

A Florida Employer's Guide to Navigating Covid-19 in Phase III

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On Friday September 25, 2020, Governor Ron DeSantis announced that Florida will enter Phase III of reopening which allows many businesses to operate at full capacity. Navigating workplace protocols in the midst of an unprecedented pandemic can be confusing and lead to significant litigation if employers are not making informed decisions. Consulting trusted employment law attorneys who understand and monitor the changes in the guidelines issued by the Center for Disease Control ("CDC"), the Equal Employment Opportunity Commission ("EEOC"), the Occupational Safety and Health Administration ("OSHA"), and local laws has never been more critical.

As the State of Florida enters Phase III and more employees transition back to the workplace, employers should keep the following in mind:

A. Can employers require Covid-19 testing for their employees before allowing them back into the workplace?

In its latest [Guidance](#), the EEOC explains the legal distinction between requiring Covid-19 antibody testing and Covid-19 viral testing. The ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity." Therefore, an employer can require its employees to undergo COVID-19 testing before allowing them to enter the workplace and/or periodically to assess if they are a direct threat to others. On the other hand, in light of the CDC's Interim Guidelines stating that antibody testing should not be used to determine if people should return to the workplace, requiring antibody testing would violate the ADA and is not consistent with business necessity.

B. Can employers require employees to wear face coverings in the workplace?

Employers can require employees to wear protective gear and observe social distancing protocols. OSHA recommends that employers encourage employees to wear face coverings in the workplace, consistent with CDC guidance, but notes that employers have discretion based on the specific circumstances of the workplace. For example, in some work environments, face coverings could be a hazard and cause workers to inhale chemicals that collect on the face covering. When an employee requests a disability-related or religious accommodation under the ADA or Title VII to an employer's face covering rule, the employer should provide the requested modification if reasonable, or enter into an interactive process to determine an alternative. Employers do not have to provide

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accommodations that pose an undue hardship.

C. What can employers ask if an employee calls in sick?

An employer may ask an employee who calls in sick if he or she is experiencing symptoms of Covid-19. Nonetheless, employer should remain cognizant that all information about the employee's illness is a confidential medical record under the ADA.

D. Can employers ask employees if they have family members who have Covid-19?

No. Employers cannot ask employees medical questions about their family members because the Genetic Information Nondiscrimination Act ("GINA") prohibits such inquiries. Nonetheless, an employer may ask its employees whether they have had contact with anyone diagnosed with COVID-19 or who may have Covid-19 symptoms without violating GINA.

E. How should employers respond to pandemic-related harassment?

The EEOC has observed that this pandemic could fuel biases against certain protected classes. Employers should remain vigilant in disciplining derogatory or hostile remarks directed to employees based on any protected characteristic. Any such discipline should be equally applied for all protected classes. Employees should be reminded of an employer's procedure for reporting workplace harassment and encouraged to utilize that procedure.

F. Can an employee report an employer if he or she feels unsafe at work due to Covid-19 protocols not being followed and what effect, if any, would the employee's execution of a liability waiver have on the employee's ability to make such a report?

Yes, the employee can report the employer and a liability waiver would not prevent the employee from filing such a complaint. [OSHA's website](#) provides: "Under federal law, your employer has the responsibility to provide a safe and healthful workplace that is free from serious recognized hazards. If you have concerns, you have the right to speak up about them without fear of retaliation. If you feel you are being exposed to a serious health or safety hazard, you have the right to file a complaint. If you have suffered retaliation because you voiced concerns about a health or safety hazard, you have the right to file a whistleblower protection complaint." Section 11(c) of the Occupational Safety and Health Act of 1970 (29 U.S.C. § 660(c)) prohibits an employer from retaliating against an employee for filing a safety or health complaint with OSHA and/or raising a health and safety concern with their employer.

In short, employers should ensure that they do not make off-the-cuff decisions related to Covid-19 and that they consult trusted employment law attorneys when navigating the intricacies of this pandemic's effect on workplace protocols.

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About Deedee Bitran

[Alamea Deedee Bitran](#) is an attorney in the Fort Lauderdale office of Shutts & Bowen, where she is a member of the Business Litigation Practice Group. Deedee represents employers, business owners and developers. While in law school, she served as a Judicial Intern to the Honorable Ivan F. Fernandez in the Third District Court of Appeal and as an Articles Editor on the FIU Law Review. She also served as a Legal Research Assistant to Professor Kerri Stone, where she researched and contributed to articles on employment discrimination and harassment.

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