



Hiring in a COVID-19 World

By Lin Gensing-Pophal

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HR professionals are faced with myriad new responsibilities during the coronavirus outbreak—and some are also still required to perform the usual tasks—like hiring.

While many companies have temporarily shut down, and many others have put hiring on hold, for some organizations it's business as, mostly, usual. Companies that had been recruiting for key positions will likely need to move forward with that hiring process. Companies suddenly finding themselves in need of new workers (grocery stores and delivery services) must come up with new ways to recruit and hire that comply with legal and safety regulations.

How can companies appropriately—and legally—extend, or not extend, job offers? Can companies require testing? Quarantine? Work-from-home? Can they choose not to hire someone who refuses to work onsite—or from home? We asked some HR and legal experts to weigh in.

[SHRM members-only toolkit: Recruiting Internally and Externally (www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/recruitinginternallyandexternally.aspx)]

Interviews: Live or Remote and the Implications of Each

While most areas of the United States are practicing social distancing, bringing candidates into the workplace to meet with a hiring team may not be a good idea.

"The COVID-19 pandemic will force many employers to conduct virtual interviews over Skype, Zoom, Google Hangouts and other media instead of face-to-face," said Beth Zoller, an attorney and legal editor for online HR resource site XpertHR. Before doing so, though, employers should "make sure that the interviewer and the job applicant have the correct information to connect to the video or remote interview and that they are comfortable with the technology."

There may be some legal considerations as well, Zoller said. If the interview is being recorded it may be necessary to obtain consent before the interview, in accordance with state laws. "Additionally, be aware of state laws such as that in Illinois that impose specific requirements with regard to video interviews (www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/illinois-artificial-intelligence-video-interview-act.aspx)," she said.

Requiring an applicant to come in for an interview raises potential safety issues. "If an employer requires a job applicant to come to the workplace for an interview," Zoller said, "the employer should make sure to take the appropriate safety precautions (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-how-to-protect-workers.aspx) to protect the health of the workplace."

SHRM RESOURCE SPOTLIGHT

Coronavirus and COVID-19 (www.shrm.org/ResourcesAndTools/Pages/communicable-diseases.aspx)

Can You Test Applicants for Coronavirus?

Blaine Bortnick is an attorney and partner in the New York City office of Rasco Klock. The Equal Employment Opportunity Commission (EEOC) recently released guidance on testing job applicants for coronavirus, Bortnick said, "to reassure employers that they may screen job applicants after making a conditional offer, as long as the employer does so for all entering employees in the same type of job."

In addition, he said:

- Employers may delay the start date of an applicant with COVID-19 or its symptoms.
- Employers may withdraw job offers to applicants who have COVID-19 or its symptoms if they need the applicant to start immediately.
- Employers may require employees to work from home, and they may decline to hire applicants who refuse to work at the company's designated work location, whether that be onsite or remotely.

Carl Muller, an attorney with Tucker Ellis in Cleveland, advises caution when rescinding job offers, however. Candidates who test positive but who have only mild symptoms—similar to a cold or mild flu—would not likely be considered to have a disability under the Americans with Disabilities Act (ADA). But employers may be violating the ADA if they decline to hire a candidate who tests positive and is hospitalized "with significant symptoms and whose breathing is impaired for many months during a lengthy recovery. [That person] would likely be considered to have a disability under the ADA," he said.

The EEOC has also advised that federal, state and local public health guidelines also be followed. "However, employers need to be aware that any medical screening, including temperature checks, are considered medical examinations and thus are considered confidential medical records," Bortnick said.

Can You Require Quarantine or Work-at-Home?

Yes. The bottom line is that employers have an obligation to protect the health of their employees.

"Nobody with coronavirus or associated symptoms should be in the workplace, and this extends to candidates and new hires," said Hannah Sorcic, counsel in Reed Smith's labor and employment group in Chicago. "If the employer has legitimate concerns about a new hire's exposure, it can require the employee to remain offsite for a period of time, or perhaps delay the start date. Consistent and nondiscriminatory application of company policies and procedures will be critical, as we anticipate a wave of COVID-19 employment litigation will follow."

Further, when returning to work, employers may require workers to submit doctors' notes certifying their fitness for duty, according to the EEOC, citing ADA guidelines.

Muller said that there may be instances where these mandates could be problematic.

- There may be some anti-retaliation or other protections for candidates and employees who refuse to work onsite if doing so would violate one of the many federal, state and local orders directing nonessential businesses to cease operations (www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/when-employers-violate-shelter-in-place-orders.aspx) or to have their employees work remotely.
- Employees have certain protections if refusal to work onsite is due to legitimate health and safety concerns.
- Under certain circumstances, a request to work remotely, rather than onsite, could constitute a request for reasonable accommodation under the ADA.

These scenarios are all very fact-specific, said Muller, who advises employers to confer with counsel for specific advice.

Can You Choose not to Hire Someone Who Refuses to Work Onsite or from Home?

"Most likely, but employers should make these decisions on a case-by-case basis, while keeping an eye on consistency," Sorcic said. The reason for refusal may be important, she added. "While employers are not required to accommodate a generalized anxiety about contracting the virus, they should apply the same ADA 'reasonable accommodation' analysis where candidates have disclosed an underlying health condition that may place them at higher risk." Some positions cannot be accommodated, she said, but points out that "it is important for employers to show how they reached that conclusion."

All of these questions, and their potential answers, are very dependent on the particular circumstances of each scenario, Muller said. "The situation is fluid, and none of these decisions have yet been tested in the courts, so employers are advised to tread carefully and make sound decisions driven by the advice of their legal counsel," he added.

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