

On March 19, 2020, Aflac, Inc., announced the agreement to acquire Zurich North America's U.S. group benefits business (ZEB), which consists of group life, group disability, and absence management products. Aflac Columbus and Aflac NY (Aflac) will reinsure, on an indemnity basis, Zurich's U.S. in-force group life and disability policies. As of November 2, 2020, Aflac will assume the administration of the aforementioned re-insured Zurich Employee Benefits policies and services. These materials are provided for informational purposes only and are subject to change without notice. They are not intended to convey or constitute legal, financial, or other professional advice and cannot be used as such. You should not act upon any such information without first seeking qualified professional counsel and opinion on your specific matter. 11/2/2020

Reopening the workplace during COVID-19

Actions employers can take to prepare the workplace for employees returning to work:

Below are some ideas for employers to consider for the safe transitioning of employees back to the workplace. The U.S. Department of Labor, in collaboration with the U.S. Department of Health and Human Services, has developed comprehensive Guidance for Preparing Workplaces for Coronavirus:

<https://www.dol.gov/coronavirus> and <https://www.osha.gov/Publications/OSHA3990.pdf>

- Reopen in phases (i.e., 50-75% capacity at first) to avoid overcrowding work spaces.
 - Some employers have discussed shifts – morning and evening, but this is only feasible if employees are using their own workspaces; shared workspaces (office/ desks/ computers/ phones) lead to increased sanitation challenges.
- Reconfigure open work spaces to enable social distancing.
 - Eliminate open work spaces and install closed or partitioned (partially closed) work spaces.
 - Install Plexiglas or acrylic separators at security desks/reception desks or other high-traffic or face-to face points.
- Implement employee temperature and symptom checks.
 - The Equal Employment Opportunity Commission has issued guidance stating that taking employees' temperatures during the COVID-19 pandemic is permitted:
 - <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>
 - Employers covered by the Americans with Disabilities Act (ADA) may ask employees if they are experiencing influenza-like symptoms, such as fever or chills and a cough or sore throat, or shortness of breath.
 - The fact that an employee had a fever or other symptoms is subject to ADA confidentiality requirements. Employers must maintain all information about
- Require masks in the office when entering and leaving the office or when walking/using common areas. (Local or state ordinances may impose more stringent requirements.)
- Keep cafeterias closed – offer boxed lunches delivered to employees and/or designated areas for pickup.
- Eliminate face-to-face meetings where social distancing is not possible.
- Increase sanitation practices.

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- Place hand sanitizer and sanitizing wipes near elevators or entry doorways and throughout the work spaces.
- Implement routine (at least twice daily if not more often) wipe-downs of high traffic areas (elevator buttons, stairway handrails, break rooms, door handles, etc.).
- Encourage employees to wipe surfaces before and after use and encourage frequent handwashing.
- Send home any employees displaying COVID-like symptoms.
- For non-exempt (i.e. hourly) employees, employers should be mindful of delays caused by temperature checks, additional security checks, wait times for elevators to avoid overcrowding, etc. If employees are experiencing such delays to the beginning of their workday resulting from issues beyond their control, employers may need to compensate the employees for such additional time.
 - For example, consider adding 10-15 minutes or whatever the appropriate time is to the employees' daily compensation, but be mindful that if the total hours "worked" by the employee (including wait times) exceed 40 hours per week (or state daily overtime definition), the employer may be required to compensate employees for such additional time as overtime time-and-a-half at the employee's regular rate.
 - Another option is to slightly shorten the workday to account for any delays. For example, if the employee normally begins his or her day at 9 a.m., allow the employee to arrive at the building at 9 and be ready to clock-in or begin working at 9:10 or 9:15 (or whatever time is appropriate given the delays), but compensation begins at 9 a.m. In any event, if the employee is "working" (including wait times) more than 40 hours per week, overtime must be paid.
 - Resist the temptation to reclassify employees as "exempt" to avoid paying overtime. The requirements for exempt employees under the Fair Labor Standards Act contain specific requirements.

Working from home as an accommodation

It is easy to envision situations where employees who are already on disability benefits will seek to continue to work from home as an accommodation.¹ The EEOC has expressly provided that "employees with disabilities that put them at high risk for complications of pandemic influenza may request telework as a reasonable accommodation to reduce their chances of infection during a pandemic."

<https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>

1. This could also apply to employees with compromised immune systems or chronic health conditions such as diabetes, heart conditions and respiratory conditions.

Reopening the workplace during COVID-19

As with all requests for ADA accommodation, the employer should discuss the specifics with the employee, including duration of the accommodation and the reasonableness of the accommodation. The EEOC has also stated that:

“If an employee with a disability needs the same reasonable accommodation at a telework site that he had at the workplace, the employer should provide that accommodation, absent undue hardship. In the event of undue hardship, the employer and employee should cooperate to identify an alternative reasonable accommodation.”

Examples could include special headsets or a computer screen-reader for a vision-impaired employee.

Managing remote employees

- For non-exempt employees, provide reminders of the overtime policy (i.e., overtime must be approved by manager in writing prior to working any overtime).
- Remote work is not an excuse for non-performance. The ADA states that the employees must be able to perform their jobs with or without reasonable accommodation. If the accommodation is to work remotely (not reduced hours), the expectation is that the employee will continue to work the same or substantially same schedule (of course in reality, that will be challenging for those with small children at home). If an employee is not adequately performing his or her job, this should be addressed. The key is continued communication between the employer and employee about needs and expectations.

Please continue to check the CDC, DOL, EEOC, etc. websites frequently for the most up-to-date information and guidance. If you have questions, please consult with your legal advisors. BHIS cannot provide legal advice.

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