



Dealership Health and Safety Concerns During A Pandemic

Legal Disclaimer: This document will change over time with new information and developments. It does not provide, and is not intended to constitute, legal advice. All content and materials are for general informational purposes only. **Important:** consult an attorney familiar with the federal, state and/or local law employment law, and with dealership operations, to obtain specific advice with respect to any specific legal matter. Note: since many state and local governments have instituted emergency COVID-19-related measures and may have stricter or different employment laws that apply to your operations, please pay close attention to the information you receive from your state and metro dealer associations and your outside counsel.

Dealerships are operating under a variety of federal, state, and local edicts restricting both business operations and public activities. Sales and service customers are being innovatively accommodated to help ensure that their transportation needs are being met. Importantly, these efforts require that special attention be paid to practices aimed at providing safe and healthy workplaces and transactions for employees and for customers.

I. SPECIFIC RECOMMENDATIONS

- A. **Review [A Dealer Guide to Safely Operating Your Dealership During a Pandemic](#) and NADA's [Lifeline Webinar Series](#) for guidance on health and safety issues and suggestions during a pandemic.**
- B. **Keep abreast of the latest federal and state mandates and best practice suggestions.** Federal guidance will change as more is learned about the COVID-19 virus. Check NADA's [Coronavirus Hub](#) often to stay abreast of new developments. Also pay close attention to communications from your state and local ATAEs and your state and local health departments.
- C. **Educate and engage with employees.** Continually remind employees of [how to protect themselves and others](#), of the [Guidelines for Cleaning and Disinfecting](#) the workplace, of the [symptoms of COVID-19](#), and of the importance of seeking medical attention if symptoms appear. Check in with isolated or sick employees and their families to offer support. Good policies and goodwill go a long way during a pandemic.
- D. **Rely on experts.** For example, when dealing with sick or potentially exposed employees, follow the direction of their medical providers and local health officials. Refine business response plans as federal and state guidance changes, and work with your attorney to address employment law issues when they arise, such as with respect to workers compensation and [emergency paid sick leave](#).

KEY RELATED NADA WEBINARS:

[Managing Service Operations: Making it through the COVID-19 Pandemic](#)

[So, an Employee Has Covid-19 Symptoms or Has Tested Positive...Now What?](#)

[Running a Dealership During a Pandemic: Legal Issues and Federal Mandates](#)

KEY FEDERAL RESOURCES INCLUDE:

1. Centers for Disease Control's (CDC) [online resources](#) for businesses to plan, prepare, and respond to COVID-19. The CDC also has guidance for [critical infrastructure workers](#) and [helpful cleaning recommendations](#).
2. Occupational Safety and Health Administration (OSHA) [Guidance on Preparing Workplaces for COVID-19](#), [Guidance on Returning to Work](#), and [Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace](#)
3. U.S. Equal Employment Opportunity Commission (EEOC) [technical assistance question and answers](#) and workplace anti-discrimination laws.
4. Environmental Protection Agency (EPA) [guidance on disinfectants](#) for use against COVID-19.

II. FREQUENTLY ASKED QUESTIONS: EMPLOYEE HEALTH AND SAFETY

Q A. Which COVID-19 federal and state health and safety standards and laws apply to my dealership? (02/01/2021)

A There are no specific federal OSHA standards covering COVID-19, but OSHA does offer extensive [guidance](#). For dealerships, the primary regulatory obligation falls under OSHA's "General Duty Clause," which requires employers to furnish workers with employment and a place of employment free from recognized hazards that cause or are likely to cause death or serious physical harm. Dealerships can mitigate hazards to protect employees consistent with OSHA's latest Guidance:

- [OSHA's COVID-19 Frequently Asked Questions](#), which provides COVID-19 guidance to employers and employees on grouped by workplace topic.
- [Guidance on Returning to Work](#), which focuses on the need to develop and implement strategies for infection prevention.
- [Guidance on Preparing Workplaces for COVID-19](#), which outlines steps to take for potential employee exposures. Dealership employees generally have a medium or low exposure risk.
- [Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace](#), which is intended to help employers identify risks of exposure to COVID-19 and to help them determine appropriate control measures to implement.

OSHA [states](#) that the most current [CDC guidance](#) should be consulted when assessing potential workplace hazards and evaluating the adequacy of protective measures. Where COVID-19 circumstances may interfere with a dealership's efforts to comply with applicable health and safety standards, [OSHA has stated](#) that it will consider good faith efforts to comply before undertaking potential enforcement actions.

Protect employees from exposure to [hazardous chemicals used for cleaning and disinfection](#). Common sanitizers and sterilizers may contain hazardous chemicals. Where employees may be exposed to hazardous chemicals, comply with [OSHA's Hazard Communication Standard](#), with personal protective equipment standards, and with other applicable OSHA chemical standards.

Your state may have an [OSHA-approved State Plan](#) with health and safety standards and enforcement programs that are at least as effective as OSHA's but with different or more stringent mandates. Most state and many local governments have instituted emergency COVID-19-related measures and have imposed stricter or different employment laws applicable to dealership operations. Again, reach out to your state and metro dealership associations and attorneys for guidance on state occupational health and safety mandates and their COVID-19 implications.

Q B. Is a case of COVID-19 a recordable illness for purposes of OSHA injury and illness recordkeeping and reporting?

A OSHA has [guidance](#) on this issue. Generally, [OSHA recordkeeping requirements](#) mandate that covered employers record certain work-related injuries and illnesses on their OSHA 300 log. Typically, dealerships must record a case of COVID-19 if it:

Is a confirmed case of COVID-19, as defined by the CDC;

1. Is "work-related"; and
2. Involves one or more of OSHA's general recording criteria.

While not expected to undertake extensive medical inquiries, dealerships must still make good faith efforts to determine if a case of COVID-19 is work-related. In determining whether a good-faith effort was made, the DOL will examine:

The reasonableness of a dealership's investigation into the case's work-relatedness.

1. The evidence available to the dealership.
2. Any other evidence that the case was transmitted at the dealership workplace.
3. If a dealership is unable to determine if its workplace played a causal role in the transmission of COVID-19 case, it does not have to record it. When in doubt, consult with an attorney to assess potential recordkeeping responsibilities.

Note: even where COVID-19 cases are not deemed to be work-related, dealers should still take appropriate steps to protect against additional employee and customer exposure.

Q C. Should my dealership develop a COVID-19 prevention program? (02/01/2021)

A OSHA [guidance](#) released in January 2021 states that employers should implement prevention programs in the workplace to mitigate exposure risks to COVID-19. A COVID-19 prevention program includes the following key elements: conducting a hazard assessment; identifying measures to limit the spread of COVID-19; adopting measures to ensure that infected or potentially infected workers are separated and sent home; and implementing retaliation protections for workers who raise COVID-19 related concerns. Dealerships should have already taken many of these steps to ensure the safety of their employees and customers, but should review this guidance for ways to strengthen their current workplace safety programs.

Q Should dealership employees wear face coverings or masks?

A Both the [CDC](#) and [OSHA](#) recommend employees wear face coverings at work when interacting with each other and with the public and are especially important when physical distancing measures are difficult to maintain. Medical conditions may prevent certain employees and members of the public from being able to wear face masks. In many states and localities, the use of face coverings or masks is mandatory under certain circumstances. Dealerships should consult with their ATAEs and state and local health departments to determine when face coverings are required. Dealerships can have a say regarding the types of face coverings their employees use, especially when they offer to provide them, but dealerships should never refuse employee requests to wear face coverings or masks. Note: cloth face coverings are not subject to OSHA's respiratory protection mandate.

Q Can I ask an employee exhibiting symptoms of COVID-19 to stay home?

A Yes. The CDC [indicates](#) that employees exhibiting symptoms of influenza-like illness at work should leave the workplace and be evaluated by medical provider. Further, the [Equal Employment Opportunity Commission](#) (EEOC) [indicates](#) that advising workers to go home is permissible and not considered disability-related if the symptoms presented are similar to COVID-19 or the flu.

Q F. An employee has tested positive for COVID-19. What should the dealership do?

A The NADA Lifeline Webinar, [So, an Employee Has Covid-19 Symptoms or Has Tested Positive...Now What?](#) covers this topic in detail. Typically, infected employees should be sent home until released by a medical provider or local health department. Consult [NADA's FAQ on the New Federal Emergency Leave Mandates](#), as infected employees may qualify for emergency paid sick leave.

Follow CDC guidelines for [cleaning and disinfecting](#) areas where a sick employee was present. Ask the infected employee to identify all employees, customers and other persons in the workplace who were within a close proximity for a prolonged period of time (more than a few minutes) within the previous 14 days. Attempt to contact this list regarding potential exposure. Maintain the infected employee's confidentiality consistent with medical information privacy laws and the Americans with Disabilities Act (ADA).

Q G. Should employees who worked near an infected employee stay home?

A Instruct such employees to consult with and follow the advice of their medical providers or local health departments regarding whether to self-isolate. Also, instruct employees based on the [CDC's Public Health Recommendations for Community-Related Exposure](#) and follow [CDC guidance](#) if an employee develops new symptoms. The CDC's guidance may change over time, so check and revise dealership policies accordingly. Document thoroughly all employment-related decisions and keep copies of the government guidance used to make decisions. Again, become familiar with the [NADA FAQ on the New Federal Emergency Leave Mandates](#), as impacted employees may qualify for emergency paid sick leave.

Q H. A dealership employee has a suspected but unconfirmed case of COVID-19 or has self-reported that they encountered someone who had a presumptive positive case of COVID-19. What should we do?

A Follow the same precautions as noted above. Instruct employees to consult with and follow the advice of their medical providers or local health department. Instruct employees to proceed based on the latest [CDC Public Health Recommendations for Community-Related Exposure](#) and follow [CDC guidance](#) if an employee develops symptoms. Document all employment-related decisions and keep copies of the government guidance used to make decisions. Again, become familiar with the [NADA FAQ on the New Federal Emergency Leave Mandates](#), as impacted employees may qualify for emergency paid sick leave. Employees must provide proper documentation of their illness and the need to self-quarantine.

Q I. How do I address employees with higher risks of serious illness?

A The [CDC](#) currently recommends minimizing face-to-face contact between such employees and others, assigning work tasks that allow them to maintain a distance of six feet from other workers, customers and visitors, or to telework if possible. Underlying conditions that increase the risk of serious illness include, but are not limited to, chronic lung disease, moderate to severe asthma, hypertension, severe heart conditions, weakened immunity, severe obesity, diabetes, liver disease, and chronic kidney disease that requires dialysis. High-risk workers should self-identify and dealerships should take steps to comply with applicable medical privacy mandates. The [NADA FAQ on the New Federal Emergency Leave Mandates](#) notes that, under certain circumstances, employees with a higher risk of serious illness may qualify for emergency paid sick leave or accrued paid leave.

Q J. Can an employee refuse to come to work out of fear of COVID-19 exposure or infection?

A Generally not. Consult an attorney to address this question as it involves state law issues and fact-specific determinations. Generally, employees are only entitled to refuse to work if they believe they are in imminent danger. 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...” Imminent danger may exist if there is a:

1. threat of death or serious physical harm; or
2. 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.

The threat must also be immediate or imminent, meaning an employee must believe that death or serious physical harm could occur within a short time (e.g. before OSHA could investigate the problem). Most work conditions do not meet the elements required for an employee to refuse to work. Consult with an attorney *before* deciding whether an employee may refuse to work. In addition, review current [CDC guidance](#) when assessing potential workplace hazards and evaluating the adequacy of protective measures. Where protective measures are not as protective as those recommended by the CDC, OSHA will consider whether employees are exposed to recognized hazards and whether there are feasible means to abate them.

Q K. Do employees who refuse to come to work because of fear of COVID-19 qualify for the employee emergency paid leave mandates?

A Generally not. Fear of COVID-19 is not a qualifying reason for emergency paid leave. However, an employee may separately meet the criteria for a qualifying reason. Consult the [NADA FAQ on the New Federal Emergency Leave Mandates](#).

Q L. I have an employee who refuses to come to work because of fear of COVID-19 and does not qualify for paid emergency sick leave, what should I do?

A First, take steps to ensure employees feel safe given the circumstances, by using the latest federal and state guidance and, if necessary, by working an attorney to make sure there is no “imminent danger” to the specific employee, as explained above. This is a fact-specific inquiry that can change with the evolving nature of the COVID-19 crisis. Second, carefully document any denials of requests for emergency paid leave. Consult the [NADA FAQ on the New Federal Emergency Leave Mandates](#). If possible, consider allowing non-essential workers to telework. Also, remind eligible employees of the availability of paid and unpaid leave. Note: it is illegal to retaliate against workers who report unsafe or unhealthy working conditions during a pandemic. Termination should be considered only as a last resort and after carefully documenting all steps taken to retain a reluctant employee. Work with an attorney as necessary.

Q **M. Can I require employees to get COVID-19 tests prior to returning to work? The ADA generally prohibits employers from performing medical examinations, but the CDC, EEOC, and state/local health authorities have each issued guidance that allows for a negative viral test as a pre-condition for return to work.**

A Note that the CDC's [Interim Guidelines](#) state that *antibody test* results "should not be used to make decisions about returning persons to the workplace." Further, the [EEOC has stated](#) that an antibody test does not meet the ADA's "job related and consistent with business necessity" standard for medical examinations or inquiries for current employees. Therefore, requiring antibody testing before allowing employees to re-enter the workplace *is not allowed* under the ADA.

Q **N. During a pandemic, may an ADA-covered employer take its employees' temperatures to determine whether they have a fever?**

A The CDC and state/local health authorities have both indicated that employers may measure employees' body temperature. But, many employers are instead instructing their employees to not come to work if they have a high temperature. As with all medical information, the fact that an employee has a fever or other possible COVID-19 symptoms is subject to ADA confidentiality requirements. Note: not all employees infected with COVID-19 will have a fever.

Q **O. Can a dealership require employees to get vaccinated? (02/01/2021)**

A Dealerships should work with their attorneys to develop policies related to vaccinations. Dealerships may encourage or possibly require COVID-19 vaccinations, but policies must comply with the ADA, Title VII of the Civil Rights Act of 1964 (Title VII) and other federal and state workplace laws. If a dealership plans to require its employees to get a COVID-19 vaccine, it should develop a written policy which addresses vaccine refusal

and disability and religious accommodations. Alternatively, dealerships may wish to encourage and incentivize employees to get vaccinated. For example, dealerships may want to:

- Help make obtaining the vaccine easy for employees.
- Cover the costs of getting the vaccine.
- Provide incentives to employees who get vaccinated.
- Provide paid time off for employees to get the vaccine and recover from any potential side effects.

Q **P. What if an employee refuses to get vaccinated? (02/01/2021)**

A Dealerships with this issue should work with their legal counsel as this question requires a fact-specific analysis under the ADA, EEOC, and state employment laws. For more details on this analysis, please see [EEOC Question K.5-K.7](#).

Q **Q. Should vaccinated employees still wear masks, practice physical distancing, and adhere to other COVID-19 protection measures? (02/01/2021)**

A Per recommendations by [OSHA](#) and the [CDC](#), employees who are vaccinated must continue to follow protective measures, including wearing face coverings and remaining physically distant when necessary. According to the CDC, experts need to understand more about the protections that COVID-19 vaccines provide before backing away from appropriate steps to slow COVID-19.

Suggestions and comments may be directed to [NADA Regulatory Affairs](#).