

Covid-19 and its Impact on Your Transportation Business

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We hope you enjoyed our December 9th “lunch and learn” presentation to the Duluth Superior Transportation Association members!

This handout is a brief summary of many of the issues we covered, in no particular order and in brief. Do not make decisions based only on these materials. In addition some advise may be state specific, check the law in your state (there can be a difference between MN and WI law).

Employers – Review and update your Covid-19 Preparedness Plan.

A Preparedness Plan is a must for every business. It is a living document that should be revisited often to keep up with the information we are gaining as they study this virus. Preparedness plans are not going away anytime soon. Businesses need good plans for the continued vigilance with this virus and to help prevent or address new potential hazards in the workplace. Take into account the recommendations of the CDC, but keep in mind they are guidelines not the law. If you follow the guidelines it may provide some protection from lawsuits. Below is a link for additional information to assist in making your plan. Also let us know if you have questions for us.

Employers with questions related to the development of Covid-19 preparedness plans are encouraged to contact MNOSHA Workplace Safety Consultation for assistance or questions related to the development of a Covid-19 Preparedness Plan at 651-284-5060 or osha.consultation@state.mn.us

https://www.dli.mn.gov/sites/default/files/pdf/COVID_19_preparedness_plans_industry_guidance_FAQs.pdf

Can an employer expect to be sued when an employee/independent contractor catches Covid-19? For what? How will this work? What about independent contractors?

Yes employees and third parties can potentially sue for getting Covid-19. There have been some lawsuits already. However, a plaintiff will have the burden to prove that he/she got Covid-19 from contact with your business and even if this threshold test is met, the case can only proceed if the plaintiff ALSO proves the business did something negligent to cause it. As a business you cannot guarantee that people/employees will not get Covid-19. It is everywhere and even if you do everything right, someone could get Covid-19. An employer should try to follow CDC guidance along with balancing its business needs, as it does in the ordinary course of its business already. An employers obligation is to take reasonable steps to protect its workforce. That preparedness plan is helpful to show what steps you are taking or what steps you did take if you are sued. An employer that fails to develop or implement a Covid-19 Preparedness Plan is an example of an adverse work condition that may qualify an employee who quits for unemployment insurance. Check to see if your company insurance provides coverage if you are sued.

Should employers be reporting Covid-19 cases as workers compensation claims?

Yes, **if** an employee believes he or she contracted Covid-19 while working the employee should notify the employer as soon as possible after symptoms develop. The employer must file a first report of injury with workers' compensation insurer or claim administrator. **HOWEVER**, exposure to Covid-19 alone does not constitute a workers' compensation injury. An employee must actually contract Covid-19 due to his or her employment to be entitled to workers' compensation benefits. A threshold issue will be how to prove that the virus was in fact caught at work, as many people do not consistently observe safe masking and distancing, and contact with others is always an exposure risk.

If an employee is not ill, but must stay home from work because he or she was exposed to the virus, the employee is not entitled to workers' compensation benefits under the current law.

https://www.dli.mn.gov/sites/default/files/pdf/MN_worker_protections_related_to_COVID_19.pdf

A Minnesota new law enacted in April 8, 2020, states that certain employees are presumed to have an occupational disease covered by workers' compensation. Long-haul truck drivers are **not** covered by the new law. An employee who has Covid-19 but who does not fall within one of the enumerated occupations can still claim workers'

compensation injury or occupational disease if he/she believes the illness is due to employment.

http://www.dli.mn.gov/sites/default/files/pdf/COVID-19_work_comp_presumption_faqs.pdf

When should a truck or other commercial vehicle driver stay home and quarantine?

Drivers who have been in **close** contact with someone who has Covid-19, excluding people who have had Covid-19 within the past 3 months, should stay home and quarantine. Current guidance states that people who have tested positive for Covid-19 do not need to quarantine or get tested again for up to 3 months as long as they do not develop symptoms again. People who develop symptoms again within 3 months of their first bout of Covid-19 may need to be tested again if there is no other cause identified for their symptoms.

Close contact means: driver was within 6 feet of someone who has Covid-19 for a total of 15 minutes or more; driver provided care at home to someone who is sick with Covid-19; driver had direct physical contact with the person (hugged or kissed them); driver shared eating or drinking utensils; or they sneezed, coughed, or somehow got respiratory droplets on the driver.

Drivers should stay home for 10 days after the last contact with a person who has Covid-19. Driver should watch for fever, cough, shortness of breath, or other symptoms of Covid-19. If possible, driver should stay away from others, especially people who are at higher risk for getting very sick from Covid-19. **Note that CDC guidance is changing slightly as to how long one must quarantine and when the Covid-19 test should be given.**

Source – <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/quarantine.html>

When can an employer require that an employee be tested?

The ADA requires that mandatory medical test of employees be “job related and consistent with business necessity.” Employers may take steps to determine if employees entering the workplace have Covid-19 because an individual with the virus will pose a direct threat to the health of others. An employer may choose to administer Covid-19 testing to employees before they enter the workplace to determine if they have the virus.

Source – Question 20:

https://www.dli.mn.gov/sites/default/files/pdf/Employer_and_employee_questions_related_to_COVID_19.pdf

When can an employee return work?

Ultimately this decision is up to the employer (in compliance with applicable law, and keeping in mind its Preparedness Plan). The CDC has provided some guidance as well, which is not law but good practice. <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/end-home-isolation.html>

Recent CDC guidance states that an employee that has tested positive or exhibited symptoms should not be in contact with others until:

- ☐ 10 days since symptoms first appeared, **and**
- ☐ 24 hours with no fever without the use of fever-reducing medications, **and**
- ☐ Other symptoms of Covid-19 are improving*

*loss of taste and smell may persist for weeks or months after recovery and need not delay the end of isolation

What is the employer's obligation to pay an employee during isolation or illness?

Source: specific question numbers included in parentheses.

<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

In General: (Call with specific actual scenarios and do not rely on this general information):

The Families First Coronavirus Response Act ("FFCRA") paid leave provisions went into effect on April 1, 2020, and apply to leave taken between April 1, 2020, and December 31, 2020. (Q1). **It applies to employers with fewer than 500 full-time and part-time employees within the United States.** (Q2). Workers who are independent contractors under the Fair Labor Standards Act ("FLSA"), rather than employees, are not considered employees for purposes of the 500-employee threshold.

An employee is eligible for EPSL if a health care provider directs or advises the employee to stay home or otherwise quarantine, because the health care provider believes that the employee may have Covid-19 or is particularly vulnerable to Covid-19, and quarantining themselves based upon that advice prevents the employee from working. (Q61).

The employee may take up to two weeks—or ten days—(80 hours for a full-time employee, or for a part-time employee, the number of hours equal to the average number of hours that the employee works over a typical two-week period) of paid sick

leave for any combination of qualifying reasons. However, the total number of hours for which the employee receives paid sick leave is capped at 80 hours under the Emergency Paid Sick Leave ("EPSL") Act. (Q9).

If an employee is taking paid sick leave because he or she is unable to work or telework due to a need for leave because the employee (1) is subject to a Federal, State, or local quarantine or isolation order related to Covid-19; (2) have been advised by a health care provider to self-quarantine due to the concerns related to Covid-19; or (3) are experiencing symptoms of Covid-19 and are seeking medical diagnosis, the employee will receive for each applicable hour the greater of:

- ☐ Their regular rate of pay,
- ☐ The federal minimum wage in effect under the FLSA, or
- ☐ The applicable State or local minimum wage.

In these circumstances, the employee is entitled to a maximum of \$511 per day, or \$5,110 total over the entire paid sick leave period. (Q7)

If the employee is taking paid sick leave because he or she is: (1) caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to Covid-19 or an individual who has been advised by a health care provider to self-quarantine due to concerns related to Covid-19; (2) caring for his/her child whose school or place of care is closed, or child care provider is unavailable, due to Covid-19 related reasons; or (3) experiencing any other substantially similar condition that may arise, as specified by the Secretary of Health and Human Services, that employee may be entitled to compensation at 2/3 of the greater amounts above.

Under these circumstances the employee is subject to a maximum of \$200 per day, or \$2,000 over the entire two week period. (Q7).

A covered employee may be eligible for up to an additional 10 weeks of paid expanded family and medical leave at 2/3 of the employee's regular rate of pay where an employee, who has been employer for at least 30 calendar days, is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to Covid-19.

Qualifying Reasons for Leave: Under the FFCRA, an employee qualifies for paid sick time if the employee is unable to work (or unable to telework) due to a need for leave because the employee:

1. is subject to a Federal, State, or local quarantine or isolation order related to Covid-19;
2. has been advised by a health care provider to self-quarantine related to Covid-19;
3. is experiencing Covid-19 symptoms and is seeking a medical diagnosis;

4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
5. is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to Covid-19; or
6. is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Under the FFCRA, an employee qualifies for expanded family leave if the employee is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to Covid-19.

Duration of Leave:

For reasons (1)-(4) and (6): A full-time employee is eligible for 80 hours of leave, and a part-time employee is eligible for the number of hours of leave that the employee works on average over a two-week period.

For reason (5): A full-time employee is eligible for up to 12 weeks of leave (two weeks of paid sick leave followed by up to 10 weeks of paid expanded family & medical leave) at 40 hours a week, and a part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

Calculation of Pay:

For leave reasons (1), (2), or (3): employees taking leave are entitled to pay at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a 2-week period).

For leave reasons (4) or (6): employees taking leave are entitled to pay at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a 2-week period).

For leave reason (5): employees taking leave are entitled to pay at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$12,000 in the aggregate (over a 12-week period).

<https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>

What happens if an employee is afraid to come to work?

The employer should find out the reason for this fear. There is no law that allows employees to refuse to come to work and still keep the job. Being “afraid” is not a recognized condition under the ADA (Americans with Disabilities Act) triggering the employers potential obligation to reasonably accommodate an employee’s condition.

If however an employee has a recognized condition under the ADA that is causing the “fear” such as an anxiety disorder, mental health issues or a physical condition such as asthma, diabetes or heart conditions that makes them particularly susceptible to Covid-19, the employer may have an obligation to accommodate the employee. The employer needs to have a conversation with the fearful employee to determine if the employer can accommodate recognized conditions. Under the ADA, reasonable accommodations are adjustments or modifications provided by an employer to enable people with disabilities to enjoy equal employment opportunities. If a reasonable accommodation is needed and requested by an individual with a disability to apply for a job, perform a job, or enjoy benefits and privileges of employment, the employer must provide it unless it would pose an undue hardship, meaning significant difficulty or expense. Where an accommodation would result in undue hardship, the employer must offer an alternative accommodation if one is available absent undue hardship.

Flexibility by employers and employees is important in determining if some accommodation is possible in the circumstances. Temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment may also permit an individual with a disability to perform safely the essential functions of the job while reducing exposure to others in the workplace or while commuting.

If the employee is asking for an accommodation, employers may ask questions to determine whether the condition is a disability. The employer may discuss with the employee how the requested accommodation would assist him and enable him to keep working and explore alternative accommodations that may effectively meet his needs; and request medical documentation if needed.

Section D & G <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

How much information can you share if an employee tests positive? What can you say/should you say about an employee with Covid-19?

The ADA requires that an employer keep all medical information about employees confidential, even if that information is not about a disability. The information that an employee has symptoms of, or a diagnosis of, Covid-19, is medical information. But the fact that this is medical information does not prevent the manager from reporting to appropriate employer officials so that they can take actions consistent with guidance from the CDC and other public health authorities.

Employers should make every effort to limit the number of people who get to know the name of the infected employee. The ADA does not interfere with a designated representative of the employer interviewing the employee to get a list of people with whom the employee possibly had contact through the workplace, so that the

employer can then take action to notify those who may have come into contact with the employee, without revealing the employee's identity. Use generic descriptions to provide notice so to not violate the ADA's prohibition of disclosure of confidential medical information.

If staff need to know how to contact an employee that may be working from home or on leave the employer cannot disclose the reason for the leave, just the fact that the individual is on leave or working from home.

Question B.5. <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

Could employers require employees to get a Covid-19 vaccine? Could a business require proof of a Covid-19 vaccine to enter its premises?

Yes. We do believe employers to some extent will be able to require that in order to stay employed at their company, the employees will need to have the vaccine. Remember most employees are employees at will, meaning they can be terminated for any reason or no reason at all, as long as the employer is not illegally discriminating. As an example, if an employee cannot get the vaccine because of a serious health condition, then the employer cannot require it of that employee, because to do so may be discrimination based upon the employee's medical condition. Employers are entitled to medical documentation if an employee claims he/she has a medical condition that precludes the employee from getting the vaccine. I do believe that there will need to be a business necessity to require the vaccine and the fact that the pandemic has been declared a national health emergency to the public the business necessity is there. There is some precedent for this already as some medical facilities require their staff to have flu shots.

Can a business refuse customers who can't prove they had the vaccine? Yes, we do believe that some business will be able to require that the customer show proof of the vaccine to attend an event or do business at their place of business. A business owner controls his or her own business. Again those businesses do need to take care that they are not violating any applicable laws concerning unlawful discrimination. We already see in the news that Ticketmaster and other large public venues like sporting stadiums are starting to look at phone Apps that would allow them to screen every patron as they go in to determine if the entrant has had the vaccine.

What cleaning process does the CDC recommend for shared vehicles and work spaces? And what happens when that workplace moves from state to state?

Employers should provide disposable disinfectant wipes so that commonly touched surfaces can be wiped down. Drivers should clean and disinfect frequently touched surfaces on a routine basis such as: In the truck cab (driver door handle, steering wheel, seat belt and buckle, arm and head rest, seat cover, turn signal, wiper controls,

dashboard, air ducts, radio, and temperature controls). In the sleeper berth (light switches, mattress tray, temperature controls, and other flat surfaces). If a third party must have access to the interior of your truck (for example, mechanics, other drivers, inspectors), request that the third party clean and disinfect the truck before turning it back over to you.

For disinfection, use products that meet EPA's criteria for use against SARS-CoV-2 external icon, diluted household bleach solutions, or alcohol solutions with at least 70% alcohol, and are appropriate for the surface. Follow manufacturer's directions for use and clean hands afterwards; more detailed cleaning and disinfecting guidance is also available.

<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/long-haul-trucking.html>

The Federal Motor Carrier Safety Administration ("FMCSA") has a page that includes links to the federal and state emergency declarations. Additionally, there is an option to subscribe to the page which would notify the subscriber when there are changes to the page.

<https://www.fmcsa.dot.gov/emergency-declarations#by-State>

Can truck drivers drive together in the same truck? What about workers together in the same cube? How should shared spaces be treated?

If two employees from different households must drive together, face coverings should be worn inside the truck and the driver and passenger should avoid sharing bedding in the sleeper berth. Also, drivers and passengers should not share personal protective equipment (such as vests, safety glasses, hard hats), tools, phones, radios, or other personal items.

Employers should take additional precautions to address risks associated with ride-alongs or team driving when they cannot be avoided. The same issues apply to shared workspaces; employees should not be within six feet of each other and should wear masks as/when required by applicable law. If sharing space, alternate days and ensure cleaning between employees.

<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/long-haul-trucking.html>

CDC's Information for Long Haul Truck Drivers (note that this advice change when taking about owner-operators, who are not employees):

<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/long-haul-trucking.html>

- ❑ Employers should have a plan in place for drivers in case they become ill while on the road. This should include where to stop, where and how to seek medical advice and treatment, and plans for freight delivery.
- ❑ Employers are encouraged to implement flexible sick leave and supportive policies and practices. Consider drafting a non-punitive emergency sick leave policies if sick leave is not offered to some or all employees. Employers should be flexible in requiring a positive Covid-19 test result or a healthcare provider's note for employees who are sick to validate their illness, qualify for sick leave, or to return to work as at points in this pandemic sometimes quick test results and doctor visits have been difficult to get.
- ❑ Drivers should practice proper hand hygiene. Hands should be washed regularly with soap and water for at least 20 seconds, or use an alcohol based hand sanitizer containing at least 60% alcohol.
- ❑ Employers should pre-qualify truck stops, rest areas, and hotels to ensure such facilities are open, supplied, and follow recommended Covid-19 safety practices such as:
 - Cleanliness and disinfection (such as routine cleaning, available hand sanitizing stations, and private showers);
 - Proper food handling and food service
 - Contact less fuel payment

Employees at will

Remember that employees, unless union members or subject to a written contract, are employees at will and may be fired for any reason or no reason at all, as long as the employer is not illegally discriminating. Employees can be fired for failing to follow the employers Preparedness plan, for not wearing masks, for lying to the employer, for failing to do their work from home if allowed to work remotely, for coming to work when they know they are sick, etc. (again, an at will employee can be fired at any time, no reason is needed). Before firing an employee for the listed events however, always have a conversation as to why the employee is failing to do his or her job, to ensure that the employer is not illegally discriminating. Employment question are many times very fact specific. Give us a call if you have particular questions about a particular scenario to help assess your risk factors.

One little known tool for employers wishing to assist employees:

The Qualified Disaster Relief Program was passed in the wake of 9/11 to provide a way for employers to better assist employees that have been negatively impacted by a "qualified disaster." The Covid-19 pandemic has been declared a national disaster such that the QDRP applies. An employer may assist an employee who is DIRECTLY impacted by Covid-19 by providing funds to that employee. If done in accordance

with the program, the employer may deduct the payment, but the employee does not have to recognize it as income (i.e. no W-2, no 1099). This would be a great benefit, if an employer wishes to give assistance to employees, what rules apply?

- ☐ There is no form agreement or form to fill out. This means that an employer must carefully document the program it puts together, who gets funds and why. Many employers have created formal applications for employees to use, and set amounts and terms that will apply to all employees. If you are considering assisting an employee with Covid-19 related expense, make sure to document your actions. This protects your deduction AND the employee (who won't have to recognize the income).
- ☐ What expenses can an employer pay? Those that are directly related to Covid-19 and are considered ESSENTIAL such as:
 - over the counter medications
 - medical bills and services, including medicines (to the extent they are not covered by insurance)
 - hand sanitizer, cleaning products
 - child care
 - expenses specific to having to work from home
 - changes to the home necessitated by Covid-19

So, how about all those employees working from home? What concerns should an employer have in this regards?

Much to many employers surprise, data is now showing that employees working from home are generally as or MORE productive than they were at the office. So what happens in the post Covid-19 era? Be considering the following:

- ☐ Does your business need all that office space?
- ☐ Is the existing space configured in a way that would allow office sharing? What special concerns exist with office sharing in a post Covid-19 world?
- ☐ Do you have employees using personal computers to log in to the office and work from home? If so, how are you ensuring that those computers are virus free, up to date and secure? Ideally an employee would have a dedicated company laptop from which to work. CONSIDER: all work done on a company laptop or PC (or company email) belongs to the company and an employee has no expectation of privacy. This may be important in the case of an employee that works from home and then quits or is terminated.
- ☐ Do you have a written policy governing the employee's use of technology from home? It should cover confidentiality obligations and make clear the employee's obligations vis a vis the equipment and company information. No one should use the computer (or have access to it) except the employee. You don't want a 4th grader accidentally downloading your company financials.

Covid-19 has cost every employer money from lost accounts, lost opportunities and more. If an insured building burns down, insurance covers it. What about business interruption insurance, shouldn't this cover an employer?

There have been cases filed in this regard, but not have been successful to date. Most policies are written in such a way that the "damage" which is covered is physical damage (such as in the case of a fire). If this remains true, the business interruptions caused by Covid-19 are unlikely to be covered by business interruption insurance. Legislation is under consideration in some states to require insurers to pay these claims, in light of the huge numbers of possible claims this legislation will be controversial.

My contract has a force majeure clause, so I don't have to pay rent, right?

Wrong. It depends a bit on the contract but in general, a force majeure clause excuses performance only while the event (an earthquake for instance) makes it impossible to perform. Making a payment is generally never going to be impossible. And if you are in the space using it, a court won't excuse you from making payment. In addition consider also:

- ☐ Many contracts list events that consist of "force majeure" events – and pandemic wasn't usually included. That is changing now.
- ☐ Many contracts require that a party that thinks a force majeure event has occurred advise the other party and recommence performance as soon as possible.

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