

Intro

Hello and welcome to the BXS Insurance webcast this July 8, 2020. I'm Amy Underwood, the Director of Sales and Innovation for BXS insurance Employee Benefits and I'm joined today by Andy Impastato, Director of Industry Affairs.

Remember, our world changes fast so things might have changed by the time you hear this.

BXS Insurance is Right Where You Are during these challenging times. We're here with you, helping to advocate and provide guidance, so you can be there for what matters most.

Topic

On today's webcast we will review some of the top questions raised to ThinkHR regarding employee safety in light of the COVID-19 epidemic.

Main Content:

Moderator: Hi Andy, welcome to the show. Before diving into the questions, please give our listeners a quick explanation of ThinkHR as a resource.

Andy: ThinkHR is a people risk management tool with 3 main components: technology, content and live HR advisors. This has been extremely valuable to our clients in this time of uncertainty and they have provided us with some of the most commonly asked questions during the last month related to COVID.

Moderator: From what I have seen, employers can use all the help they can get when it comes to making decisions on return to work and employee safety. Top of mind seems to be what can be done and can't be done. Can an employer send employees home if they are symptomatic?

A: Yes. The CDC has advised employers that employees who appear to have symptoms of COVID-19 (like cough or shortness of breath) should be separated from other employees and sent home immediately. If the employee feels well enough to work, consider whether they can effectively telecommute.

Note: Nonexempt employees may be entitled to a few extra hours of pay if you're in a state with reporting time pay, but this cost will be well worth it to maintain the safety of the workplace.

Moderator: As an extension of that, What if my employee discloses that their family member or roommate has COVID-19?

A: Individuals who share a household with someone who is infected should self-quarantine for 14 days per the CDC. The CDC does not currently recommend special scrutiny or quarantine for those who have been exposed to an asymptomatic person who has been exposed to someone with COVID-19 (meaning you don't need to send everyone home to quarantine as a result). Remember that the confidentiality of medical information must be maintained per the Americans with Disabilities Act.

Moderator: It seems many employers are asking how much they can and can't ask an employee. With that and Given COVID-19, If an employee is out of the office due to sickness, can the employer ask them about their symptoms?

A: Yes, but there's a right way to do it and a wrong way to do it. In most circumstances, employers shouldn't ask about an employee's symptoms, as that could be construed as a disability-related inquiry. Under the circumstances, however — and in line with an employer's responsibility to provide a safe workplace — we recommend asking specifically about the symptoms of COVID-19 and making it clear that this is the extent of the information you're looking for.

Here's a suggested communication: "Thank you for staying home while sick. In the interest of keeping all employees as safe as possible, we'd like to know if you are having any of the symptoms of COVID-19. Are you experiencing a fever, cough, and/or shortness of breath?"

Remember that medical information must be kept confidential as required by the Americans with Disabilities Act. If the employee does reveal that they have symptoms of COVID-19, or has a confirmed case, the CDC recommends informing the employee's co-workers of their possible exposure to COVID-19 in the workplace (but not naming the employee who has or might have it) and directing them to self-monitor for symptoms (fever, cough, or shortness of breath).

Moderator: Many employers are essential businesses. How does this work with a shelter in place rule and if an employee is refusing to work as they say it's not safe. Can we discipline them?

A: This is certainly a difficult situation to be in. We recommend extreme caution in disciplining or terminating an employee who refuses to work in a location that has shelter-in-place rules in effect, as it poses several types of legal risk. Generally, employees do not have a right to refuse to work based only on a generalized fear of becoming ill if their fear is not based on objective evidence of possible exposure. In that case, you would be able to enforce your usual attendance policies. However, under the current circumstances, where COVID-19 cases are increasing and many cities and states are implementing drastic public health measures to control spread of the virus, we think it would be difficult to show that employees have no reason to fear coming in to work, particularly in a location with a shelter-in-place rule.

Provide Reasonable Accommodation

Employees who are in a high risk category — either because they are immunocompromised or have an underlying condition that makes them more susceptible to the disease — should be granted a

reasonable accommodation under the Americans with Disabilities Act and/or state law. Employees who live with someone who is at high risk should be granted a similar accommodation. It would be a reasonable accommodation under the circumstances to allow the employee to work from home or take a non-working leave, if working from home is not possible.

Under OSHA rules, an employee's refusal to perform a task will be protected if all of the following conditions are met:

- Where possible, the employee asked the employer to eliminate the danger, and the employer failed to do so;
- The employee refused to work in "good faith." This means that the employee 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 is not enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.

No Punishment or Retaliation for Raising Safety Concerns

An employer cannot retaliate against an employee for raising a safety concern. Additionally, employees who won't work because of safety concerns may be considered to be engaging in protected concerted activity under the National Labor Relations Act if they have a "good faith" belief that their health and safety are at risk.

Incentivize Employees Instead

Instead of disciplining employees who express fear at this time, we recommend you consider methods to encourage employees to come to work and to help put their minds at ease. Consider emphasizing all of the safety methods you have put in place (e.g., scheduled hand-washing, frequent disinfection of surfaces, social distancing rules, reduced customer capacity, staggered shifts, or more extreme measures if warranted by your industry). We recommend relying heavily on the CDC guidelines and local health department information in establishing safe working conditions at this time. You might also consider offering premium pay or additional paid time off for use in the future to employees who must come to work.

Moderator: Extending beyond COVID-19, Can an employer send an employee home if they are sick or pregnant, regardless of whether it's COVID-19-related, just to be safe?

A: You have the right to send people home for sickness if it appears that they have something contagious; in this case, you are protecting other employees in the workplace. This includes sending employees home who have the common cold.

You should not send employees home because you believe they are higher risk — this includes pregnant employees. We would encourage you to make working from home or unpaid leaves available for employees who want that option, but not to force that on anyone who doesn't pose a risk to others.

Moderator: How should employers handle taking employees' temperatures?

A: The Equal Employment Opportunity Commission has issued guidance that employers may take employees' temperatures during the COVID-19 pandemic because COVID-19 is spreading nationwide. Note that many people may have COVID-19 without a fever, so other safety precautions should not be scaled back just because employees "checked out" upon arrival to work. The Centers for Disease Control and Prevention (CDC) summarizes symptoms [here](#).

The main [CDC COVID-19 page](#) has general community mitigation strategies as well as certain regional specific strategies. We cannot provide guidance on how to implement temperature checking procedures, but significant precautions should be taken so that you do not actually increase risk by reusing a tool that comes into contact with hands, faces, and/or mouths of multiple employees.

Outro

Thank you for listening to today's webcast. We're always here to help if you have any questions. Remember, our world changes fast so things might have changed by the time you hear this.