

MEMORANDUM

TO: Kari Thurlow

FROM: Penelope J. Phillips
Grant T. Collins

DATE: May 18, 2020

RE: FAQs from LeadingAge MN Members Regarding Employee Protections Related to COVID-19

On May 13, 2020, Governor Walz issued four new Executive Orders (20-53, 20-54, 20-55, and 20-56) related to COVID-19. The Executive Orders expanded the peacetime emergency until at least June 12, 2020 and established new protocol for some non-essential businesses to begin reopening.

The Executive Orders also included guidance relating to employee-supplied personal protective equipment (“PPE”), workplace safety, and workplace accommodations. LeadingAge MN Members should be mindful of this new guidance as they continue to provide essential services to Minnesota residents.

Personal Protective Equipment

FAQ: Can employees bring their own PPE from home?

Executive Order 20-54 provides that employers may not discriminate or retaliate against employees for “wearing gloves, a cloth face covering, eye protection, or other protective gear which the worker has personally procured and reasonably believes will protect them, their coworkers or the public against COVID-19.”

There are, however, two exceptions. The first exception is if the “personally procured” equipment violates “industry standards” or if the equipment does not comply with “existing employer policies related to health, safety, or decency.” Thus, a nurse cannot wear cloth gloves or a cloth mask when OSHA standards require that the employee don a surgical mask or surgical gloves.

The second exception applies if the employer already provides protective equipment that “meets or exceeds protective gear procured by employee.” In that case, the employer can demand that the employee utilize the employer-provided equipment. Thus, as with the previous example, the employer could require a nurse to utilize a surgical mask and surgical gloves instead of the cloth mask and cloth gloves that the employee brought from home. Likewise, an employee insisting on wearing his eyeglasses can be made to don safety goggles supplied by his employer.

If, however, the employee brings an “N-95” mask from home – “N-95” means that the respirator blocks at least 95 percent of very small (0.3 micron) particles – then the employer could not require the employee to utilize a less-exacting mask.

FAQ: Does this mean that I always have to allow an employee to wear an N-95 mask that the employee brought from home?

Yes, unless the employee’s use violates “industry standards” or if its use would violate “existing employer policies related to health, safety, or decency.”

For example, an employee’s use (or re-use) of an N-95 mask may violate “industry standards” if the employee fails to follow the CDC’s guidance on “re-using” N-95 masks (available here: <https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/decontamination-reuse-respirators.html>).

Likewise, an employee insisting on wearing self-procured latex gloves can be made to remove them if the employee refuses to change them or thinks that wearing gloves excuses her from washing her hands.

Workplace Safety

FAQ: What should I do if employees raise concerns regarding COVID-19 at the workplace?

Executive Order 20-54 provides that employees cannot be disciplined or discharged for “asking questions or expressing concerns” about workplace safety or health matters relating to COVID-19. As authority for this proposition, the Executive Order cites existing worker protections contained under federal OSHA (29 C.F.R. § 1977.9(c)) and MN-OSHA (Minn. Stat. § 182.654, subd. 9).

The Executive Order also specifies that employees cannot be retaliated or discriminated against for engaging in any of the following activities:

- Communicating with management regarding COVID-19 related topics, including asking questions or expressing concerns;

- Refusing to work based on a reasonable belief that they have been assigned to work in an unsafe or unhealthful manner with the potential of exposure to COVID-19; or
- Filing a report with the Minnesota Department of Labor and Industry regarding a potentially hazardous work condition involving COVID-19.

Finally, although not addressed in the Executive Order, if multiple employees join together to voice concerns regarding the terms and conditions of their employment, including any possible safety concerns regarding COVID-19, or if a single employee voices concerns on behalf of other employees, those employees may additionally be protected under the National Labor Relations Act.

FAQ: Can an employee refuse to work due to a claim of unsafe conditions related to COVID-19?

Executive Order 20-54 reminds employers that, under MN-OSHA (Minn. Stat. § 182.654, subd. 11), employees have the right to refuse to work under conditions that the employee reasonably believes, in good faith, to present “an imminent danger of death or serious physical harm.” According to the Executive Order, this includes “a reasonable belief that they have been assigned to work in an unsafe or unhealthful manner with an infectious agent such as COVID-19.”

An employer also may not discriminate against an employee for a good-faith refusal to perform assigned tasks if the employee has requested that the employer correct the hazardous conditions but the conditions remain uncorrected.

If an employee raises concerns about COVID-19, employers should be prepared to respond that the employer is following all federal and state guidelines. Typically, employee concerns regarding safety can be addressed or eliminated by providing PPE in accordance with state and federal guidelines.

Workplace Accommodations

FAQ: Do employers need to provide an accommodation to employees who are at a higher risk of contracting COVID-19 due to a preexisting disability?

Yes, [guidance issued by the Equal Employment Opportunity Commission](#) provides that employers must engage in the interactive process to determine whether it is able to offer a reasonable accommodation to an employee who, due to a **preexisting disability**, is at a higher risk due to COVID-19.

As with all requests for disability-related reasonable accommodations, employers must provide the employee with an accommodation unless doing so would create an undue hardship on the employer.

For employees working in long-term care, there are a number of potential accommodations which may be available. If the employee in question works in the employer's administration or billing departments, it may be possible to have them perform their job duties remotely, or to do so at the office in a manner which limits or minimizes their contact with co-workers or residents.

For employees who provide direct-care to residents, it may be possible to have the employee continue to perform their duties safely with additional PPE. If it is not possible for the employee to continue working safely due to their increased risk of contracting COVID-19, it may be appropriate to offer the employee an unpaid leave of absence. Also, if the disability qualifies as a "serious health condition," the employee may be eligible for up to 12 weeks of leave under the FMLA.

Ultimately, the appropriate accommodation is determined through the "interactive process" and it depends on the needs of the individual employee, the needs of the employer, and the job duties in question.

FAQ: Do employers need to provide any accommodations to older employees due to the fact that older individuals are at a higher risk of contracting COVID-19?

Advanced age is not, by itself, a "disability" under the ADA or MHRA. To be "disabled," the individual must suffer from a mental or physical impairment that substantially limits a major life activity.

While simply being 65 years of age or older does not make an employee *per se* disabled under the ADA or MHRA, it is possible that someone of advanced age may have a medical impairment that qualifies as a disability, such as having a compromised immune system. The older worker may also have a mental impairment, such as anxiety, that requires accommodation.

Thus, rather than denying a request out of hand, employers should take care to process all employee accommodation requests, including those who may not appear to have a physical disability, in order to understand the employee's needs and, if necessary, request additional information from the employee's medical provider.

Indeed, in Executive Order 20-54, Governor Walz directed the Minnesota Department of Human Rights to develop and issue guidance "regarding employers' obligations to provide reasonable accommodations related to COVID-19 for qualified employees with disabilities . . . which may include employees with health conditions who are at high-risk . . . if they are exposed to or if they contract COVID-19." This forthcoming guidance will likely provide additional insight concerning an employer's obligation to accommodate employees regarding COVID-19 concerns.

Another executive order, Executive Order 20-55, provides that individuals age 65 and older are considered "at-risk persons" and encourages them to stay at home during the

pandemic. The Executive Order does **not**, however, require at-risk workers stay at home. Indeed, it expressly allows at-risk persons to leave their homes to “work, if it is not possible to work from home.”

Please let us know if you have any questions.