

GENERAL GUIDANCE ON LEGAL ISSUES RELATED TO COVID-19 IN THE WORKPLACE

Employers across the country are facing unique and unprecedented challenges in responding to workforce issues in light of the COVID-19 pandemic. The following shares guidance and insight into common issues that can arise.

WORKPLACE SAFETY AND HEALTH

1. Do we have an obligation to protect employees from the virus at our worksites?

Yes. OSHA requires that employers “furnish...a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm” to employees. Employers must use “feasible methods” to keep their workplace safe, such as:

- Notifying and training employees on precautions, such as proper handwashing, coughing into elbows, sneezing into tissues, social distancing, staying home in the event of a fever, and sanitizing work areas;
- Notifying employees if there is known exposure to COVID-19 in the workplace, including if an employee, vendor, or another visitor at the workplace has been diagnosed with COVID-19.
- Undertaking reasonable cleaning measures.

Employers should record on an OSHA 300 log if an employee is infected with COVID-19 as a result of performing work-related duties (if at least one general recording criteria (listed in 29 CFR 1904.7) is met, like requiring medical treatment beyond first-aid or days away from work).

2. What other steps should we take?

- Place appropriate restrictions on business travel and provide guidance on personal travel. *See Travel Section, below.*
- Set expectations for when an employee is ill – encourage the employee to stay home when presenting any symptoms and require the employee to stay home if the employee has a fever.
- Provide tissues, wipes, and hand sanitizer to employees (if available). Post CDC guidance poster (<https://www.cdc.gov/coronavirus/2019-ncov/about/share-facts-h.pdf>).
- Check with janitorial services to ensure proper cleaning procedures.
- Implement quarantine for employees returning from Level 3 countries (and consider for Level 2 countries).
- Send home any employees displaying symptoms.
- Prohibit visitors with symptoms from entering the workplace.

- Consider cancelling large events or employee attendance of large events (*i.e.*, trade shows, *etc.*).

It is important to continuously communicate with employees so they understand the measures being taken to keep them safe.

3. Can an employer send an employee home if the employee displays COVID-19 symptoms?

Yes. The ADA does not prohibit employers from following CDC guidance and sending home employees who demonstrate symptoms associated with COVID-19.

4. Can employers take the temperature of employees?

Normally, it would violate the ADA to require employees to submit to temperature checks. However, the EEOC has released guidance that an employer may measure employee's temperature given the widespread nature of COVID-19. Employers should be cognizant of (1) who administers the checks, (2) where and how temperature readings are maintained (for confidentiality concerns, *see* below under Legal Risks), and (3) avoiding the appearance of discrimination based on any protected category (such as disability, perceived disability, or national origin). Only properly trained and qualified personnel should take the temperatures, both to ensure a proper process and protect the employee and others from possible infection.

5. May an employer require an employee who is out sick with flu-like symptoms to provide a doctor's note, submit to a medical exam, or remain symptom-free for a specified amount of time before returning to work?

Yes, an employer may impose such requirements for an employee's return to work, either because the requirements are not disability-related (if the pandemic is less severe) or because they would be justified based on direct threat considerations (if the pandemic is more severe). If an employer's policies do not currently include such requirements, changes should be communicated to employees in writing. Employers should also be cognizant of employees' being unable to obtain documentation based on overwhelmed healthcare resources.

6. What should an employer do if an employee tests positive?

If an employee tests positive, the employer should first notify local public health agencies and seek guidance on next steps. Employers should then notify their employees and any customers or vendors of the potential exposure. Employers should evaluate where the infected employee most frequently worked and socialized to evaluate the extent of possible exposure. Employers should not identify the employee by name or any other identifying characteristics.

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7. Can an employer ask an employee about possible symptoms?

Yes. Employers can ask employees to identify if they have experienced symptoms associated with the pandemic, such as fever, cough or a sore throat. The EEOC says such questions are allowed based on the direct threat justification. It is important to focus questions on pandemic symptoms rather than symptoms associated with other unrelated conditions.

8. Can an employer ask an employee about symptoms suffered by family members?

Yes, with caution. Federal law prohibits employers from asking specific questions about the medical history of an employee's family members. However, questions about whether members of the employee's household have been diagnosed with COVID-19 or are displaying symptoms of COVID-19 infection are allowed. Such questions should not be designed to elicit information about any genetic condition. *See Other Legal Risks, below.*

TRAVEL

1. Can we restrict employee business or personal travel?

Business Travel: An employer may restrict business travel. Employers should continue to consult the CDC's website: "[Coronavirus Disease 2019 Information for Travel](#)" for up-to-date travel notices concerning risk. As of March 19, 2020, CDC advises that employers restrict all nonessential travel to areas with a Warning Level 3 and to exercise caution regarding travel to Alert Level 2 areas, particularly if the person traveling is in a high-risk group.

Personal Travel: No. Employers cannot prevent employees from traveling to affected areas for personal reasons, even high-risk areas, but they can deny a time off request based on the destination, the business cost of a resulting quarantine or other legitimate business-driven reasons. Employers can follow CDC recommendations on self-quarantine or self-monitoring (including working from home, if applicable) as a result of personal travel and should advise employees of the employer's protocols.

2. What if an employee has a family member who has traveled to a high-risk area or displayed COVID-19 symptoms?

Employers may request that employees report if any immediate or close-contact family members have traveled to high-risk areas or displayed symptoms. After consulting the CDC guidance, the employer may decide to require the employee to self-quarantine for 14 days following possible exposure to someone with COVID-19.

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COMPENSATION

1. Do employers have to pay employees for leave?

Generally, no, subject to state paid sick leave statutes and employee rights to use PTO and other paid leave under state family and medical leave laws. Under the FLSA, employers must generally pay non-exempt employees only for the hours they actually work. Salaried exempt employees must receive their full salary in any week in which they perform any work, even if they only work part of the week, subject to certain limited exceptions.

The FLSA does not require employer-provided vacation time. Where an employer offers vacation time to its employees, there is no prohibition on an employer requiring that such accrued leave or vacation time be taken on a specific day(s). This will not affect the employee's salary basis of payment so long as the employee still receives in payment an amount equal to the employee's guaranteed salary.

It is prudent to allow any employee to use accrued/allotted, unused PTO for all or part of the quarantine period. Generally, employers should not force employees to use sick leave over any other type of available leave (vacation and unpaid leave).

Employers should be mindful of their own policies and of ongoing updates to state sick leave laws, as some states are extending sick leave statutes to cover the COVID-19 situation. If employer policies and applicable state laws do not mandate paid sick leave, employers have flexibility to decide if the leave should be paid or unpaid.

As of March 19, 2020, a bill is pending in Congress that may provide for emergency paid leave benefits for employees taking unpaid leave due to COVID-19 and expand unemployment benefits. The law may also modify employer obligations under the FMLA. *See Other Legal Risks, below.*

2. Do employers have to offer unpaid leave?

An employee sick with COVID-19 or caring for a family member with COVID-19 likely will qualify for leave under the FMLA. In a situation where the employer sends an employee home for symptoms consistent with the pandemic, covered employers should follow the requirements of the FMLA for eligible employees, including providing FMLA eligibility notices and notice of rights. Employers may need to provide employees with additional time to obtain medical certifications, given the likelihood of an overwhelmed health care system.

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3. What if an employee refuses to come to work to avoid getting COVID-19?

Preventative leave taken by an employee to avoid exposure would not be protected under the FMLA as currently enacted. However, employers should encourage employees who are ill or exposed to potentially ill family members to stay home and consider flexible leave policies.

The ADA would protect employees with certain mental health conditions, severe anxiety, or similar conditions that could contribute to needing an accommodation to not come to work during an outbreak. The ADA would similarly protect employees with an autoimmune disorder or similar condition.

4. If an employer directs exempt employees to work without pay or take vacation, will that decision impact the employee's exempt status?

Employers cannot direct employees to work without pay.

Under the FLSA, employers must generally pay non-exempt employees only for the hours they actually work. Exempt, salaried employees must generally receive their full salary for any week in which they perform work, subject to certain limited exceptions, but need not be paid their salary in weeks in which they perform no work.

5. Does my company have to pay employees who are sent home due to a mandatory plant or facility closure due to a government state of emergency?

It depends on the length of the closure and the status of the employee. For exempt employees required to be paid on a "salaried basis" and non-exempt employees under the fluctuating workweek compensation scheme, the employer does not need to pay the employee for any workweek in which the employee performs no work. If the employee works any part of the workweek, a private employer may direct these employees to take vacation or debit their leave bank account in the case of an office closure, whether for a full or partial day, provided the employees receive in payment an amount equal to their guaranteed salary

The FLSA only requires employers to pay nonexempt employees (other than employees who are paid under the fluctuating workweek method) for hours that the employees have actually worked. Therefore, an employer is not required to pay nonexempt employees if the employer is unable to provide work to those employees due to a mandatory plant or facility closure due to a government issued state of emergency.

Employers also should consider whether employees are eligible to unemployment compensation benefits during a temporary shutdown. Refer to the applicable state department of labor website.

See also Legal Risks section, below.

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6. Do employers have to permit employees to work at home?

Depends. While “work-at-home” is not a required accommodation under the ADA, it is a potential accommodation for those suffering from an underlying disability. It is also a recognized way of controlling the spread of infections. Given the current environment, the better practice is to allow for such work if duties can be adequately performed remotely.

Employers should document the temporary nature of any “work from home” arrangements offered so that employees are not entitled to ask for work-at-home as an accommodation in the future after the pandemic. Recommended language: “Because of the extraordinary situation in the workplace caused by COVID-19, you will be working remotely for a temporary period. We understand that you might not be able to perform all of your job’s essential functions during this temporary period because you will be working remotely.”

7. If an employer requires employees to work from home, must the employer pay those employees who are unable to work from home?

For exempt employees, an employer may be required to pay if the employee is otherwise able to work remotely. Because specific circumstances vary, please check with your counsel for guidance. As for non-exempt employees, different rules apply. If the employee is unable to work, an employer is not required to compensate the employee. Recently passed legislation may alleviate the lack of compensation. Employers are advised to confer with their counsel for further guidance.

8. Are employers required to cover additional costs that employees may incur if they work from home (internet access, computer, additional phone line, increased use of electricity, etc.)?

Employers may not require FLSA-covered employees to pay or reimburse the employer for items that are business expenses of the employer if doing so reduces the employee’s earnings below the required minimum wage or overtime compensation. Additionally, employers may not require employees to pay or reimburse the employer for such items if telework is being provided as an accommodation to a disabled employee.

State law may impose additional obligations relating to reimbursement of expenses. Some states include expense reimbursements in their definition of “wages.” Certain states, like California and Illinois, have statutes that specifically require employers to reimburse employees for expenses incurred by the employee on behalf of the employer. Telecommuting expenses that exceed normal household and personal expenses may fall under this category.

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TELEWORKING

1. How can my company control overtime if we allow non-exempt employees telework?

Employers should set out clear standards for hours of work for employees who are working from home. For example, employers should inform such employees of their specific work hours and that they are not authorized to work outside of those hours unless requested in writing by Human Resources or another high-level manager. Employers should inform non-exempt employees that they must record all time worked and are not permitted to work “off the clock.” Any request by a manager to a non-exempt employee to work without recording their time should be reported and handled immediately.

2. How can my company protect company information and data while employees are teleworking?

Employers should require employees working from home to follow the company’s data security requirements, including accessing the company’s information and networks through secure connections, using dual factor authentication or other secure methods of access. This is particularly true if employees are using their personal devices for work. Employers also can prohibit or place additional security requirements on the use of public Wi-Fi for work. Employers can and should, to the extent feasible, prohibit employees from using personal email or texting to conduct company business, and should prohibit employees from creating or storing company or customer documents and information on personal devices or personal cloud data storage sites. Employees using hard copy files should agree to protect the confidentiality of the files and agree to maintain them in a secure location. Spoofing and hacking schemes are flaring up to take advantage of the pandemic. Employers should remind employees to be careful of such schemes. This website from the FBI provides good guidance: <https://www.ic3.gov/preventiontips.aspx#item-13>

OTHER LEGAL RISKS AND CONSIDERATIONS

1. Off Duty Conduct Restrictions: Some states prohibit blanket restrictions on employee off-duty conduct (like personal travel) so mandatory bans on personal travel and personal activities are risky.
2. State and Federal Leave Laws: Employers should remain aware of their obligations under state and federal leave laws to allow employees leave to care for themselves and others who are ill, including persons in affected areas. Employers should remain up to date on FMLA and state leave law requirements and should consult counsel if necessary.

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3. Age and National Origin Discrimination Concerns: Employers should not treat employees differently based on their age, national origin or other protected class and must not make determinations of risk or exposure based on an employee's protected characteristic. Employers should rely on CDC guidance to determine risk of COVID-19.
4. Confidentiality: Employers must maintain the confidentiality of employee's medical information and any medical leave details. 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 not disclose the identity of the quarantined employee due to federal and state law restrictions.
5. Disability Discrimination and Harassment: Employers must be careful to prevent discrimination and harassment against employees who are disabled or perceived as disabled because they are exhibiting symptoms suggestive of having contracted coronavirus. Employers should ensure the confidentiality of all employees' medical information and leave details to prevent harassment. Employers should also consider reminding employees of anti-harassment and discrimination company policies and tamp down rumors about employees related to employee health or travel. Employers must be vigilant about promptly responding to and investigating any complaints of harassment or bullying in the workplace
6. Privacy Concerns: Employers may ask employees if they are experiencing COVID-19 symptoms such as fever, tiredness, cough, and shortness of breath. Federal or state law may require the employer to handle the employee's response as a confidential medical record. Employers should maintain this information in a separate, confidential medical file and limit access to individuals with a business need to know. In addition, some states require employers to use reasonable physical, administrative, and technical measures to protect the security of medical information.
7. **FFRCA - RECENT FEDERAL LEGISLATION: ON MARCH 14, 2020, THE U.S. HOUSE OF REPRESENTATIVES PASSED HB 6201, THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA). THE BILL, AS MODIFIED, WAS APPROVED BY THE SENATE AND SIGNED BY PRESIDENT TRUMP ON MARCH 18, 2020. THE ACT CONTAINS SEVERAL PROVISIONS IMPOSING ADDITIONAL REQUIREMENTS ON EMPLOYERS, AS SUMMARIZED BELOW:**

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SPECIAL PAID LEAVE TO CARE FOR CHILD DUE TO SCHOOL OR CHILDCARE CLOSURE UNDER AMENDMENTS TO THE FMLA

The FFCRA amends the FMLA through the Emergency Family and Medical Leave Expansion Act (EFMLEA). The EFMLEA adds a new category for leave “for a qualifying need related to a public health emergency.”

Coverage: Employers with fewer than 500 employees are obligated to provide such leave, and any employee who has worked for the employer for at least 30 days is eligible. The leave is available to an employee who cannot work (or telework) due to a need to care for a child whose school or childcare is closed due to a public health emergency. Employers of health care providers or emergency responders can elect to exclude such employees.

Paid and Unpaid Leave: The first 10 days of the EFMLEA leave are unpaid. Thereafter, the employer must provide paid leave equal to two-thirds of the employee’s regular rate of pay (as determined under the FLSA) based on the number of hours that the employee otherwise would be normally scheduled to work.

Importantly, the EFMLEA permits employees to choose to use accrued paid time off (vacation, personal, medical or sick leave) while on public health emergency leave but is silent on whether the employer can require that the employee use such leave.

Reinstatement after Leave: Limited rights of reinstatement rights are available to employees working for employers with more than 25 employees.

TWO WEEKS OF PAID SICK LEAVE UNDER THE EMERGENCY PAID SICK LEAVE ACT.

Coverage: A separate title of the FFCRA, the Emergency Paid Sick Leave Act, requires private employers with fewer than 500 employees (and certain government employees) to provide two weeks of paid sick leave (80 hours for full time employees and the average number of hours worked in a 2 week period for part-time employees). For private employers, “employees” are those covered under FLSA, and there is no minimum length of employment or hours of work for an employee to qualify for the leave. However, as with the EFMLEA, employers of health care providers and emergency responders can elect to exclude those employees from the Act.

Paid Leave: Specifically, the employer must provide paid sick time to an employee who is unable to work (or telework) due to a number of situations, including but not limited to mandated quarantine, seeking medical diagnosis based on experiencing COVID-19 symptoms, or caring for a child whose school or childcare facility is closed. Paid leave is capped at various amounts, ranging from \$200 per day (\$2,000 in the aggregate) to \$511 per day (\$5,110 in the aggregate), depending on the reason for which leave is requested. Subject to these limits, paid sick leave cannot

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be less than the *higher of* the employee's regular rate of pay under the FLSA, the federal minimum wage and applicable state or locality minimum wage. Employers are advised to confer with their counsel for further guidance.

Effect on Other Leave: The sick leave does not preempt state and local paid sick leave laws or diminish employee rights under existing collective bargaining agreements and employer policies.

Posted Notice and Possible DOL Regulation: The Act permits the DOL to issue regulations that may limit eligibility for the leave and requires the DOL to prepare a model notice to be posted by employers.

Prohibited Acts: The Act prohibits employers from: requiring employees to find a replacement worker as a condition for using paid sick leave; requiring employees to use other leave before using paid sick leave; and discharging, disciplining or discriminating against any employee who takes leave or engaged in protected activity under the Act.

Sunset: The Act, and the requirements under the Act, expire on December 31, 2020.

UNEMPLOYMENT COMPENSATION UNDER THE EMERGENCY UNEMPLOYMENT INSURANCE STABILIZATION AND ACCESS ACT OF 2020.

The Emergency Unemployment Insurance Stabilization and Access Act of 2020 provides \$1 billion in funding to states for “processing and paying unemployment insurance (UI) benefits, under certain conditions.” About \$500 million of the funds to states are for non-benefit related resources (i.e., for technology, systems, and administrative costs) *if* the state meets the following requirements designed to ensure that workers have access to benefits:

- Require employers to provide notification of potential UI eligibility to laid-off workers
- Ensure that workers have at least two ways (for example, online and phone) to apply for benefits
- Notify applicants when an application is received and being processed and if the application cannot be processed, provide information to the applicant about how to ensure successful processing.

Employers should expect changes on the state level to unemployment compensation benefits and procedures and should be prepared to notify employees of potential unemployment compensation rights.

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FURTHER GUIDANCE

CDC Guidance for Employers:

<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html>

CDC Interim Guidance for Businesses and Employers:

<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

CDC Guidance for Coronavirus 2019 Information for Travelers:

<https://www.cdc.gov/coronavirus/2019-ncov/travelers/index.html>

For additional posters and print resources:

<https://www.cdc.gov/coronavirus/2019-ncov/communication/factsheets.html>.

EEOC Pandemic Guidance:

https://www.eeoc.gov/facts/pandemic_flu.html.

What You Should Know About the ADA, the Rehabilitation Act, and COVID-19:

https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm

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