long term care providers related to COVID-19. This is a fluid situation, and we will continue to update our guidance. Please note that this guidance is generally applicable to Oregon and Washington. You should consult with an attorney for state specific employment questions.

1. If an employee is scheduled to work, but calls off due to fear of COVID-19, which may or may not be present in the facility or community, can the employee use available sick time or PTO? Additionally, if an employee calls off during this time or has had numerous call offs, can the employee be written up for discipline?

The employee should be able to use PTO for this absence. If the facility has a combined PTO plan, it should cover sick and safe reasons as well as vacation. While technically an asymptomatic employee who calls off for fear of COVID-19 is not using the time for a sick and safe reason, employers may allow employees to use PTO. It may even be to the employer's advantage to allow employees to draw down on their PTO if the employee is going to be out anyway.

We caution against writing an employee up for excessive calls off if they are only calling off of work for COVID-19 related reasons, unless you have reason to suspect fraud/abuse.

2. If an employee tests positive for COVID-19 and it is unknown if the employee contracted the virus at the facility, in the community or at home, can the employee use sick or PTO time, or is the employer obligated to pay the employee for scheduled hours?

The employee can use sick or PTO in this situation. We have not seen any guidance requiring employers to pay for scheduled hours; however, workers' compensation may be available.

3. If an employee calls off for a scheduled shift due to being quarantined for 14 days after exposure to COVID-19 (has not tested positive) and it is not known where the employee contracted the virus, can the employee use available sick time or PTO? Also, is the employer obligated to pay the employee for his or her scheduled hours?

The employee should be able to use sick time or PTO in this circumstance.

We have not seen anything suggesting an employer must pay for the time off, but can allow employees to use their PTO. If the employee is a healthcare worker who is quarantined by a physician or public health officer, they may be entitled to workers' compensation.

4. If an employee refuses to work in his or her assigned resident hallway or section, presumably out of fear of exposure to COVID-19 or for a stated concern of being exposed to it, can the employer follow its normal policy and procedures related to employee discipline for non-compliance with accepting a work assignment? Keep in mind all safety protocols and PPE are in place to protect the employee as they demonstrate universal precautions.

This is highly fact specific, and the answers will depend on the specific circumstances. Generally:

- Employees who are refusing to work need to still follow the handbook guidelines on calling out, requesting PTO use, etc. If it is for a sick and safe reason, employers can only ask for verifications

for absences exceeding 3 days per the sick and safe laws. They can be disciplined for failing to follow the handbook rules — but we recommend a light touch for both public relations and personnel reasons, given the staff shortage.

- If an employee refuses to work because they have symptoms, there should be no discipline.
- If an employee refuses to work because they are high-risk, then we recommend engaging in the interactive process to determine if there is a reasonable accommodation (which includes reassignment, light duty and leave) during this time period. ADA/disability rules apply here — only requesting the specific information needed to explore an accommodation, limits on the type of documentation you can request from healthcare providers (and note a likely delay from healthcare providers verifying this), etc.
- If an employee refuses to work because they state the facility has not provided enough PPE/protections, we would recommend exploring that contention with the employee and coordinating with counsel on the response and next steps, because it could be a protected activity per workplace safety laws.
- If none of the above fit, an employee should still be required to explain why they are refusing to work in their assigned area, but we urge employers to be careful in imposing discipline given the current climate. We understand that this is difficult in light of short staffing concerns, but unless you suspect fraud or abuse by these employees, it is the recommended approach.

5. In the event the outbreak continues and a facility or community's employee base is depleted, can a facility or community call otherwise healthy workers back to work if those workers are staying home as part of "social distancing" or because they identify as part of an at risk population?

While technically, employers can still avail themselves of the typical tools to deal with absenteeism, we recommend proceeding with caution. First, if an employee is a member of a high-risk population, or has family members nearby who are part of the high-risk population, they should be allowed to self-quarantine without discipline. If an employee is not high risk, doesn't have a family member nearby who is high risk, and is not exhibiting or experiencing symptoms, then technically their leave is not protected under the sick and safe leave laws, or (without more information) the disability laws, etc., and they can be subject to an absenteeism policy. However, they may still be entitled to take vacation leave, subject to the vacation leave policy. While employers can explain to employees that the regular attendance rules apply, but if they need to take leave that is not a covered sick/safe reason, then they need to coordinate with HR to explore solutions.

6. If an employee has tested positive for COVID-19, but is asymptomatic (no cough, fever, respiratory illness) can you allow them to come to work?

Per [CDC guidance](#), facilities could consider allowing asymptomatic health care personnel who have had an exposure to a COVID-19 patient to continue to work after options to improve staffing have been exhausted and in consultation with their occupational health program. These health care personnel should still report temperature and absence of symptoms each day prior to starting work. In fact, some states, such as Washington, are requiring checks at the beginning of each shift. Facilities and communities could have exposed health care personnel wear a facemask while at work for the 14 days after the exposure event if there is a sufficient supply of facemasks. If health care personnel develops even mild symptoms consistent with COVID-19, they must cease patient care activities, don a facemask (if not already wearing), and notify their supervisor or occupational health services prior to leaving work.

Facilities and communities should have a low threshold for evaluating symptoms and testing symptomatic health care personnel, particularly those who fall into the *high-* and *medium-* risk categories described in the [CDC guidance](#).

Facilities and communities, in consultation with public health authorities, should use clinical judgment as well as the principles outlined in this guidance to assign risk and determine need for work restrictions. CDC remains available for further consultation by calling the Emergency Operations Center at 770-488-7100.

7. If an employee who tested positive for COVID-19 was ill and now claims to be better and wants to return to work, what kind of evidence can you require the employee provide to return to work?

See No. 6 above. Employers may also consider requesting that employees who have tested positive obtain a note from a qualified healthcare professional indicating that the employee is fit to return to work and that it is safe for that person to be in the workplace.

8. What if we have staff who is at high risk (over 60, immunocompromised, lung disease, etc.) and this person does not wish to care for residents who may have COVID-19, do we have to accommodate the staff person? What if we are short-staffed?

Yes — we would treat this as a request for a reasonable accommodation. The employer needs to engage in the interactive process with the employee and look for a reasonable accommodation that will allow the employee to perform the essential functions of their job, which could include leave.

9. If staff reports they can't come to work because they have a sick family member, can we discipline the person or require them to come to work?

No — this may qualify as protected leave under any number of laws (including sick leave to take care of a sick family member, may be family leave under the Washington State Paid Family and Medical Leave, and FMLA).

10. Can we, as a nursing home or assisted living facility, force our employees to test for COVID-19?

This depends on the state where you are located. For instance, in Washington, the Governor has required by proclamation that all staff in nursing homes and assisted living facilities be screened at the start of their shift. At this time, a facility cannot force further testing upon a staff member. However, the issue of testing staff is evolving by the day and this may change by a government mandate.

11. Can we require employees who are caring for potentially sick residents or those residents with the virus to use N95 respirators or do we need to conduct a medical evaluation first?

An N95 FFR is a type of respirator which removes particles from the air that are breathed through it. These respirators filter out at least 95% of very small (0.3 micron) particles. N95 FFRs are capable of filtering out all types of particles, including bacteria and viruses. This is the type of mask that the [CDC recommends](#) health care personnel use. The CDC updated [its guidance](#) to indicate that surgical masks are an acceptable alternative to N95 masks when the supply chain of respirators cannot meet the demand.

Not everyone is able to wear a respirator due to medical conditions that may be made worse when breathing through a respirator. Before using a respirator or getting fit-tested, workers must have a medical evaluation to make sure that they are able to wear a respirator safely.

The information contained in this document and presentation is intended for educational purposes only. Nothing in this document is intended to provide you with legal advice. If you have specific questions, you should consult with an attorney.