



# 3 More COVID-19 Legal Questions You Should Answer

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In a previous column ([www.shrm.org/resourcesandtools/hr-topics/employee-relations/humanity-into-hr/pages/4-covid-19-legal-questions-you-should-answer.aspx](http://www.shrm.org/resourcesandtools/hr-topics/employee-relations/humanity-into-hr/pages/4-covid-19-legal-questions-you-should-answer.aspx)), prominent labor and employment attorneys from around the country discussed four COVID-19-related questions they were hearing often and suggested answers. Since then, HR professionals have asked follow-up questions. This column responds.

**1. A rule requiring employers to reimburse employees ([www.shrm.org/resourcesandtools/hr-topics/employee-relations/humanity-into-hr/pages/4-covid-19-legal-questions-you-should-answer.aspx#3](http://www.shrm.org/resourcesandtools/hr-topics/employee-relations/humanity-into-hr/pages/4-covid-19-legal-questions-you-should-answer.aspx#3)) who are required to work from home for "expenditures incurred by the employee in direct consequence of the discharge of his or her employment duties" sounds quite broad. Are there limits to an employer's obligations to compensate employees for the expenses they have incurred as a result of working from home?**

According to Eric Mackie, attorney with Ogletree, Deakins in Chicago, the applicable state statutes do include limiting language. For example, the Illinois Wage Payment and Collection Act generally requires employers to reimburse their employees only for "necessary expenditures or losses" incurred by the employee in direct consequence of working from home.

Mackie added that California and other jurisdictions impose similar reimbursement obligations on employers. Whether an employee is mandated to work from home is a factor courts consider when deciding whether an incurred expenditure is "necessary." For example, at least one court has held that, where remote work is permitted by the employer but not required, the expenses associated with working from home are not "necessary" because, under such circumstances, remote work is a choice and any related expenses are unnecessary.

Mackie noted that there is little guidance regarding whether employers must reimburse employees required to work from home for expenses incurred only as a matter of convenience (e.g., a height-adjustable standing desk). Although convenient, such expenses are arguably unnecessary and not subject to mandatory reimbursement requirements. Mackie recommended writing a work-from-home policy that outlines expenses that are necessary (e.g., mobile cellular phones, Internet, etc.) and those that are not.

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**2. As employees return to the physical worksite during the COVID-19 pandemic, employers should be mindful of employee circumstances that may not be addressed under the Families First Coronavirus Response Act, the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), and local paid-sick-leave laws. Perhaps an employee shares a household with a pregnant or high-risk family member or has to care for an elderly parent or an infant. Where an employee does not qualify for any legally protected leave or accommodation, what measures do you recommend an employer take?**

As workplaces reopen and employees voice concerns about returning to the physical workplace, Jacqueline Cookerly Aguilera, an attorney with Morgan, Lewis & Bockius in Los Angeles, recommended that employers develop a policy to address COVID-19-related requests for alternative workplace arrangements and other reasonable accommodations.

The policy should identify the permissible reasons that may trigger an accommodation (e.g., the employee is at higher risk for severe illness, lives with someone who is high risk, or has caregiving obligations for children or older relatives, etc.). The policy should specify the employer's process for responding to a request, including engaging in an interactive dialogue with the employee to identify the specific basis for the request and the work accommodation the employee is seeking. The employer should carefully evaluate each request and consider workplace alternatives that may address the employee's concerns while balancing the employer's business needs. According to Aguilera, the employer may choose to request documentation supporting the basis for the employee's request (keeping in mind that certain statutory protections limit the type of documentation an employer may request), such as certification from a health care provider, or require the employee to self-certify to the reasons supporting the request.

Lastly, Aguilera recommended that a COVID-19 accommodation policy supplement the employer's existing reasonable accommodation policy. Like the accommodation policy, employers should evaluate COVID-19-related requests on a case-by-case basis and in consultation with HR. Workplace accommodations may vary based on the situation but may include telecommuting, rotating telecommuting with physically reporting to the office, reducing schedules or taking a leave of absence. Any accommodation should be documented and reviewed at least every 30 days should business needs or COVID-19-related guidance change. Finally, the policy should be applied consistently across the workforce to avoid discrimination claims.

**3. We've returned employees to onsite work, except for those who have asked for continued telework as an accommodation for a disability. A number of nondisabled employees have expressed that it is unfair that they have to return to onsite work when some of their co-workers are able to continue working remotely. What may we tell a disgruntled employee who has returned to onsite work and believes that it is unfair that some of his or her co-workers continue to work remotely?**

"Don't disclose confidential health information by stating that you've provided telework only as an accommodation to employees with disabilities," said Mark Tolman, attorney with Jones Waldo in Salt Lake City. According to the Equal Employment Opportunity Commission (EEOC), in its EEOC Enforcement Guidance on the ADA, a "statement that an individual receives a reasonable accommodation discloses that the individual probably has a disability because only individuals with disabilities are entitled to reasonable accommodation under the ADA."

Instead, Tolman recommended a more constructive approach. "Start by asking an employee who is concerned about perceived unfairness about a co-worker working remotely why he or she wants to work from home. If the employee reveals that he or she may have a disability that places them at risk for COVID infection, you should initiate the same ADA interactive process that led you to provide telework to other disabled employees. However, if the employee does not disclose a need to telework for health reasons, this employee will not be entitled to remote work as an accommodation under the ADA." Tolman also noted that an employee with a serious health condition, or who is caring for someone with a serious health condition, may be entitled to leave under the FMLA or related state or local laws.

Although the provision of telework to employees with disabilities may seem unfair to an employee without a disability, Tolman observed that the United States Supreme Court has said, "by definition any special 'accommodation' requires the employer to treat an employee with a disability differently (i.e., preferentially)." Thus, if an employee continues to press for details about why a co-worker with a disability is able to work remotely—or receives any other special workplace accommodation—Tolman recommended that you follow the EEOC Enforcement Guidance on the ADA and state that the company is "acting for legitimate business reasons or in compliance with federal law."

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