

## **COVID-19 Planning & Information For Vermont Dental Employers**

*This is an update from [Alexandra Clauss](#), an attorney and shareholder at Primmer Piper Eggleston & Cramer PC. Alexa counsels businesses on best practices and events affecting the workplace.*

On March 7, 2020, health officials announced the first case of coronavirus (COVID-19) in Vermont. The second presumptive case in Vermont was announced on March 11, 2020, with 212 Vermonters being monitored as of 1:00 p.m. on March 12, 2020. Large gatherings such as conferences, parades, and other events are being canceled, and news outlets are reporting that over 100 colleges have canceled in-person classes and moved online. On March 11, 2020, the World Health Organization declared the COVID-19 outbreak a global pandemic. To learn about COVID-19, how it spreads, its symptoms, prevention, and what to do if you are sick, visit the [CDC's website](#).

This alert is to provide answers to some frequently asked questions related to an employer's response to COVID-19 and provide links to helpful guidance, based on information available as of March 11, 2020. It is not intended to provide legal advice on any specific matter. This is a rapidly evolving situation, and employers must stay informed and be guided by the most up-to-date recommendations of the [Centers for Disease Control and Prevention](#), the [Vermont Department of Health](#), and the departments of health in the states where your worksites are located. Employers should seek advice from employment counsel before imposing stricter requirements on employees, to confirm such restrictions are compliant with applicable law.

### **1. What are an employer's responsibilities and legal obligations to employees?**

- The federal Occupational Safety and Health Act (OSHA) and Vermont's Occupational and Health Administration (VOSHA) require employers to provide a safe and healthful workplace for all employees. Under this general duty of care, employers must ensure that workplace conditions meet or exceed applicable safety and health regulations. Please visit [OSHA's website](#) for standards, directives, and other related information that may apply to worker exposure to COVID-19. OSHA and VOSHA both prohibit employers from retaliating against workers for raising concerns about health or safety in the workplace.
- All employers should be ready to implement strategies to protect their employees, clients, and patients from COVID-19, while ensuring continuity of operations.
- All employers should review their safety policies, programs and emergency action plans to ensure that they include infectious disease protocols and are compliant with OSHA and health and safety regulations.
- Exposure risk to COVID-19 may be elevated for healthcare workers who interact with potentially infected patients. For obligations specific to COVID-19 and dental providers, the American Dental Association has published a resource available [here](#).

### **2. How should an employer address and prevent harassment or discrimination related to COVID-19?**

- Potential harassment and discrimination issues can arise if individuals are targeted based on assumptions or fear. For example, an employer should not tolerate any harassment or impose additional requirements on an individual simply because of their national origin, race, ethnicity, or any other legally protected characteristic. Employers must also take steps to prevent workplace harassment or discrimination towards an individual who is suspected to be infected, who may be disabled or perceived to be disabled.
- Employers must be prompt and vigilant in responding to and investigating any complaints of harassment or discrimination in the workplace and take steps to stop any inappropriate behavior. Employer actions should be based on legitimate, non-discriminatory business reasons, guided by objective standards and reasonably reliable sources of information such as the CDC and the Vermont Department of Health. If an employer is developing a policy requiring incubation period leave, that policy should be based on neutral, objective information from the CDC and be uniformly and consistently applied.
- If an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace, but must also

maintain confidentiality related to the employee's medical and leave information as required by law.

**3. What if an employee tests positive for COVID-19, and the Department of Health asks for a list of people the employee has had contact with, and that list includes patients?**

- A dental practice could identify the patients (disclosing minimum necessary) under 45 CFR § 164.512(b)(1)(i) (HIPAA):
  - A covered entity may use or disclose protected health information to a public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease . . . , including, but not limited to, the reporting of disease, . . .
- A dental practice could disclose that an employee with COVID-19 had contact with a list of identified people, and it would not be necessary to say in what capacity.

**4. How should employers be making decisions related to employee leave and requests for time off?**

- If an employee is quarantined due to their own travel or exposure or to care for a family member for similar reasons, employers need to determine whether the Family and Medical Leave Act (FMLA), Vermont Parental and Family Leave Act (VPFLA), or other leave laws apply to an employee's absence. If the employee is required to be away from work to receive medical care, per the advice of a healthcare provider, or is needed to care for a family member, leave laws may apply to the absence. However, if it is the employer requiring the employee to be away from work, an employer should proceed with caution and confirm the circumstances of the leave is actually qualifying before designating the leave as FMLA and/or VPFLA. Under Vermont's Earned Sick Time law, an employer may adopt a policy that requires an employee to use earned sick time for an absence from work for a reason that is covered under the law. Before requiring the use of earned sick time or other paid time off for an absence, employers should confirm the reason for leave is covered and that the action is consistent with the employer's policy. Please keep in mind employers cannot require employees to use earned sick time or other forms of paid time off during leave that qualifies under the VPFLA. Employers should also be aware that an employee's request for time off or telework may be a request for a flexible working arrangement under [Vermont law](#), which must be considered by the employer in good faith. If an employer will require a note clearing the employee to return to work, employers should implement a uniform, consistent, and legally-compliant policy for obtaining such information.
- The Equal Employment Opportunity Commission has provided the following [Pandemic Preparedness guidance](#) with answers to frequently asked questions about the workplace and medical inquiries of employees during Coronavirus-like events.

**5. Does an employer have to pay employees who are not working for a reason related to COVID-19?**

- No, an employer does not have to pay an employee if they are not working, absent any contract (e.g., an employment contract or collective bargaining agreement) or policy requiring the employer to pay the employee. In determining its approach, an employer should also consider non-legal matters such as encouraging compliance with requests to stay home when sick, employee morale, public relations, and the fact an employee's inability to work may not be within the employee's control. Decisions about pay during quarantine be consistent and uniformly applied. One difference relates to exempt/salaried employees who generally must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked, unless the situations meets one of the exceptions under the law. A U.S. Department of Labor opinion letter addressing such exceptions can be viewed [here](#) and a Fact Sheet summarizing the circumstances in which an employer may make deductions from an exempt employee's salary may be viewed [here](#).

**6. What if an employee refuses to work because of concerns about infection?**

- Employees are entitled to refuse to work if they believe they are in imminent danger. Section 13(a) of OSHA defines “imminent danger” to include “any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.” OSHA discusses imminent danger as where there is “threat of death or serious physical harm,” or “a reasonable expectation that toxic substances or other health hazards are present, and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency.”
- An employer should seek advice from an employment attorney before disciplining or firing an employee who is refusing to work over fears of COVID-19 infection.

**7. How should we handle employee personal travel?**

- Employers should advise that employees check the [CDC's Traveler's Health Notices](#) for the latest guidance and recommendations for each country to which they will travel. Specific travel information for travelers going to and returning from various affected locations can be found on the [CDC website](#).
- It is prudent for employers to ask employees to inform them if they are planning travel (or have traveled in the last 14 days) to a foreign country or on a cruise ship, if they have had close contact with someone who has COVID-19, within the last 14 days, or if they have been in close contact with someone who is exhibiting symptoms and has travelled (within the last 14 days) on a cruise ship or to a geographic area designated as Level 2 or 3 by the CDC. Employees should be notified they may be required to stay home upon return from travel, as the employer deems appropriate based on guidance from the CDC and Vermont Department of Health.

**8. How should we be communicating with and educating employees?**

- Employers should communicate with employees by sharing facts about COVID-19, what to do if they are sick, actively encourage employees who feel sick to stay home, and place posters in the workplace emphasizing the importance of stopping the spread of germs and washing hands. Posters and information sheets are available from the CDC [here](#).
- The CDC recommends that employees who appear to have acute respiratory illness symptoms (e.g., cough, shortness of breath) upon arrival to work or develop such symptoms during the day should be asked to go home and if the employee is unable to work from home, the employee should be permitted to use their available sick time or PTO in accordance with the employer's sick time and leave policies.

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